

Termination of contracts

Where one party argues that the other party has breached the K, the other party may respond in a number of ways:

- The other party may acknowledge the breach
- The other party may dispute that the breach has occurred – argue erroneous interpretation of K obligations
- Party in breach may argue that the contract was frustrated
- Party may argue that enforceability of K is affected by vitiating factors

Termination by subsequent agreement (mutual)

→ Express agreements

- Can make new K, need four elements including consideration
- If K is executory: both parties still have obligations to perform under K
- If K is partly executed: one party has performed
 - Need to have accord and satisfaction
 - Purchase of a release from an obligation by other consideration
 - Accord: agreement by which the obligation is discharged
 - Satisfaction: consideration which makes that agreement operative

McDermott v Black (1940)

- B (purchaser) alleged he was induced by fraudulent misrepresentations made by M (vendor). B withdrew allegations on condition that M extend time to complete contract. B refused to complete on extended date so M rescinded contract. B then sued for deceit relying on misrepresentation he initially withdrew.
- **Dixon J:** essence of a&s is acceptance by P of something in place of his cause of action...depending on his own consent or agreement
 - Accord executory (different from a&s): doesn't extinguish old cause of action, doesn't afford a new one either
 - Needs to be a promise for something, can't be a promise of performance
- M successful because there was consideration passing between parties for second agreement
- **Key legal principle:** if one party has partly executed K, the non-performing party can't give good consideration
 - Can't provide release as there's nothing to release them from (they've done their obligations)
 - But he can satisfy the requirement of satisfaction by promising to do something extra → Once that thing is done there is accord and satisfaction

Termination for breach

→ Rights conferred by the common law

- Aggrieved party can be entitled to terminate contract if other party breaches
 - Even if they decide not to terminate – can receive damages

→ What constitutes a breach of contract?

- Party fails to perform at the time/to the standard required by the contract
- Types of breach:
 1. Failure to perform: occurs after time for performance has expired
 - No performance
 - Defective performance
 - Delayed performance
 2. Anticipatory breach: occurs before performance is due
- General rule: breach of K doesn't require fault

→ When is there a right to terminate for breach at common law?

- Depends on classification of the term breached
 1. If term is a **condition**: aggrieved party will be entitled to terminate for any breach of that term by the other party regardless of gravity/consequences of breach, plus damages
 2. If term is a **warranty**: aggrieved party won't be entitled to terminate merely by reason of breach of term by other party, although damages available
 - Usually only classified this where required by statute eg. *Goods Act*
 3. If term is an **intermediate** or **innominate** term: aggrieved party's right to terminate depends on gravity & consequences of breach of term
 - If serious: entitled to terminate

→ **Termination for breach of a condition**

- General rule: if the breached term is a condition, aggrieved party will be entitled to terminate the K for any breach of that term, even if it was of little gravity/consequence (*Arcos v Ronaasen*)
- In absence of classification by statute/express statement by parties, whether a term is a condition is determined by construction of contract
- Test for whether a term should be construed as a 'condition' set out in *Tramways*

Arcos Ltd v EA Ronaasen and Son [1933]

- Contract for sale of wood staves to make barrels, described wood staves as ½ inch thick. Some of staves weren't this thick, slightly more. Quality of wood was still fit for purpose. Buyer rejected goods as he could purchase them cheaper elsewhere
- Held: purchasers were entitled to reject goods under *s13 Goods Act* as they weren't as described (now law's changed, *s13* isn't automatically a condition for non-consumer sales)

- **Key legal principle:** if there's a breach of a condition, can terminate K regardless of gravity
 - Doesn't matter if they can be used commercially, what matters is they didn't fit the description

How to determine whether term is a condition

1. Statutory classification

Goods Act 1958 (Vic)

- *S17(a)*: the seller has a right to sell the goods
- *S18*: the goods correspond with the description
- *S19*: the goods are reasonably fit for purpose
- *S20*: the bulk of the goods correspond with the sample

2. Express classification in the K

- If it says 'it is a condition of the K that...' → consider it still might not be a condition (*L Schuler*)
- If it says 'it is a warranty of the K that...' → consider it might be a condition
 - *S16(2)*: stipulation may be a condition even though called a warranty
 - Depends on construction of the K: how important is the term to K

L Schuler AG v Wickman Machine Tool Sales Ltd [1974]

- W was S's sole representative for S's panel pressing business. S terminated contract as W had failed to make visits to carmakers.
 - Cl 7(b): condition of this agreement that W shall send its representatives to visit [6 largest UK car manufacturers] at least once every week for purpose of soliciting orders for panel presses, all up 1400 visits
 - Cl 11: either party can terminate agreement if other was in material breach and didn't change its behaviour on 60 days notice (W was making some, but not all visits)
- **L Reid:** held S couldn't terminate as cl 7 wasn't a condition → cl 7 had to be read with cl 11, had to give notice & 60 days to change
 - Using the word 'condition' is strong indication of parties intention that it be a condition, but it's not conclusive of it
 - Have to consider intention of parties
 - **Wilberforce** dissented, thought it was a condition
- **Key legal principle:** using the word 'condition' is strong indication that it be a condition, but it's not conclusive of it, have to look at intention of parties

3. Intention of parties

- Essentiality test (**Jordan CJ** in *Tramways*): does it go to the root of the K? What are the consequences of non-compliance?

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938)

- T entered into contract with L to advertise Luna Park on trams for three seasons. T **guaranteed** that the advertisements “would be on the track at least eight hours a day throughout the season”. 2 seasons in, L argued each ad wasn’t displayed for at least 8 hours a day and therefore they weren’t bound anymore. T argued obligation was performed if each ad was displayed for an average of eight hours per day.
- **Jordan CJ in the trial:** question whether a term in a contract is a condition (essential promise) or warranty (inessential) depends on intention of parties appearing from the contract.
 - **Test of essentiality** is whether it appears from the general nature of the contract or from some particular terms, that the promise is of such importance to the promisee that he wouldn’t have entered into the contract unless he had been assured of a strict/substantial performance of the promise, and this ought to be apparent to the promisor
- **Wrongful repudiation:** “...a party who without lawful justification purports to treat himself as discharged from the obligations of the contract for a supposed essential breach by the other party is himself guilty of repudiating the contract and thereby vests in the other party a right lawfully to put an end to the contract...” per **Jordan CJ** in *Tramways*
 - Keep in mind that wrongful termination is a repudiation of the contract and gives the other party the right to terminate the contract and obtain damages
- In considering the legal consequences of a breach of contract, need to remember:
 - Breach may extend to all/some of promises
 - Promises broken may be important or unimportant
 - Breach of any promise may be substantial or trivial
 - Breach may occur when:
 - Innocent party hasn’t yet performed any of promises, or performed all
 - Innocent party has received no performance from defaulting party, or has received performance in whole/part
 - Resultant rights of innocent party & nature of remedies available may depend on these matters
- Nature of promise broken → one of most important of matters
 - Has to go to root of K
 - Found it was a condition, L could terminate, because:
 - Wording = ‘guarantee’ → signals the term was a condition
 - Payment was only made after all ads were displayed → signals condition
 - Correspondence before K = continuity of displaying ads was important
 - This test is ‘succinctly stated’ (*Associated Newspapers*)
- **Key legal principle:** term must be so important that the parties would not have entered the K without it (essentiality test)

Associated Newspapers Ltd v Bancks (1951)

- B agreed to provide weekly drawing & AN would publish it on front page of comic section for 10 years. Complied for 2 years until one week, shortage of newsprint meant comic was on 3rd page. B then said he was no longer bound by contract as AN broke it. AN tried to file for injunction to prevent B from leaving
- [Dixon, Williams, Webb, Fullgar & Kitto JJ](#): is AN's undertaking to present B's comic on front page of newspaper a condition/essential term (breach, B can terminate contract immediately)
 - Or is it merely warranty/non-essential term (breach, B can only get damages)
- 3 'ingredients' to this contract: B present drawing, weekly, & AN present it on front page
- Held it was a condition, B could terminate contract
 - Condition as B wouldn't have entered K without this term
- **Key legal principle:** how to determine whether condition or warranty:
 - Intention of parties
 - Conduct of parties
 - Whole contract
 - Whether failure to perform would render contract different
 - Whether it affects substance & foundation of contract