Freedom of contract in english law

Philosophy, Freedom

In earlier days, agreement was built on a very classic and simple basis: it is concluded at the moment that the acceptance of an offer takes place and that is all. In consequence, equal parties were non-existent and stronger parties had the possibility to impose unfair and domineering conditions upon those who were weak and vulnerable. It is in this context that both legislations and courts agreed that State action was indispensable to ensure fairness among individual parties, in an era where the exercise of law of freedom were extremely restricted.

In today’s English law, freedom of contract is one the foundation of contract law. The existence of freedom of contract requires three main considerations: the freedom to contract or not to contract, the freedom to choose with whom to contract, and the freedom to decide the terms of the contract. Thus parties are totally free to engage or not to engage in agreements. However, freedom of contract can fail to have the desired or expected effect in contracts where power relations are not equal. The stronger party can impose its " will" to the weaker party.

In order to deal with any potential conflict that can arise from this matter, English legal systems has set up rules ensuring the effective and fair exercise of freedom of contract. This essay will discuss and examine those rules in question, established by the English law in order to effectively balance freedom of contract and fairness between the contracting parties as well as fair contractual terms. And also on the other hand limits of freedom of contract will be exposed. Freedom of contract, as its appellation suggests, has a strong relationship with contract.

In order to identify this relationship, it is important to understand what is meant by “ contract” and the rules governing it. In English law, a contract is a legally binding agreement reached on a set of promises (or obligations) and specific terms. The validity of any contract requires 4 main features: an offer, acceptance, consideration and intention to create legal relations. Thus, when one party (the offeror) makes an offer which the other (offeree) accepts, then agreement is concluded.

However, the mere fact of an agreement is insufficient for a contract to be completely valid. This implies that a party must promise to give or do something for the other. This idea of exchanging promises is known as " consideration" and is an essential requisite of any valid contract. In Currie v Misa(1875) it (consideration) was held to constitute a benefit to one party or a detriment to the other. For instance, when a bottle of wine is bought from a shop, the benefit received is the bottle of wine, and the detriment is themoneypaid to the shop.

Yet it is important to take into concern the rules governing consideration. First of all, consideration must not be in the past(as mentioned in the a. This rule suggests that if one party willingly performs an act, and the other party then makes a promise the consideration said to be in the past. Therefore past consideration is regarded as no consideration at all. For instance, a pregnant woman named Julie, knowing that her neighbour, Lucy, is concerned about herhealth, offers to do the housework for her.

This takes Lucy tremendous amount of time to do, and Julie is so content with the result that she promises to pay Lucy ? 30 for her effort. If Julie fails to pay, Lucy will not have the possibility to sue for breach of contract as

Julie's promise to pay was after the completion of the work. The fact of this case is supported by the case of Re McArdle(1951, CA) in which it was held that no valid contract existed since the home improvements were past consideration; they had been carried out before any promise to pay had been made.

Another rule is that consideration must move from the promisee which is very similar to the concept of law of privity. So for instance if A makes a promises to B, the promise will only be enforceable if B can equally show that he has provided consideration for A’s promise. This rule clearly demonstrates the fairness (among parties) of the doctrine of consideration. Finally, consideration must be sufficient but need not to be adequate. This rule stipulates that a good consideration must be of some value but there is not necessity for a bargain to be of adequate value.

For example, if someone is willing to sell his Ferrari for ? 1, the contract will not be in vain due to lack of consideration and therefore will be sufficient. In this case, Courts will not measure the adequacy of the consideration (the fact that a Ferrari is offered to be sold at only ? 1) as it is up to one party to decide whether or not he agrees with the other party promises. The contract in English law enhances principle of freedom of contract.

Indeed, the terms of the contract is freely determined and agreed by the parties. However, there are various circumstances in which additional terms may be implied into the agreement. The aim of implied terms is often to provide a supplement to a contractual agreement in the interest of making bargain more effective, to achieve fairness between the parties and to alleviate hardship. Term may be implied by custom. Here it is suggested that

a contract must always be examined in the light of its surrounding commercial context.

So the parties automatically assume that sometimes their contract will be subject to the customs of a particular locality or trade and therefore do not deal specifically with the matter in their contract. One of the cases illustrating this is Hutton v Warren(1836). A term may equally be implied into a contract y Act of Parliament in the form of statutes. Under the Sale of Goods Act 1979, ss 12-15 for instance, a seller automatically assumes certain obligations to the buyer as a result of terms which are automatically implied in every contract regulated by the Act.

The seller is required by statute to promise that he has lawful authority to transfer ownership of the goods(s12)(the seller would for example break this term if it turns out that the goods were stolen); that the goods being sold will match the description he provided the buyer(s13)(for instance a shirt described as 100 per cent cotton should not contain man-made fibres); that the quality of the goods being sold will satisfy the buyer(s14(2)); that the good will be suitable for any purpose specified by the buyer(s 14(3)); and that the goods being sold will match any sample shown to the buyer prior to the contract being made(s 15).

Breach of any of these terms will put the buyer in a strong position and be given the option to be discharged from the contract or alternatively carry on with the contract and claim damages for the breach. This will lead us to the concept of remedies mentioned in the following part. In English contract law, a crucial aspect of the contractual relationship is the enforcement of the

contract, as the obligation that pact must be kept firmly by parties is considered as the backbone of any contractual relationship.

However, a problem can occur if a contract is not adequately performed and one of the parties renounces to perform its obligations. This is where the concept of non-performance and the remedies available to the injured party become applicable. Breach of contract arises from the non-respectof the pact (or terms) agreed between parties. The aggrieved party is then given thecommon law rightto claim for a remedy resulting from any quantifiable loss or harm suffered. Damage (financial compensation) is the most basic remedy available to the innocent party.

In today businessenvironment, it is not rare for the parties to agree in advance the damages that will be payable in the occurrence of a breach of contract. These damages are referred to as liquidated damages. An illustration of liquidated damages is the charges imposed for cancelling a flight or the booking of a hotel room. But sometimes, there is a temptation for a party with stronger trading power to try imposing a penalty clause (punitive payment for the non-performance of a term or condition) as demonstrated in Wilson v. Love (1896) case.

Other remedies such as quantum damages and injunction may be granted at the discretion of the court as part of its equitable jurisdiction. So, as mentioned above, remedies is all about compensating the aggrieved party for causing him loss or harm. This can be avoided by the consideration of the prevailing rules of freedom of contract. In other words, Freedom of contract allowing individual parties to freely contract or not to, and no one being

forced to do it , whoever therefore who gives a contractual promise must then keep it.

Or on the contrary case, as described in earlier parts can be constrained by legal authorities to honour its commitment or compensate the other party. However, performance of a contract becomes sometimes impossible due to the circumstances beyond the control of either of the parties and not due to their fault. The legal term referring to this situation is frustration. An example of this unforeseen event is illustrated in the case of Taylor v Caldwell (1863) in which it was held that contract was impossible to perform due to an external and unforeseen event.

Consequences are that the contract is killed and parties discharged from further liability. This limits the exercise of freedom of contract in a sense that the agreement formed by the parties is nullified, regardless individual parties will. Another limitation of freedom of contract is that the choice of other contracting party is not always free. For example, an employer is not totally free to hire the person of his choice. The fact that insurance contracts are sometimes made ?? obligatory by parties equally render the exercise of freedom of contract limited, as concerned parties did not freely choose to contract with an insurance company.

So far, this paper has been about the relationship between the exercise of freedom of contract and law of contract. However not only is freedom of contract concerned with contract law but also with another component of the English private law, which is tort law. A tort is a civil wrong. In other words, it refers to the liability of a person who causes harm to another with the

obligation to repair the damages suffered by the victim. An example of tort is damage to commercial interests, e. g. inducement of breach of contract.

Also known as tortious interference, inducement of breach of contract arise where the wrongdoer convinces a party to breach the contract against the claimant, or where the wrongdoer prevents one party from performing his obligations(agreed with the other party), thus stopping the claimant from receiving the performance promised. Furthermore, after mentioning the existence of aduty of care, which is an element required making negligence claim (concerned with a wrongdoer’s careless conduct which cause damage or loss to the defendant), the claimant (the injured party) can prove that this duty has been broken by the defendant (the other party).

Hence the close relationship between duty of care and the requisites of freedom of contract in the sense that if parties freely agree to contract (including the terms of it), then, it is suggested, that they owe a duty of care to each other because the careless conduct (which can affect the contract) of one party can prevent the other one from receiving the performance promised, regardless to the external factor that caused the misconduct of the blamed party. This fact is supported by the case of Garret v.

Taylor (1620) in which the court upheld a judgment for the claimant. To conclude, the purpose of this essay has been to describe and make a connection between law of contract as well as law of torts and freedom of contract. Thus, English legal systems have established multiple rules of conduct from different parties to a contract in order to ensure fairness between them. Henceforth, contracting parties are given freedom to contract with whoever they want, including the terms of the contracts.

Also, thanks to rules such as of duty of care, or of doctrine of remedies, an injured party is now given the possibility to claim for compensation of loss or harm caused by the blamed party, who will be then obliged by legal authorities to repair the damages caused to the aggrieved party due to non-respect of the rules established. In the end, it must be acknowledge that English Law has stroke an appropriate balance between freedom of contract and fairness. References:

Currie v Misa (1875) LR 10 Ex 153; (1875-76) LR 1 App Cas 554: Definition of consideration Garret v. Taylor, 79 Eng. Rep. 485 (K. B. 1620): Tortious interference Hutton v Warren (1836) 1 M; W 460: Implied terms Re McArdle(1951, CA): Past consideration being unacceptable Sale of Goods Act 1979, ss 12-15 : Statutory implied terms Taylor v Caldwell (1863) 3 B ; S 826; 122 ER 309; [1863] EWHC QB J1: impossibility of performance of contract Wilson v. Love (1896) : Liquidated damages