Promissory theories of contractual obligations law contract essay

Law

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\n[/toc]\n \nAquinas wrote that, " man is obligated to man by any promise and this is an obligation of natural law"*. Promissory theories of contractual obligation suggest that obligations are created by parties through promises. A promise is created by communicating an intention, to the promisee, not to merely perform an act, but to undertake an obligation. The label ‘ promissory’ emphasises that contractual obligations are obligations that are created by the parties, which means that they are voluntary or self-imposed obligations. According to Charles Fried, the promise principle is that principle by which persons may impose on themselves obligations where none existed before.[1]Whether these promissory theories provide a unifying and coherent explanation of the key rules and principles of English Contract Law will be discussed in this essay.

Promise as a moral duty

A natural account of the relationship between contract and promise holds that legal liability in contract enforces a corresponding moral responsibility for a promise.[2]Many commentators, including Charles Fried, have regarded

promises as binding, ‘ for a promise puts a moral charge on a potential act’*. They assert that the promise principle is the ‘’moral’’ basis of contract law*. A contract is an enforceable promise or set of promises, and whatever the legal consequences of his non-performance, a person who has made a contract is morally obligated to keep it just because he has promised to do so. An individual is morally bound to keep his promise because he has intentionally invoked a convention whose function it is to give grounds - moral grounds – for another to expect the promised performance*. Promises are based on mutual trust between both the parties which gives rise to future obligations. It is necessary to establish that promising is different than merely stating an intention as in the latter you reserve the right to change your mind later. For example, if A says to B that he intends to sell his bike to B, but later on sells it to C, he has done no wrong. But the position is been different if A promises to sell his bike to B. In this case he is morally obliged to sell the bike to B only. If he sells it to C, he has committed a moral wrong and breached the contract. The convention of promising create expectations in others and by virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it*.

Key rules and principles and how they fit promissory theories

The English Contract law sets some key rules and principles which determine the binding nature of a contract. The most important of these are the rules on offer and acceptance; intention to create legal relation; consideration; terms; privity; and remedies. Promissory theories do provide a prima facie

explanation for many areas of English contract law. Promissory theories can be summarised by the principles underlying the freedom to contract; freedom of contract; remedies; and privity of contract. An offer is a communication which indicates certain terms on which the offeror is prepared to make a contract. It is made with the intention of being bound by those terms, once they are accepted by the offeree. Intention by both parties to be legally bound by the contract is also necessary. If two or more parties make an agreement without any intention of being legally bound by it, that agreement will not be regarded by the courts as a contract. Similarly, Freedom to contract means that the obliged person undertook to do something for another person, more than mere statement of fact or intention to act. Promises communicate an intention to undertake an obligation. Hence, the rules on offer and acceptance can therefore be understood as a means of identifying what types of communication constitute a promise. A promise cannot just be thrust on someone – he must in some sense be willing to be its beneficiary.[3]Acceptance offers a further point of correspondence between the moral institution of promise and the legal institution of contract.[4]The terms of the contract are also important factors when determining the validity of the contract. Freedom of contract means that the content (terms) of a contractual obligation is a matter for the parties, not the law. Parties to the contract are free to decide what terms they want to include in the contract. This is consistent with promissory theories as the content of a promise is determined by the content of the undertaking that the promisor communicated, so is within the promisor's control. Privity of contract refers to the concept that contractual obligations

are binding only on the contracting parties and none other. The rule on Privity of contract also fits with promissory theories as promissory obligations are personal obligations and a promisor is only liable to the promisee, in case of non-performance. An obligation that is created by communication of intention to undertake it is in principle owed to the promisee alone. Finally, remedies (such as damages, specific performance and injunctions) are available in contract law in case of non-performance of a contract. The remedies for breach of contract are specific performance and payment of compensatory damages which are also consistent with promissory theories as specific performance is an order to do the very thing that the promisor promised to do, and the injured party is awarded the financial value of the promise in damages.

Objections to Promissory theories and its possible responses.

The key element of consideration plays a vital part in formation of a contract. Consideration is defined as either a benefit received by one party or a detriment suffered or undertaken by the other, as a result of the original promise. It does not matter how seriously the promise had been made and it will remain unenforceable unless the promisee promises something in return. However, this element is inconsistent with promissory theories as they do not require a promise to be binding only if it is given as an exchange of another promise, by the promisee. Traditionally, contract law has not considered mere promises as being sufficient to create contractual obligations unless supported by consideration. It is the doctrine of consideration that leads some to see contracts as distinct from promise*. The rule on consideration has been subject to considerable criticisms.

Promissory theorists argue that this requirement is contrary to the idea that contracts are self-imposed obligations. This requirement could also lead to injustices as parties who had relied on serious promises would find no recourse in case of non-performance of the promise, unless they provide consideration for it. It may fail in giving effect to promises which ought to have legal effect. The objection to this rule has been to its transformation into a formula of denial, a formula that would deny legal effect to most promises for which there is nothing given or received in return*. Consideration rule also states that a nominal consideration (such as a peppercorn) is sufficient to bind the promisor. It is necessary in cases of gratuitous promises which may be taken seriously or induce reliance on the promisee. However, it may seem illogical to exchange a large sum of money for peppercorns. There are further more objections to promissory theories as being compatible with contract law. Arguably, the most significant objection is that promissory theories are inconsistent with the objective approach which the common law adopts in determining the existence and content of a contractual obligation. This is so because promissory theories declare obligations to arise from promising, which is said to be inherently subjective. If contracts are based on promises, common law should adopt the subjective approach. Supporters of the promissory theories argue that in determining the meaning of the contract the objective approach may be used but for determining the mere existence of the contract, the judges should be required to determine whether each of the parties had formed the requisite subjective intent to make a promise. A subjective approach to this response is appropriate because promises can only be made intentionally, not through

fault or mistake, and a search for intent is necessarily subjective. Another possible fit objection to promissory theories is that they are unable to account for everyday transactions such as buying from a vendor or taking a bus. In such simultaneous transactions it is often impossible to find anything resembling a promise. However, contract law does recognise these transactions as being offer and acceptance, for example by getting on a bus you offer to purchase a ride which is then accepted when the bus pulls away. The response to this objection is that some simultaneous transactions involve implicit promises, but not all. Simultaneous transactions do not involve promises and so are not properly governed by rules designed for promises. Instead, such transactions should be regarded as non-contractual transfers of property.

Promissory Estoppel and Reliance

Promissory estoppel is an equitable doctrine which is used to enforce promises made without any consideration because the promisee relied on that promise and acted on that reliance. For example, if Ann promises something to Ben, and Ben acting in reliance of that promise either suffers detriment or that act alters his position, Ann cannot later renege on her promise to Ben on the basis that Ben provided no consideration. It is demonstrated by the case of Central London Property trust Ltd v High Tree House Ltd* where Denning J basing his judgment on the decision in Hughes V. Metropolitan Railway* laid down the foundations of this doctrine. Even though, the plaintiffs in this case won, Denning J in his obiter statement clarified that had the plaintiffs sued to recover for past-payments in full, they would have been unsuccessful in their claim even though their promise was

unsupported by consideration. This doctrine can be said to be consistent with promissory theories as far as enforcement of promises without consideration is concerned. But it cannot go unnoticed that reliance plays a vital role for this doctrine to be enforceable. Contrary to the promissory theories, reliance theories suggest that contractual obligations are obligations to ensure that others whom we induce to rely upon us are not made worse off as a consequence of that reliance. Contracts and promises do mostly induce reliance and non-performance of that contract does leave those, who relied on the promise, worse off. It can be said that the purpose of promising itself is to encourage individuals to rely on one another, and that it does by protecting their reliance interest. It is argued that promises should be enforced whether or not there have been reliance by the promisee but it is also true that promise-keeping is in general a moral or legal duty only because it is wrong to encourage reliance of others and then disappoint their expectations. By promising we not only foresee reliance, we invite it: we intend the promisee to rely on that promise*.

Criticisms to Promissory theories

It is unobjectionable that not all promises are contracts because a significant number of those who we make in the ordinary course of living are not legally enforceable. Although we may have a moral obligation to perform such promises, no legal sanction attaches to their breach.

Conclusion

Despite the continued popularity of promises amongst some contract theorists, promises alone have never played a very important role as a freestanding ground of liability*.