

Termination Part 1

When can a contract be terminated?

- As agreed by the parties (as specified in the contract or otherwise); or
- Where the common law permits it:
 - For breach of condition
 - For a sufficiently serious breach of an intermediate term
 - For repudiation
 - After sufficient delay
- ***no legal right to just terminate, termination is a breach of contract***
- ***if you want a remedy, seek restitution in court, do not just terminate***

Termination by agreement

- Parties can agree to terminate a contract in accordance with a term of the contract
 - *Crawford v Sydney Valve*
 - Party gave notice of 6 months that it would terminate the contract
 - If the terms say you can terminate, under specific circumstances and they arise, you are allowed to terminate
 - Often in lease agreements and employment contracts
- Parties can agree to terminate a contract by mutual agreement the same way as they can agree to any other deal (i.e. that agreement must be supported by good consideration)
 - Both parties give something up to end contract (allowing the other to abandon obligations)
 - Depends on whether the contract is:
 - Executory
 - Both parties have obligations to perform
 - Partly executed
 - One party has completed their obligations but the other has not
 - Fresh consideration is necessary
 - Fully executed
 - Both parties have performed all obligations

What is a breach?

- A breach of contract occurs whenever one of the parties to the agreement did not perform their obligations as required under the contract
- **Every** breach gives rise to the right of damages
- **Not every** breach gives rise to the right to terminate

Consequences of Termination

- The rights and obligations that accrued before the moment of termination are binding and enforceable
- Those that accrued after are not

Rule 1

- If the breached term is a condition, the aggrieved party will be entitled to terminate the contract for any breach of that term, even if it was of little gravity of consequence

Rule 2

- If the breached term is a warranty, the aggrieved party will be entitled only to damages
- They have no right to terminate the contract

Is it a warranty or a condition?

1. Does a statute characterise it for you?
 - a. *Arcos v Ronaasen*
2. Have the parties characterised it for themselves?
 - a. *Schuler v Wickman Machine Tool Sales*
 - i. 1400 sales visits, not a condition as if they miss one then that doesn't go to the heart of the contract, the parties would have entered into it regardless of missing a few visits
3. If not, you must work it out as a matter of construction
 - a. *Tramways Advertising v Luna Park*

Tramways Essentiality Test

- The question whether a term in a contract is a condition or warranty....depends on the intention of the parties as appearing in or from the contract
- The test of essentiality is whether it appears from the general nature of the contract, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise....and this ought to have been apparent to the promisor

Associated Newspaper v Bancks Test

- A condition is a term that the parties regard as **essential**
- It goes to the root of the contract

Consequences of Characterisation

- **Condition** → any breach entitles termination
- **Intermediate terms** → consequence depends on seriousness of breach
 - Can be treated as a condition or warranty in relation to termination rights depending on seriousness of the breach and consequences (looks at circumstances)
 - Determined at time of breach
- **Warranty** → no breach entitles termination

Rule 3

- If the breached term is an intermediate/innominate term, the aggrieved party may be entitled to terminate, depending on the gravity and consequences of the breach

Hongkong Fir Test

- The question which the learned judge had to ask himself was, as he rightly decided, whether or not....the delay which had already occurred as a result of the incompetence of the engine room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners by that date in taking steps to remedy these two matters, were, when taken together, such as to **deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charter-party**
 - Claimed damages for breach of contract
 - Unlawful termination counter argument
 - Court found in favour of ship owners
 - To entitle termination, must deprive the party of substantially the whole benefit of the contract

Ankar

- Ankar acted as guarantor for General Energy for the hire of machine equipment

- Lombard was financing the transaction
- Ankar was required to notify Lombard if General Energy defaulted on the lease or lease was transferred, but did not
- HC: these terms are conditions
 - Breach of condition allows termination of contract
 - Sufficiently serious issues in breach that means you could terminate the contract

Koompahtoo - main judgement

- Intermediate terms as per Hong Kong Fir case are part of the Australian law
- This third classification promotes just outcomes for breach of non-essential terms where that breach is sufficiently serious to justify the termination
 - Accounts kept not up to standard, money going missing
- Per Kirby J
 - Suggested that it would be a lot simpler if the law just said that contracts could be terminated where there was:
 - A breach of an essential term;
 - A breach of a non-essential term causing substantial loss of benefit; or
 - A renunciation of the contract
 - Repudiation

What about warranties?

- Exercise caution when characterising a term as a mere warranty
- If a term can be breached in more than one way, with varying degrees of seriousness, better to characterise the term as an intermediate/innominate term and then ask whether the breach is one that was sufficiently serious as to give rise to the right to terminate
- Only classify term as a warranty if it can only be breached and not sufficiently deprive the party of substantially the whole part of the contract