

# 1

## The Nature and Importance of Contract Law

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## 1 What is a contract?

A contract is a promise (or a set of promises) that is legally binding; by ‘legally binding’ we mean that the law will compel the person making the promise (‘the promisor’) to perform that promise, or to pay damages to compensate the person to whom it was made (‘the promisee’) for non-performance. Promises are a common feature of our lives; individuals make promises to family members and their friends, promises are made within the workplace, suppliers and their customers make promises about the supply and acquisition of goods and services, and political parties make election promises. However, only some of these promises are legally binding—and only some of those that are binding are contracts. For a promise to give rise to a contract it must in substance amount to an undertaking by the promisor that is proffered in exchange for something sought in return from the promisee; for example, a promise by A to let B have her car if B pays A \$10,000. The concept of ‘bargain’—I will do something if you do something in return—inherent in promises of this nature is the defining characteristic of a contract.

As we have noted, some promises are binding even though they are not contractual in nature. Thus, a promise that does not contain the element of a bargain may still give rise to legal rights and obligations if the promisee has relied upon that promise in circumstances in which it would be unjust to allow the promisor to resile with impunity. This was established for Australia by *Waltons Stores (Interstate) Ltd v Maher*,<sup>1</sup> the effect of which is ‘that an equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts to his detriment, seeks to resile from the promise’.<sup>2</sup>

## 2 The importance of contract law

Contract law is important because it underpins our society,<sup>3</sup> without it, life as we know it could not exist. This is because in countries such as Australia most goods and services are created and distributed through markets and markets have at their heart a contract. Consider for a moment this issue from the point of view of a business: almost every transaction it will make will involve a contract; for example, it will purchase raw materials, lease premises, hire equipment, sell its products or services, and use banking and related systems to make or receive payments. Likewise, most transactions by consumers involve the purchase of goods or services facilitated by a contract. As with businesses, it is difficult to think of many transactions entered into by consumers that are not of this nature.<sup>4</sup> Finally, from the perspective of governments, although most of what they do derives from an act of the relevant parliament, increasingly the services they provide are being privatised and

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1 (1988) 164 CLR 387. This case is extracted at p 147, below.

2 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 428–429, per Brennan J.

3 A similar view was expressed by Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132 when his Honour said that ‘the law of contract ... underpins the economy’.

4 As citizens, members of the public engage in activities—such as visiting a public park or using a footpath—that are not contractual. However, when doing so they are not consumers in the conventional sense.

delivered pursuant to a contract. This is consistent with Maine's thesis that the movement of progressive societies is from 'status to contract'.<sup>5</sup>

The importance of contracts to our society helps to explain one of the principal reasons why the law enforces them. This reason and the moral justifications for contract law are discussed in the following extract from the work of Professor PS Atiyah, one of the leading contract scholars of the twentieth century.

### Stephen A Smith, *Atiyah's Introduction to the Law of Contract*

Clarendon Press, Oxford, 2005

#### [at 3]: The Justification for Contract Law

[W]hat, if anything, is the justification for contract law? Assuming that contracts are voluntary undertakings, why should the law enforce such undertakings? Stated differently, on what basis is it legitimate for the state, acting through the courts, to sanction individuals for breaking contracts? Why lend the state's support to what is an essentially private complaint?

Virtually all societies have evolved laws for the enforcement of contracts, so it is no surprise that most commentators believe that, while certain aspects of the law may pose difficulties, in broad terms the law of contract is justifiable. More specifically, two kinds of justifications are typically given for the law of contract. The first, which is associated with 'economic' and other broadly 'utilitarian' approaches to law, justifies contract law on the basis that it facilitates mutually beneficial exchanges, and so promotes overall social welfare or social 'wealth' (broadly defined). The underlying idea is that where two parties freely agree on a contract involving, say, a simple exchange of money for goods, the seller does so because he thinks he will be better off with the money than with the goods, and the buyer does so because she prefers the goods to the money. Both parties thus emerge from the exchange better off (in one sense) than they were before, and since society's wealth is made up of the total wealth of its members, even a simple exchange of this kind can improve social wealth. In short, contract law (and the officials needed to enforce the law) is a justified use of the state's resources because it helps everyone to become better off. ...

<4> ... From an economic perspective, the primary reason a law of contract is needed is that most exchanges of any complexity cannot be performed simultaneously. One or both parties will have to perform in the future, which means that the other party has to have confidence that she will perform. Suppose that I want a special machine made to order for my factory. A manufacturer could make the machine, and then sell the finished product to me in a simultaneous exchange of machine for cash. But the manufacturer is likely to be worried that I might change my mind at the last minute, leaving him with a machine that is difficult to sell. I might also worry that the manufacturer will change his mind, and decide not to make the machine. Admittedly, there are many reasons aside from the law that each of us might keep to our agreement, such as our interests in our reputation >>

5 In *Ancient Law*, 14th edn, John Murray, London, 1891, Chapter V, Sir Henry Maine argued that as societies develop they progress from relying on status for their organisation to relying on contract. Thus, while in 'ancient law' individuals were bound together by status, in modern societies they are free to make contracts and form associations with whoever they chose.

or simply our sense of morality. Nonetheless, it is clear that the risk of non-performance will sometimes dissuade people from entering otherwise beneficial deferred exchanges. It is because of this risk that a law of contract is needed. The fundamental role of contract law, in the economic theory now being considered, is to facilitate the making and performing of deferred exchanges. The law fulfils this role in many ways, but the most fundamental is by providing remedies for breaches of contract, either in the form of orders that breaching parties perform or orders that they pay damages.

Thus interpreted, contract law's essential purpose is to secure cooperation in human behaviour, and particularly in exchange. In sophisticated modern societies this cooperation has led to a massive and elaborate system of credit—and 'credit' is simply another word for 'trust' or 'reliance'. In the simplest sort of case, where businesses provide goods or services on credit to consumers, they trust or rely on the consumer to pay and in the meantime they allow the consumers to have the goods. Generally, the consumers will ultimately pay, but if they fail to do so some sanction is needed: the law of contract provides that sanction. So contract law ultimately provides the backing needed to support the whole institution of credit. A moment's reflection is enough to show to what extent this is true not only in commercial matters, but in all walks of life. The value of consumers' bank accounts, their right to occupy their houses if rented or mortgaged, their employment, their insurance, their shareholdings, and many other matters of vital importance to them, all depend on the fact that the law of contract will enable them to realise their rights. In the striking phrase of Roscoe Pound, 'Wealth, in a commercial age, is made up largely of promises.'

The second general justification that is commonly given for the law of contract can be described more quickly. The individualist or 'moral' justification focuses not on the social benefits of contracting, but on the rights and duties of individual contracting parties. According to this view, when courts order that contracts be performed, the reason is that the defendants have duties, *owed to the claimants* (not society), to do what they contracted to do. And when courts order that damages be paid, the reason is not merely to encourage future contracting or to bring about any other social benefit, but to remedy the injustice caused by the defendant having infringed the claimant's rights. In this view, the payment of damages reflects the idea that the defendant has *wronged* the claimant, and so must repair the harmful consequences of that wrong. Damages correct the injustice *to the individual claimant* caused by the breach. Of course, the defenders of this view do not deny that contracts are socially beneficial, and that contract law facilitates the making of contracts. But they regard these advantages merely as side-effects of an institution whose primary purpose is to ensure that justice is done between individuals.

The economic and moral justifications each provide a plausible justification for the general institution of contract law and, as we shall see in later chapters, for many specific contract law rules. It seems plausible to suppose, therefore, that the best overall justification for the law of contract combines each of these accounts. The idea that contract law is justified on two grounds—an economic ground and a moral ground—is indeed a common conclusion. And as a matter of history, it is clear that lawmakers have been influenced by both grounds (and many others as well). But it is worth noting that many contract scholars are uncomfortable defending a 'mixed' justification of this kind. The reason is straightforward: the two justifications have opposite starting points. The economic view supposes that society's interests take precedence over those of the individual, while the moral view supposes the opposite. A justification for contract law that simultaneously adopts both justifications thus might be thought to raise as many questions as it answers.

### 3 The nature of contract law

#### a Contract law is largely judge-made law

Contract law is composed almost entirely of judge-made law and as such is primarily to be found in judicial decisions accumulated over the years. As a result, most books on the subject consist largely of the author's interpretation and rationalisation of those decisions. However, scholarly books have also played an important role in ordering judicial decisions and presenting them in a coherent manner. This was especially the case with early writers such as Chitty, Pollock and Anson,<sup>6</sup> who played a crucial role in developing a coherent law of contract in the nineteenth century. Indeed, the doctrines they developed in that period remain central to modern contract law.

Increasingly, however, statutes are being passed that regulate, or have an impact upon, substantial areas of contract law. Examples include (at the Commonwealth level) the *Insurance Contracts Act 1984*, the *Cheques Act 1986*, the *National Consumer Credit Protection Act 2009*<sup>7</sup> and the *Carriage of Goods by Sea Act 1991*; and (at the state and territory level) the various Sale of Goods Acts,<sup>8</sup> Electronic Transactions Acts<sup>9</sup> and Fair Trading Acts.<sup>10</sup> Perhaps the most significant, at least from the perspectives of the volume of litigation and the regulation of consumer contracts, has been what is now the *Competition and Consumer Act 2010* (Cth).<sup>11</sup> This has revolutionised contract law in the areas such as anti-competitive agreements, misrepresentation, implied terms, manufacturers' liability, unconscionable conduct and unfair contract terms. All of these statutes affect areas that were once the sole preserve of judge-made law. As a result, although judge-made law remains the more important ingredient, especially in commercial transactions, Australian contract law is now a complex mix of both judge-made and statute law.

An important challenge presented by this mix of case and statute law is that the statutory modifications of case law are not conveniently collated in a single source and are constantly being added to. This means that English texts (upon which great reliance was placed until comparatively recently) may no longer accurately represent important areas of Australian

6 J Chitty, *The Law of Contracts*, S Sweet, London, 1826; F Pollock, *Principles of Contract at Law and in Equity*, Stevens, London, 1878; WR Anson, *Principles of the Law of Contract*, Callaghan & Co, Chicago, 1880.

7 The key provisions of this Act regulate the provision of consumer credit. They became part of the law of each state and territory, replacing state and territory Credit Acts, through reference legislation utilising s 51(xxxvii) of the *Australian Constitution*: see the *Credit (Commonwealth Powers) Act 2010* (NSW); *Credit (Commonwealth Powers) Act 2010* (Qld); *Credit (Commonwealth Powers) Act 2010* (SA); *Credit (Commonwealth Powers) Act 2009* (Tas); *Credit (Commonwealth Powers) Act 2010* (Vic); *Credit (Commonwealth Powers) Act 2010* (WA).

8 *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1923* (NSW); *Goods Act 1958* (Vic); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1895* (WA); *Sale of Goods Act* (NT).

9 *Electronic Transactions Act 1999* (Cth); *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Northern Territory) Act* (NT); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2011* (WA).

10 *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 1989* (Qld); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 2010* (WA); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas).

11 This act was originally known as the *Trade Practices Act 1974* (Cth); it was renamed the *Competition and Consumer Act 2010* (Cth), as part of a major revision of Australian consumer law in 2010, by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*, Schedule 5, item 2. The provisions of this Act of most relevance to contract law are: (i) those in Part IV (and associated provisions) dealing with restrictive trade practices which prohibit certain agreements because they are anti-competitive; and (ii) those in the *Australian Consumer Law*, located in Schedule 2, which prohibit certain forms of conduct and create certain rights that have either an impact on contractual dealings generally, or only on those involving consumers, or consumer goods or services.

## Sample Only

contract law, and that Australian texts, which do integrate local statutory modifications, may soon become dated in certain areas. As a result, it is important for anyone practising or studying contract law to be alert for statutory modifications to the common law—modifications which can sometimes appear in unlikely places.

## b Contractual obligations are largely self-imposed

In contrast to most other areas of law, contractual obligations are largely self-imposed. Unlike, for example, the criminal law or the law of torts, which impose obligations upon individuals whether or not they consent to them, contract law merely provides a framework within which individuals can create their own rights and obligations if, but only if, they wish to do so. In *Baltic Shipping Co v Dillon*<sup>12</sup> Brennan J expressed this defining characteristic of a contract succinctly when he said that it was an institution ‘by which parties are empowered to create a charter of their rights and obligations *inter se*’. As a result of contract law being of this nature, generally speaking, individuals are free to decide whether or not to enter into a contract at all; and if they do so decide, they are free to determine:

- what the nature and content their respective rights and obligations will be; and
- what the consequences will be of those obligations not being honoured, or rights infringed.

There are, of course, limits to this freedom. Thus, in some cases it is mandatory to enter into contracts; third party personal injury insurance in relation to the use of motor vehicles<sup>13</sup> and workers’ compensation insurance<sup>14</sup> are prime examples. In other cases, terms are prescribed<sup>15</sup> or prohibited<sup>16</sup> for certain contracts. More common still, inequality in bargaining position and the associated use of standard form contracts often means that, in practice, if a person wishes to enter into a contract they must do so on the terms laid down by the other party. In such cases, by entering into the contract, the former is taken to have agreed to the latter’s terms notwithstanding that they felt that they had no choice about the matter. Only if the dominant party’s conduct constitutes duress or undue influence, or is unconscionable in some way, or the terms in question form part of a standard form consumer contract and are judged to be ‘unfair’, will such a contract be unenforceable.<sup>17</sup>

## c The law of contract, not contracts

Unlike the position in some jurisdictions, Anglo-Australian common law recognises a general law of contract that applies equally to all types of agreements; in other words, that there is a law of *contract*, rather than a law of *contracts*. However, principally as a result of legislation, special rules have been introduced to govern particular types of contracts; examples include

12 (1993) 176 CLR 344 at 369.

13 See, for example, *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 4.

14 See, for example, *Workers Compensation Act 1987* (NSW) s 155.

15 See, for example, *Home Building Act 1989* (NSW) s 7.

16 For example, it is now common for consumer protection legislation to prohibit (in the sense of making void) contractual provisions that would take away the protection given to consumers by the legislation: see the *Australian Consumer Law*, s 64.

17 For a discussion of these topics see chapters 14–17, below.

those statutes dealing with contracts for the sale of goods, insurance, consumer credit, the carriage of goods, and building and construction. Typically, the focus of these statutes is the content of the contract and they leave the general law to govern its formation and the remedies for breach. However, in other cases aspects of these matters are also covered, and in some instances the operation of the general law is eliminated almost entirely.<sup>18</sup>

#### d Relationship with other branches of law

Contract and other branches of the law are not mutually exclusive. Thus, a particular event may give rise to rights or obligations under more than one regime. For example, consumers who purchase goods or services that prove to be faulty will have a remedy for breach of contract against the supplier for any loss that this causes them and a statutory right to claim compensation from that person.<sup>19</sup> In addition, if the goods cause personal injury or damage to other property, as well as a contractual claim against the seller, they will have a claim for the tort of negligence<sup>20</sup> and a statutory claim against the manufacturer.<sup>21</sup>

## 4 Contract theory

The description of contract law in the previous section is a traditional one and reflects what is often referred to as ‘classical’ and ‘neoclassical’ contract theory. Classical contract theory enjoyed its zenith during the heyday of laissez-faire in the nineteenth century and had at its centre the doctrines of freedom of contract and sanctity of contract. According to the former, individuals are the best judges of what is in their own interests and they should be ‘free’, within the broad limits of the criminal law and public policy, to contract upon whatever terms they wish. In the words of Lord Diplock in *Photo Production Ltd v Securicor Ltd*,<sup>22</sup> it is ‘[a] basic principle of the common law of contract ... that the parties to a contract are free to determine for themselves what primary obligations they will accept’. The doctrine of sanctity of contract takes this concept one step further by saying that a contract, once made, is ‘sacred’ and should, therefore, be enforced according to its terms and not rewritten by the courts because they may think that the parties have made a bargain that is unsatisfactory in some way.

Developments in the twentieth century, however, revealed the practical limitations of the classical theory. In its pure form, it could not accommodate the sympathy that developed for those who lacked the bargaining power needed to protect their own interests, or the growing desire of the courts to intervene in order to ensure just outcomes. This saw it metamorphose into neoclassical theory. This process and the relationship between the two are explained further in the following extract.

18 For example, employment law is now almost entirely governed by subject-matter-specific statutory provisions.

19 Under the *Australian Consumer Law*, a consumer has certain statutory rights against the supplier of goods or services in relation to the quality of and title to the goods or services supplied: see ss 51–63 and associated remedy provisions.

20 See *Donoghue v Stevenson* [1932] AC 562.

21 Under ss 138–141 of the *Australian Consumer Law*, a consumer has certain statutory rights against the manufacturer of goods if those goods have a safety defect that causes injury or property damage.

22 [1980] AC 827 at 848.

**Jay M Feinman, 'The Significance of Contract Theory'**

(1990) 58 *University of Cincinnati Law Review* 1283

**[at 1285]: 1. Neoclassical Contract Law**

Modern contract law is often usefully referred to as neoclassical contract law. This term aptly situates today's contract law in its historical context. The essential quality of neoclassical contract is that it is the product of the attempt to accommodate classical contract law and subsequent critiques of it. The word 'neoclassical' suggests the partial nature of the accommodation, indicating that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate. ...

<1286> Classical law in general was structured by a series of dichotomies which defined the relationships among legal actors. For example, the Federal government and state governments had separate spheres of authority, as did legislatures and courts. The most fundamental dichotomy was between the individual and the community. Therefore, relations among individuals were governed by private law, which was distinct from public law, which regulated relations between individuals and the state. Within private law, contract law embodied the dichotomy between individual and community by imagining a realm of private agreement in which individual freedom was protected from state coercion. The image that motivated this realm was the isolated bargain between independent, self-interested individuals. Steely-eyed bargainers carefully calculated their interests in a particular exchange, gave a promise or performance only in return for something else, and embodied their transaction in an agreement that carefully defined the terms of performance and therefore could provide the basis for a determinate remedy in case of breach.

Accordingly, as conceived by classical contract law, liability was always voluntarily assumed by the individual through his making of a promise or an agreement, unlike in tort law, in which liability was imposed by the legal system without regard for the individual's consent. Contract doctrines such as narrow formation rules and bargain consideration followed logically from these principles and assured that the individual actually had consented to a bargained-for exchange. When courts mechanically applied these abstract, formal doctrines, they protected the individual's right to assume contractual <1287> obligation or to avoid it at the same time as they provided a predictable basis for commercial transactions.

The problems of classical contract law quickly became apparent to judicial and scholarly commentators. Contractual liability, like all other legal liability, did not arise solely from the individual's choice but came from the court's imposition of legal obligation as a matter of public policy; a contract was binding because the court determined that imposing liability served social interests, not because the individual had voluntarily assumed liability through his manifestation of assent. Nor could the parties' words in creating the contract exclusively define the scope of liability; courts had to interpret, fill gaps, and even impose pre-contractual and quasi-contractual liability, either to make the parties' contract meaningful in its commercial context or to serve social interests other than individual choice, such as fairness. Because of the inherent limits of language and the infinite variability of facts, courts could not state doctrinal rules in such a way that they could be mechanically applied to all fact situations that might arise; moreover, the changing needs of commerce made it undesirable to attempt to do so. ...

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As with classical law, neoclassical law can be evoked by presenting the image of its prototypical case as well as by describing its substance, method, and social role. The prototype of neoclassical contract posits parties in an economic relationship that is neither entirely isolated nor wholly encompassing. The parties seek individual advantage through the transaction, but their individual advantage is tied to the success of their mutual venture. The relationship arises through voluntary bargaining which defines the basic terms of the agreement, but the terms can only be understood by examining the context within which the agreement is reached, so that context sometimes supplies interpretations and additional terms.

Proceeding from this image, as a matter of substantive principle neoclassical contract law attempts to balance the individualist ideals <1288> of classical contract with communal standards of responsibility to others. The core remains the principle of freedom of contract, distinguishing contract from tort and other areas, but this principle is ‘tempered both within and without [contract’s] formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties’ actual agreements’. In deciding the scope of contractual liability, courts weigh the classical values of liberty, privacy, and efficiency against the values of trust, fairness, and cooperation, which have been identified as important by post-classical scholars.

Neoclassical contract accommodates these conflicting values through a method that is flexible and pragmatic. Logic and analytic rigor remain important in contract law because they are a source of legal authority and an important element of professional culture. In contrast to classical law, though, neoclassical law tempers rigid logic by the use of policy analysis, empirical inquiry, and practical reason. Contract doctrine, more often formulated as general standards rather than mechanical rules, guides judges, sometimes quite strongly, but it allows them enough discretion in hard cases to reach just, socially desirable results.

Through this flexible body of principles and methods for their application, neoclassical contract serves the important social goal of supporting and regulating economic transactions. It does this in two general ways. First, it provides a framework for parties who engage in business planning. The framework helps them to create legal relations, to determine their content, to avoid them altogether, and to sort out difficulties when planning goes awry. Second, it provides a background set of norms for fair market relations. Even without the direct threat of enforcement, these norms are used by business people to set standards and limits for their conduct.

This description of neoclassical contract law and how it has arisen should be largely unobjectionable. Mainstream scholars believe that the neoclassical adaptation has successfully responded to the defects of earlier contract law and that it can continue to evolve as the need for further development arises.

[footnotes omitted]

A valuable summary of some of the other theories that have been advanced to explain the nature of a contract and the existence of contractual liability are contained in the following extract.

## Brian Coote, 'The Essence of Contract'

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(1988) 1 *Journal of Contract Law* 91

### [at 99]: The theories stated

#### a *The will theory*

Under the will theory, contracts are seen as expressions of the human will and, for that reason, as being inherently worthy of respect. In that premise are found both the justification of contract law and the basis of many of its incidents. The theory asserts the liberal principle of individual self-determination and the value of individual judgment and volition. Both are thought to be enhanced when two or more wills meet in agreement.

The idea of contract as an expression of will or intention can be traced back at least to classical Greece and Rome. Later it was developed particularly by the Pandectists, the scholars who reintroduced the study of Roman law to Europe from the Renaissance onwards. Through them the theory influenced provisions of the French and German Civil Codes as well as of Scottish law. In turn, it influenced the development of the common law in the nineteenth century, through the writings of such European theorists as Pothier and Savigny.

Associated with the will theory, or derived from it, have been the concepts of contract as agreement, of consensus *ad idem*, offer and acceptance, intention to contract, privity and the *vinculum juris*, and construction and interpretation by reference to the intention of the parties. The theory has also lent support to defences such as mistake, misrepresentation, duress and undue influence and hence to the idea that consent to a contract should be full, free and true. In the common law of the classical period, perhaps its best-known manifestation was freedom of contract, a doctrine which both reinforced, and was itself reinforced by the then-prevailing philosophy of *laissez-faire*. So pervading did that doctrine become that it found its way into the constitutions of both the United States and Germany.

Subject to a limited number of restrictions, the law of contract could be seen to have delegated to individual citizens a form of legislative authority. While this could mean that one party could place him or herself to some degree under the control of another, the power to do so was itself an expression of individual autonomy and an incident of freedom. The most often-quoted judicial statement of the freedom of contract doctrine was that of Sir George Jesse in the 1875 case of *Printing and Numerical Registering Co v Sampson* where he said:

if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

In the common law context, however, the will theory has its weaknesses, both as a justification for the enforcement of contracts and as a basis for prediction. Under the postal rule, for example, it is clear that an offerer could be bound to an offer he had already attempted to withdraw. The theory is also *prima facie* incompatible with the existence of implied-by-law terms. The most obvious weakness is the impossibility in practice of determining what the will of the parties might be, even supposing an exact concurrence of wills could ever exist about all aspects of any particular contract. The common law response has, of course, been to apply objective tests of will and intention. The parties are bound, not by what they actually intended, but by the inferences to be drawn from what they said and did. This objective approach has meant that a search for the apparent intention of the >>