

1 Termination of Contracts

Does/did ___ have a right to terminate?

- Scenario where one of the parties wants to or has attempted to terminate the contract

1) Grounds for termination

REMEMBER: The right to terminate is a rare occurrence and courts encourage performance, rather than avoidance, of contracts (*Koompahtoo; Ankar*)

- **By express term**
 - o Has the event that provides grounds for termination occurred?
 - o If yes, then there's a right to terminate
 - o If ___ hasn't complied with termination stipulation, consider if CL RtT
- **By subsequent agreement**
 - o Has there been a contract to end a contract?
 - o Has there been consideration?
 - Not an issue where neither completely performed, consideration = mutual release
 - Accord and satisfaction – non-performing party buys release (*British Russian*)
 - Termination inferred from new agreement
- **Because of breach**
 - o FIRST, consider CL rights
 - o THEN, identify the breach and classify the term
 - o Breach of condition
 - Is the term a condition? – apply test from *Jordan CJ in Tramways*
 - Legislation implies?
 - Express designation
 - o Express words required, aren't conclusive though (*Schuler*)
 - Previous decisions, not decisive
 - Intention of parties
 - o *Tramways* essentiality test
 - o Overly burdensome? (*Schuler*)
 - o Serious breach of intermediate term (preferred bc flexibility)
 - Can the term be breached in more than one way and with varying degrees? (*Hong Kong*)
 - Serious breach if goes to root of contract and deprives substantially whole benefit (*Hong Kong; Koompahtoo*)
 - o No breach of warranty gives RtT

- **Repudiation** – NEED TO CONSIDER IN ADDITION TO BREACH
 - Unwillingness or inability to perform contractual obligations BUT won't be lightly found or inferred (*Gibbs CJ in Shevill*)
 - Must relate to whole contract, a condition or be otherwise fundamental
 - Based on words or conduct (*Carr v Berriman; Shevill*)
 - Inferred from a combination of events (*Progressive Mailing House*)
 - Instalment contracts (*Maple Flock*)
 - Depends on the quantitative ratio and degree of probability of repetition
 - Erroneous interpretation (*DTR Nominees*)
 - Insisted on interpretation 'willy nilly' in the face of clear enunciation of the correct interpretation
- **Delay**
 - Time is of the essence – time stipulation is a condition (*Union Eagle*)
 - Ordinary rules of determining whether a condition apply
 - Time stipulated but not of essence
 - Serious breach of intermediate term? (controversial)
 - Is there repudiation? (*Carr v Berriman*)
 - Delay itself or combined with other conduct? (*Laurinda*)
 - Following notice procedure (*Louinder*)
 - No time stipulation
 - Implied 'reasonable time'
 - Notice procedure (*Laurinda; Louinder*)
- Right to terminate under CISG or UPICC

2) Are there any restrictions on the RtT?

Restrictions on right to terminate **don't affect rights to damages** for any breaches that have occurred

- Affirmation
 - ___ not required to elect immediately (*Tropical Traders*)
 - ___ must have knowledge of at least the facts giving rise to RtT
 - Must demonstrate unequivocal conduct consistent only with the choice to continue the contract
 - = contract remained on foot from time of affirmation, ___ loses RtT for that breach (*Sargent*)
 - Consider whether ___ had a new RtT because of subsequent or continuing breach
- ___ not ready and willing (*Foran v Wight*)
 - Actual breach – ___ r&w at the time of breach (*DTR*)
 - Anticipatory breach

- Repudiation accepted – ____ needs to show weren't substantially disabled from performing at time of repudiation (*DTR; Foran*)
 - Repudiation wasn't accepted – ____ needs to perform (*Foran; DTR*)
 - Unless performance futile or pointless (*Deane J in Foran*)
 - Goods? – *Goods Act s 35*
 - *Deane J in Foran; Hodgson JA in Sharjade obiter* => if terminating for anticipatory breach, no need to prove readiness and willingness unless also trying to get damages
- Estoppel
 - Has ____ induced party to assume that RtT terminate wouldn't be exercised (*Legione*)
- Relief against forfeiture
 - In cases concerning proprietary interests
- Waiver*

3) Consequences

- If there was a RtT
 - Right to elect to terminate or affirm
 - A door must be either open or shut; a contract must either subsist or be at an end" (per *Higgins J in Bowes v Chaleyer*)
 - Consequences of affirmation
 - Contract remains on foot (*Foran v Wight; Bowes v Chayeler*)
 - Have to perform obligations
 - Consequences of termination
 - Contract is frozen on termination
 - Both parties are relieved from further performance (*McDonald v Dennys Lascelles*)
 - **Doesn't affect rights already accrued** (those due before termination), binding and enforceable
 - **__ can claim** damages for loss of other's further performance (**loss of bargain damages**)
 - Total failure of consideration allows re-claiming of money paid (*McDonald*)
 - Exception = deposits
- If there was no RtT
 - Wrongful termination is repudiation
 - Other party may elect to affirm or terminate (accept or reject repudiation)
- Right to Cure a Breach
 - Under Aust CL, no right to cure a breach before termination by the other party
 - Under CISG and UPICC right to rectify a breach in some circumstances (where it wouldn't unduly prejudice the other party's interests)

Termination by Performance

- **Contractual liability is strict**, what is required by way of performance of the contract depends on the terms of the contract and their construction
- Party **must perform in way required and by the time required** – assess way and time to determine performance and resolve dispute
- Can be **express or implied by term or construction**, time is reasonable if not express
- Both parties fulfil their side of the bargain and contract is finished, executed

Termination by Agreement

Termination Under the Original Contract

- Express **term to say that contract will terminate after a certain time or occurrence of an event**
- Provides for when and how the contract can be terminated
- If indefinite period with no termination clause – parties rarely intend to be bound forever (subject only to frustration)
- If a contract is silent as to termination, often **appropriate to imply a term allowing termination by a reasonable notice** (*Crawford Fitting*)
- What constitutes reasonable notice depends on the nature of agreement

Termination by Subsequent Agreement

- Subsequent agreement to terminate ^
- **A contract to end a contract, requires consideration**
- No problem where neither has completely performed contract – consideration is mutual release of obligation
- Problem where one has performed and other hasn't, party that hasn't performed isn't giving consideration
 - o **Accord and satisfaction** – agreement where one party releases non performing party from and obligation to perform. In return, provides fresh consideration (buys release from further obligations) (*British Russian Gazette*)
 - o Termination may also be **inferred from subsequent** – new agreement is entered into without explanation of its effect on original agreement, infer that it is a replacement or a variation
 - Inconsistent with original agreement will often imply intention to terminate
 - Isn't itself sufficient to imply an intention to terminate

Termination for Breach

- BREACH = occurs when a **party** without lawful excuse **fails/refuses to perform obligations by time or to standard required** by the contract
- **Fault is generally not required** when assessing a breach of contract, except in case of obligation to take care (*Quinn v Burch Bros*)

Rights Conferred by CL

- **Important when contract doesn't expressly grant party right to terminate in response to breach**
- If there's a right to terminate under the contract, it will often be unnecessary to consider CL
 - o If there's an express stipulation for termination, failure to comply with stipulation doesn't necessarily mean invalid termination, if breach also gives rise to CL right to terminate
- CL right to terminate can be excluded from the contract (confirmed for sale of goods under s 61 of *Goods Act 1958* (Vic))
- **All breaches can give rise to a right to damages**
- **Only some breaches give rise to right to terminate** the contract (and claim damages for loss of bargain)

Termination for Breach of a Condition

- **Condition** = an essential term that goes to the root of the contract, wouldn't have entered into if wasn't for that term (*Jordan CJ in Tramways*)
- Aggrieved party will be **entitled to terminate for any breach** of that term **regardless of its gravity or consequences** (*Jordan CJ in Tramways* (NSWSC), approved by HCA as good statement of law)
- **Regardless of the ulterior commercial/economic motivation for terminating** (*Arcos*)
- Damages to compensate for any loss suffered by breach and loss of bargain damages available

Is the Term a Condition?

- It's not always clear if a term is a condition (or an intermediate term)
 - o Very rarely will a term be classified as a warranty, since there's a possibility to classify a term as intermediate, gives flexibility in dealing with breach (*Hong Kong*)

SEE WHETHER:

- **Legislation implies it as a condition**
 - o When there's a contract for sale of goods by description, **implied condition that goods correspond with description** (s 18 *Goods Act 1958* (Vic))
 - o **No implied condition or warranty as to quality or fitness** for any particular purpose, but there are broad exceptions (s 19 *Goods Act 1958* (Vic)) (see page 11 of lp)
- **Express Designation by The Parties**
 - o Express words are required
 - o **Court must be satisfied of parties' clear intention for term to have this status** (with the consequence that any breach will entitle aggrieved party to terminate)
 - o **Term being classified as a condition in the contract isn't conclusive** (*Schuler*)
 - *S 16(2) Goods Act 1958* (Vic) – stipulation may be a condition though called a warranty in a contract for sale of goods
 - **Not everyone uses/understands term in legal sense** (*Schuler*)
 - If they stipulate that any breach of that term will lead to right to terminate = condition, then they have a termination clause so don't need to consider CL (except in calculation of damages)
- **Previous judicial decisions (relevant, not decisive)**
- **Intention of The Parties**
 - o **Absent express classification, intention is decisive** (determined by construction)
 - o *S 16(2) Goods Act 1958* (Vic) confirms this principle for the sale of goods – whether a term is a condition or a warranty 'depends on the construction of the contract'
 - o Ask: **what was the objective intention of the parties** (having regard to the terms of contract and surrounding circumstances)?
 - o Apply *Tramways* **essentiality test**
 - Whether it appears from the general nature of the contract or from some particular term(s) that the promise **is of such importance to promisee that they wouldn't have entered into the contract unless they had been assured of strict or substantial performance** of the promise, as the case may be, and this ought to have been apparent to the promisor (*Per Jordan CJ*)
 - o If term imposes an **overly burdensome condition** on one of the parties, **unlikely it was intended to be a condition** in the legal sense (*Schuler*)
 - o Strong and clear language and other factors that suggest importance
 - Binary term? Either is or isn't
 - o Correlative terms will generally bear the same nature as each other (*Bancks*)

Arcos v Ronaasan (1933) UK

- Contract described length of pieces of wood sold to be used to make barrels
- Some of wood was fractionally different length, made no difference to use of wood

- Correspondence with description was a condition under *Sale of Goods* legislation
- **Where a term is classified as a condition, there's a right to terminate regardless of the gravity of the breach**
 - o Regardless of the ulterior commercial/economic motivation for terminating

Schuler v Wickman Machine Tool Sales (1974) UK

- E.g. when parties attempt to designate as a condition but failed to do so
- Clause stated that it *shall be a condition* that W to make 1400 visits over contract term. W didn't make all the visits
- S can terminate if term is a condition in technical legal sense, can't if in layman sense only
- HELD: not a condition
- **Weren't satisfied that parties understood what it meant to use condition in the legal sense**
- Looked at intention of parties bc unclear, would particular construction lead to absurd result?
 - o 1400 would be incredibly burdensome condition and unlikely that W would agree to that being a condition, knowing that 1 failed visit could lead to termination

Tramways Advertising v Luna Park (1938) HCA

- Contract to advertise L by 53 boards on trams for 3 seasons
- T guarantee that boards will be on tracks at least 8 hrs p/d throughout the season
- L discovered they weren't (sometime in second season)
- T argued enough that displayed on average of 8 hours, by their construction
- L attempted to terminate for breach of the condition. Yet, T continued to display ads, some info outdated. When L failed to pay, T sued, L counter sued
- HELD in **Jordan CJ** in NSWSC – to determine whether term is a condition **apply the essentiality test**
 - o **If it appears from the general nature of the contract or from some particular term(s) that the promise is of such importance to promisee that they wouldn't have entered into the contract unless they had been assured of strict or substantial performance of the promise**, as the case may be, **and this ought to have been apparent to the promisor**
 - o Found for T
- HELD by HCA: approved test but found that clause was a condition
 - o Importance/essentiality derived from words **'we guarantee'**
 - o Payment not to commence until all 53 boards were all displayed
 - o Preliminary correspondence demonstrated importance of continuity of display
 - o Therefore, L could terminate the contract for breach of condition and claim damages
 - o There was also repudiation by T – indicated an intention to continue not to perform
 - o Also first case where HCA considered possibility of intermediate terms

Associated Newspapers v Bancks (1951) HCA

- 10-year contract concluded in '49 for one-page cartoon for Sunday newspaper to be published on the first page of cartoon section
- On several (3) occasions AN published cartoons on other pages. Bancks terminated
- HELD: Termination valid as term was a condition
 - o Obligation of Bancks was to deliver cartoon every week was a condition AN wouldn't have entered into without
 - o AN had to publish on front page – **strange if Bancks obligation was condition but AN's wasn't**
 - o Continuity and integrity of the cartoon (published as a whole) and on most conspicuous page was important to Bancks
 - o Affirmed test in *Tramways v Luna Park*
 - o AN's conduct was repudiation, 3 breaches, several more intended, no consultation and despite his protests – lack of desire to perform contract on its terms

Termination for Breach of an Intermediate Term

- **Intermediate term** – also called innominate – sits in-between condition and warranty
 - o *Hong Kong Fir Shipping* (intermediate terms part of UK law)
 - o Possibility considered by HCA in *Tramways*
 - o *Ankar v National Westminster Finance* (approval of intermediate terms in obiter)
 - o Express recognition in *Koompahtoo*
- If it can be **breached in more than one way with varying degrees = likely an intermediate term** (*Hong Kong*)
- Courts prefer to construe a term as a kind that doesn't give RtT, promote performance of contractual obligations rather than avoidance (*Ankar*)
- **Termination is allowed if breach is serious** (*Ankar*)
 - o If likely to have serious consequences for further performance, then the aggrieved party will be entitled to terminate in addition to claiming damages for any losses caused (*Hong Kong per Lord Diplock*)
 - o **“Serious breach – goes to the root of the contract and deprives the innocent party of substantially the whole benefit (intended by parties) of contract”** (*Hong Kong; Koompahtoo*)

Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha (1962) UK

- HK owner of the ship, K chartered it for 24mths
- Seaworthiness clause – she being in every way fitted for ordinary cargo service
- Breach: ship out of action for about 5 months
- K terminated for breach of condition to keep seaworthy