

ELLIOTT & QUINN'S **CONTRACT LAW**

FRANCES QUINN



 Pearson

TWELFTH EDITION

Elliott and Quinn's Contract Law



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Twelfth Edition

Elliott and Quinn's Contract Law

Frances Quinn



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In loving memory of Catherine Elliott, creator and author of numerous best-selling law titles, whose writing has inspired generations of law students across the world.

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To access additional resources to support your study, including multiple choice questions and answers to the end of chapter questions and web updates, please visit www.pearsoned.co.uk/elliottquinn

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Preface

The twelfth edition of this book aims to build on the strengths of the previous editions, which have been extremely well received by both students and lecturers alike. It incorporates all the important legal developments that have taken place since the publication of the last edition, as well as some new exam-style questions to test yourself with. Previous editions included advice on how to answer the questions, but in response to requests from lecturers, you'll now find this material on the book's companion website. The Appendix at the end of the book gives useful general advice on answering examination questions on contract law.

When Catherine Elliott and I came up with the idea for this book, one of our priorities was to explain the material clearly and make it easy to understand, without lowering the quality of the content. Too often, law is avoided as a difficult subject, when the real difficulty is the vocabulary and style of legal textbooks. For that reason, we were determined to use 'plain English' as far as possible, and explain the more complex legal terminology where it arises. We also aim to provide a 'real life' context for the legal rules contained in the book, and give a flavour of the academic and social debates around this area of law. We hope this makes the subject both more accessible and more enjoyable to study.

Elliott & Quinn's Contract Law is part of a series originally created by Catherine and I. If you like our approach, you may want to look at our other books: Elliott and Quinn's *English Legal System*, *Criminal Law* and *Tort Law*.

I have endeavoured to state the law as at 1 January 2019.

Frances Quinn
Kent, 2018

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Introduction

This chapter discusses:

- Why we need contract law
- The history of contracts
- The importance of procedural fairness in the development of contract rules
- The courts' emphasis on looking at the contracting process objectively
- The impact of the Human Rights Act 1998
- The influence of Europe.

Ask most people to describe a contract, and they will talk about a piece of paper – the documents you sign when you start a job, buy a house or hire a car, for example. While it is certainly true that these documents are often contracts, in law the term has a wider meaning, covering any legally binding agreement, written or unwritten. In order to be legally binding, an agreement must satisfy certain requirements (which will be discussed in Part 1) but, with a few exceptions, being in writing is not one of them. We make contracts when we buy goods at the supermarket, when we get on a bus or train, and when we put money into a machine to buy chocolate or drinks – all without a word being written down, or sometimes even spoken.

Why do we need contract law?

The obvious answer is because promises should be binding, but in fact the law only enforces certain types of promise, essentially those which involve some form of exchange. A promise for which nothing is given in return is called a gratuitous promise, and is not usually enforceable in law (the exception is where such a promise is put into a formal document called a deed).

Why then do we need laws specifically designed to enforce promises involving an exchange? The major reason appears to be the kind of society we live in, which is called a market capitalist society. In such a society, people buy and sell fairly freely, making their own bargains, both on the small scale of ordinary shoppers in supermarkets, and on the much bigger one of a project such as the construction of the Channel Tunnel, which involved many different parties, each buying and selling goods and services. Although, as we shall see, there are areas in which government intervenes, in general we choose what we want to buy, who from and, to some extent at least, at what price.

It would be impossible to run a society on this basis if promises were not binding. Long-term projects show this very clearly – contractors working on the Channel Tunnel, for example, would have been very reluctant to invest time and money on the project if they knew that the British and French Governments could suddenly decide that they did not want a tunnel after all, and not be expected to compensate the contractors. On a smaller scale, who would book a package holiday if the tour operator was free to decide not to fly you home at the end of it? How would manufacturers run their businesses if customers could simply withdraw orders, even though the goods had been made specially for them? A market economy will only work efficiently if its members can plan their business activities, and they can only do this if they know that they can rely on promises made to them.

In fact, contract law rarely forces a party to fulfil contractual promises, but what it does instead is try to compensate innocent parties financially when a contract is broken, usually by attempting to put them in the position they would have been in if the contract had been performed as agreed. This has the double function of helping parties to know what they can expect if the contract is not performed, and encouraging performance by ensuring that those who fail to perform cannot simply get away with their breach.

The origins of contract law

In order to understand the rationale underlying contract law, it helps to know a little about its history. Although some principles of contract law go back three centuries, the majority of contract rules were established in the early nineteenth century. Before that, contract hardly existed as a separate branch of law, and took up very few pages in textbooks. Yet today, it is one of the core subjects which lawyers must study, and affects many areas of daily life. What caused the change?

The answer lies in the transformation of our society which occurred during the late eighteenth and early nineteenth centuries, a transformation which has been described as a move from status to contract. Today, we are very used to the important role that ‘the market’ plays in our society. We take it for granted that, for example, the price of food should generally be set by the manufacturer or retailer, with the customer choosing to buy cheaper or more expensive brands according to their budget or taste. We may not actually negotiate a bargain in many areas of ordinary life, but we see the operation of the market in the fact that manufacturers have to set prices at which people will buy. We would be rather surprised if Parliament suddenly made it illegal to charge more than 50p for a loaf of bread.

Before the nineteenth century, however, there were many areas of life where free negotiation and bargaining were not expected. An example is the market for what were regarded as essential foodstuffs, which included wheat, bread and beer. Although bakers and millers were entitled to make a profit, that did not mean they could sell at whatever price people would pay. Prices and quality standards were fixed, according to the price the producer had to pay for their ingredients, so limiting their profits, and ensuring that they could not take advantage of shortages. Activities such as buying goods and then selling them in the same market at a higher price, buying up supplies before they reach the market, and cornering the market by buying huge stocks of a particular commodity are all seen as smart business practice now, but in the eighteenth-century market for essential foodstuffs, they were criminal offences, called regrating, forestalling and engrossing respectively. The basis for this approach was explained by Kenyon J in **R v Rusby**: ‘Though in a

status society some may have greater luxuries and comfort than others, all should have the necessities of life.' In other words, there was a basic right to a reasonable standard of living, and nobody was expected to negotiate that standard for themselves.

A similar, though less humane, approach was taken to relationships between employer and employee – or master and servant, as they were called then. These days, we expect to have an employment contract detailing our hours of work, duties and pay, even though the amount of control we actually have in negotiating those areas may be negligible. In a status society, employment obligations were simply derived from whether you were a master or a servant; masters were entitled to ask servants to do more or less anything, and criminal sanctions could be used against an employee who disobeyed. Employers had obligations too (though rather less onerous than those of employees), which sometimes included supplying food or medical care. Both sets of obligations were seen as fixed for everyone who was either an employee or an employer, and not a matter for individual negotiation. Even wages were often set by local magistrates.

All this began to change in the eighteenth and nineteenth centuries. Society itself was undergoing huge changes, moving from an agricultural to an industrial economy, and with that came political changes, and changes in the way people saw society. With the rise of an economic doctrine called *laissez-faire* came a view that society was no more than a collection of self-interested individuals, each of whom was the best judge of their own interests, and should, as far as possible, be left alone to pursue those interests. If we apply this view to the market for bread, for example, it would suggest that bakers would sell bread for the highest price they could get, while consumers shopped around for the lowest price, and the result should be a bargain suitable to both. The market would consist of hundreds and hundreds of similar transactions, with the result that everyone would be able to secure their own best interests, and the state would not need to intervene to do this for them – in fact it should not do so, because the parties should be left alone to decide what was best for them.

This *laissez-faire* approach carved out a very important place for contracts. As we have seen, where people make their own transactions, unregulated by the state, it is important that they keep their promises, and as a result, contract law became an increasingly important way of enforcing obligations.

Freedom of contract

Its origins in the *laissez-faire* doctrine of the nineteenth century have had enormous influence on the development of contract law. Perhaps the most striking reflection of this is the importance traditionally placed on freedom of contract. This doctrine promotes the idea that since parties are the best judges of their own interests, they should be free to make contracts on any terms they choose – on the assumption that nobody would choose unfavourable terms, and so the existence of a free market will automatically produce the best results for all. Once people or companies have made their choices, the job of the courts is simply to act as an umpire, holding the parties to their promises; it is not the courts' role to ask whether the bargain made was a fair one.

Some academics, notably Professor Atiyah (*The Rise and Fall of Freedom of Contract*, 1985), have suggested that this extreme position lasted only a short time, and that the courts were always concerned to establish some concept of fairness. His view has been challenged, but in any case,

it is clear that over the last century, the courts have moved away from their reluctance to intervene, sometimes of their own accord, sometimes under the guidance of Parliament through legislation such as the Consumer Rights Act 2015. However, as the basic principle still holds, decisions which actually have their basis in notions of fairness may be disguised behind more technical issues.

Contract and fairness

In its original form, contract law laid down rules which were designed to apply in any contractual situation, regardless of who the parties were, their relationship to each other, or the subject matter of the contract. The basis for this approach was derived from the *laissez-faire* belief that parties should be left alone to make their own bargains. This, it was thought, required the law simply to provide a framework, allowing parties to know what they had to do to make their agreements binding. This framework was intended to treat everybody equally, since to make different rules for one type of contracting party than for another would be to intervene in the fairness of the bargain. As a result, the same rules were applied to contracts in which both parties had equal bargaining power (between two businesses, for example) as to those where one party had significantly less economic power, or legal or technical knowledge, such as a contract between a company and an ordinary individual.

This approach, often called procedural fairness, or formal justice, was judged to be fair because it treats everybody equally, favouring no one. The problem with it is that if people are unequal to begin with, treating them equally simply maintains the inequality. This has obvious repercussions in contract law. Take, for example, an employment contract stating that if either party is dissatisfied with the other's performance, the dissatisfied party can terminate the contract at any time. This clearly amounts to treating both parties in exactly the same way, making them play by the same rules. But in doing so, it gives the more powerful employer the useful opportunity to sack the employee at any time, while the corresponding 'benefit' to the less powerful employee will in many cases amount to no more than the chance to become unemployed.

Since the beginning of the twentieth century, the law has to some extent moved away from simple procedural fairness, and an element of what is called substantive fairness, or distributive justice, has developed. Substantive fairness aims to redress the balance of power between unequal parties, giving protection to the weaker one. So, for example, terms are now implied by law into employment contracts so that employers cannot simply dismiss employees without reasonable grounds for doing so. Similar protections have been given to tenants and to consumers, and in these three areas (and some others) traditional contract rules are overlaid with special rules applying only to particular types of contract. (You can see the way in which this approach operates in Chapter 16.)

The balance between substantive and procedural fairness in contract law is always an uneasy one, but academics such as Treitel and Peel (*The Law of Contract*, 2015) and Atiyah (1985) believe that there has been, as Atiyah puts it, 'a move from principle to pragmatism'. He suggests that in modern cases, the courts have been less concerned with laying down general rules, and more with producing justice in individual cases. In fact, an examination of the cases, especially those between businesses, where bargaining power is assumed to be equal, shows that although the courts are often attempting to secure substantive justice, they still tend to hide that attempt behind what appears to be an application of the traditional rules. The cases on innominate terms and on reasonable notice, particularly **Interfoto** (see Chapter 7), have been seen as examples of this.