Termination under the Original Contract – Implied Termination

Case: Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd (1988)

Facts: Crawford, an American-based manufacturer of specialised valves and fittings, appointed Sydney Valve in 1969 as the exclusive distributor of its products in New South Wales. Sydney Valve agreed not to deal in any other products. The contract purported to be for an indefinite period of time. However, in 1984, Crawford gave Sydney Valve 6 months notice that they intended to terminate the contract. Sydney Valve challenged.

Issues:
- Was there an implied right for Crawford to terminate an indefinite contract?
- If so, what was the reasonable amount of time required for notice of termination?

Ruling:

(McHugh JA):

The existence of an implied term to terminate depends on how the contract is constructed. To determine construction, one can look at the meaning of the words, the subject matter of the agreement, the circumstances under which the contract was made, and the provisions of the agreement. However, ordinarily, the nature of a commercial agreement will lead to the conclusion that the parties intended to terminate on notice.

When a contract is terminable on reasonable notice, the period of time must be sufficiently long to allow for the relationship to end in an orderly fashion where the other party has reasonable opportunity to enter into alternative arrangements and wind up their affairs. Further, the non-terminating party must be able to recoup any extraordinary expenditure or effort – but not merely ordinary effort or expenditure.

An indefinite contract such as this can be implied to terminate on reasonable notice. In this instance, 6 months notice is reasonable – Crawford successful.
Termination for Breach of a Condition - Statute

Case: Arcos v Ronaasen (1933)

**Facts:** Arcos entered into a contract to purchase timber from Ronaasen, to use in the manufacture of barrels. The contract prescribed a specific thickness of the stakes – half an inch each. Some of the stakes were of fractionally different thicknesses, but this made no difference to the use of the wood.

Nevertheless, Arcos terminated the contract, citing breach of the condition that each stake be half an inch thick. Arcos terminated in order to take advantage of the fallen price of timber elsewhere. Ronaasen contested the termination.

**Issues:**

- Did the minuscule variances in the stakes’ thicknesses amount to a breach of a condition?

**Ruling:**

(House of Lords):

The *Sale of Goods Act* states it is a *condition* – or essential - that goods correspond with their description. In the event of breach of a condition, the aggrieved party will have the right to terminate the contract, even if the breach was of little gravity. The differing thicknesses of the timber stakes – even if the variances did not affect usage – amounted to a breach of a condition, and Arcos was entitled to terminate – Arcos successful.

Termination for Breach of a Condition – Parties Intentions


**Facts:** Schuler was a German manufacturer of machine tools used in the construction of cars. Schuler appointed Wickman as the sole distributor of these machine tools in the United Kingdom for 4 and ½ years. One of the clauses of the contract, Clause 7(b), provided for the following:

“It shall be a condition of this agreement that Wickman shall send its representatives to visit at least once in every week for the purpose of soliciting orders for panel presses”

This clause required Wickman make 1,400 visits over the life of the contract. Wickman did not manage to make all visits. Schuler purported to terminate the contract for breach of condition. Wickman contested.
Issues:

- Could Schuler terminate the contract if Wickman failed to make even one visit out of the 1,400, eventhough the relevant term was described as a condition?

Ruling: If a term is a condition in the technical legal sense i.e. an essential term that goes to the root of the contract and one which the parties contemplated the breach of would give rise to a right to terminate, Schuler would be allowed to terminate the contract. However, the mere use of the word ‘condition’ is not conclusive. Many contracts include the word ‘condition’ only in the layman’s sense of the word. If it is unclear, the courts will decide the parties’ intentions, having regard to the terms and subject matter of the contract.

In this case, the meaning of the word ‘condition’ in clause 7(b) is unclear, and up to the courts to interpret. As a general rule, where a term’s particular construction leads to a very unreasonable result – where the nature of the term is such that a breach is likely – it is unlikely that strict compliance to the legal meaning of the word ‘condition’ is required. The result of this clause was unreasonable, and therefore not deemed to be a condition of the contract. Schuler had no right to terminate – Wickman successful.¹

Case: Tramways Advertising Pty Ltd v Luna Park Ltd (1938)

Facts: Tramways entered into a contract with Luna Park for 3 seasons, whereby it would advertise the theme park on 53 boards on tram roofs throughout the city. The contract posited that “we (Tramways) guarantee that these boards will be on the tracks at least 8 hours per day throughout your (Luna Park’s) season”.

After the contract had been in operation for 2 seasons, Luna Park argued that the contractual agreement was not being followed i.e. that Tramways was not advertising the theme park for at least 8 hours a day, every day. Subsequently, Luna Park terminated the contract for breach of this condition. Tramways admitted it had not been advertising the theme park for at least 8 hours a day, but challenged the termination, asserting that it was sufficient if the boards were advertised for an average of 8 hours a day.

Issues:

- By advertising for an average of 8 hours per day, and not at least 8 hours a day, did Tramways breach a condition of the contract, affording Luna Park the right to terminate?

¹ Unlawful termination of a contract results in repudiation, whereby the terminating party i.e. repudiating party is required to pay damages to the other party – essentially a reversal of roles.
Ruling:

At trial, Jordan CJ set out an important test to determine whether a term is a legal condition:

Test for whether a term is a Condition

“The test of essentiality is whether it appears from the general nature of the contract considered as a whole, 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 a substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor”.

(Latham CJ, Rich, McTiernan JJ):

The clause was a legal condition of the contract. By the court’s construction the following factors asserted such:

- The words “we guarantee [that these boards will be advertised...]” was in clear, precise and promissory language, suggesting that this particular term was important and essential to the contract;
- The parties agreed that payment was not to commence until all 53 boards were displayed.
- Advertising as per the arrangement was essential to the contract; and
- Preliminary discussions demonstrated the importance of continued display of the boards.

Accordingly, Luna Park was within its rights to terminate the contract for breach of the Condition – Luna Park successful.²

Case: Associated Newspapers v Bancks (1951)

Facts: Jimmy Bancks, a well known cartoonist, entered into a 10 year contract with Associated Newspapers. Bancks agreed to supply a weekly full page drawing of “Us Fellers”, and Associated Newspapers agreed to publish the drawing each week on the front page of the comic section in the Sunday Sun and Guardian.

² It was found that Tramways also repudiated the contract i.e. not only did they not perform their advertising obligation, but insisted that they would continue to advertise for only an average of 8 hours per day – clearly indicating their intention not to perform. Thus, Tramways were made to pay damages to for breach, as well as ‘loss of whole contract’.
The contract operated successfully for 2 years. However, after this time, Associated Newspapers began publishing Bancks’ cartoon on the third page of the comic section. Bancks terminated the contract, citing breach of condition. Associated Newspapers sought an injunction to restrain the threatened breach.

**Issues:**

- Was Bancks’ termination valid?

**Ruling:**

(Dixon, Williams, Webb, Fullagar and Kitto JJ):

The agreement that Bancks’ cartoon would be published on the front page of the cartoon section was a condition, on the following grounds:

- Bancks’ obligation was to deliver a one page cartoon every week. This was a condition, without which contractual obligations could not be performed. The newspaper had to publish these cartoons on the front page. It would be strange if Bancks’ obligation was a legal condition, but the newspaper’s obligation was merely a warranty, which would only attract damages;
- It was essential for Bancks’ entry into the contract that the cartoon be published continuously, as a whole, and on the most conspicuous page. Without strict performance of this promise, it is unlikely that Bancks’ would have entered into the contract in the first place – making it a condition of the contract. ³

Accordingly, the failure of the newspaper to publish Bancks’ cartoon on the front page of the cartoon section on three separate occasions amounted to a breach of condition, and Bancks had the right to terminate the contract⁴ - Bancks successful.

**Termination for Breach of an Intermediate Term**

Case: Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha (1962)

**Facts:** Hongkong Fir, a shipping company, entered into a contract for 2 years (24 months) to charter a ship to Kawasaki Kisen. Amongst other things, the contract stipulated that the vessel:

Clause 1: “...be delivered and placed at the disposal of the charterers... she being in every way fitted for ordinary cargo service”.

Consequently, the ship broke down, and took 7 months before it could be seaworthy again. Kawasaki claimed that the ship’s inactivity and unseaworthiness constituted a breach of clause 1, and purported to terminate the contract. Hongkong disputed the termination, claiming it was wrongful.

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³ The High Court here affirmed the legal test for a Condition, as stated by Jordan CJ in Tramways v Luna Park.
⁴ Associated Newspapers maintained that it was entitled to print Bancks’ cartoon on pages other than the front page, despite the cartoonist’s protests. This amounted to a repudiation of contract.
Issues:

- Was Kawasaki’s termination wrongful?

Ruling:

(Diplock LJ):

It becomes apparent when analysing the terms of a contract that two categories of terms are inherent:

I. **Conditions**, where every breach of such a term deprives the innocent party of substantially the whole benefit of the contract, as was intended by the parties;

II. **Warranties**, where no breach of such a term will deprive the innocent party of substantially the whole benefit of the contract, as was intended by the parties;

There is, however, a third, more complex category of contractual terms which cannot be classified as conditions or warranties. Breaches of a certain term will either deprive the innocent party of substantially the whole benefit of the contract, whilst other breaches of the same term will result only in trivial loss.

Clause 1, relating to the ship’s unseaworthiness, was one such complex contractual term. It could be breached either by the presence of trivial defects which are rapidly remediable, or by defects which could result in the loss of the vessel (and thus, loss of substantially all benefit). However, because the ship was only unseaworthy for 7 out of the 24 months (and therefore not the majority of the contract), it was unlikely to deprive Kawasaki of substantially all benefit – it could still use the ship for 17 months. Therefore, Kawasaki’s termination was wrongful – *Hongkong Fir* successful.


Facts: Ankar entered into an agreement with National Westminster, who would guarantee the performance of machinery hired from General Energy, a manufacturing company. In return for a security deposit of $125,000, National agreed to – amongst other things – the following clauses:

I. **Clause 8**: National would notify Ankar if General Energy proposed to assign its interest in the machinery to anyone else;

II. **Clause 9**: National would notify Ankar if General Energy defaulted under the lease agreement, whereupon National and Ankar would meet to discuss a course of action.

Subsequently, General Energy defaulted, assigning its interest in the machinery to their parent company. National failed to inform Ankar of these events. This amounted to a breach by National, as it was bound to inform Ankar of both occurrences.

Ankar sought a court declaration that it could terminate the security deposit agreement with National and be released from their contract of guarantee. Thus, they would be able to recover their security deposit of $125,000. The trial judge made the declaration, but National contested.
Issues:

- Did Ankar have grounds to terminate their contract with National?

Ruling:

(Mason ACJ, Wilson, Brennan & Dawson JJ):

Ankar argued that it was discharged from its liabilities on the ground that National’s breaches of clauses 8 and 9 were breaches of essential conditions.

4 factors favour the interpretation of clauses 8 & 9 as conditions:

- Damages for breach would be difficult to prove, making neither clause enforceable by way of damages;
- There was an obligation incumbent upon National to give notice so that Ankar could safeguard its position and interests;
- It would be disadvantageous to Ankar if General Energy defaulted. This is because it would be liable, but the machinery on which the liability was owed was no longer owned by the lessee;
- This was no ordinary contract; this was a suretyship contract, which created a special relationship between surety and creditor, and for which breach by the creditor would ordinarily discharge the surety from their obligations.

However, 3 factors do not favour the interpretation of clauses 8 & 9 as conditions:

- The clauses are not expressed to be conditions;
- No time is fixed within which notice must be given (of default); and
- The language is unclear that the clauses were intended to be conditions.

Nonetheless, on the balance of probabilities, it seems likely that the clauses were intended to be conditions, and Ankar had the right to terminate the contract – Ankar successful.

Case: Koompahtoo Local Aboriginal Land Council v Sanpine (2007)

Facts: Koompahtoo and Sanpine entered into a joint venture agreement to develop commercial land. Koompahtoo agreed to contribute the land, whilst Sanpine would manage the development. Inherent within their obligation to manage development, Sanpine would:

Clause 16.5(a): “Ensure proper books are kept so as to permit the affairs of the joint venture to be assessed”.

Further, Sanpine had to prepare reports showing accurate incurrence of expenditure so as to allow for project funds to be dealt with effectively.
However, no such reports were ever prepared, and no meaningful records were ever kept. Such breaches of clause 16.5(a) were revealed when Koompahtoo went into administration, and Sanpine was unable to inform the administrator of the financial position of the joint venture. Koompahtoo’s administrator sought to terminate the joint venture agreement, alleging that Sanpine’s conduct amounted to contractual repudiation. Sanpine commenced proceedings, seeking a declaration that Koompahtoo’s termination was invalid.

The trial judge held that the repeated breaches of clause 16.5(a), whilst being an ‘intermediate term’, amounted to repudiation. Sanpine appealed, and the NSW Court of Appeal held in their favour. Koompahtoo appealed to the High Court.

**Issues:**

- Could Koompahtoo’s administrator terminate the joint venture agreement on the grounds that Sanpine’s numerous breaches amounted to repudiation?

**Ruling:**

*(Gleeson CJ, Gummow, Heydon & Crennan JJ):*

Breaches of non-essential terms can vary widely in importance, from the trivial to the serious. However, in order for such a breach to warrant termination by the aggrieved party, it has to be serious to the extent that it (the breach) deprives the aggrieved party of substantially the whole benefit of the contract intended by the parties.

Before this case, in Australia, parties could either terminate contracts for breach of conditions, or be unable to terminate for breach of warranty. However, *Hongkong Fir* laid down the concept of **intermediate/innominate terms**. Such terms offer a practical utility:

- They afford greater *flexibility* to the law of contract; and
- Promote the *interests of justice* by limiting the right to terminate only to serious or substantial breaches (not mere trivial breaches of conditions, which had been the case).

In this contract, Sanpine’s obligations in dealing with the joint venture funds were of importance and seriousness, but it was an intermediate term nonetheless. However, the nature of Sanpine’s breaches deprived Koompahtoo of a **substantial part of the benefit** for which it contracted. Thus, having regard to the consequences of the breach – *Koompahtoo went into administration as a result of improper fund use* – it appears that clause 16.5(a) amounted to a sufficiently serious breach of an intermediate term, and Koompahtoo’s termination was valid – *Koompahtoo successful*.

*(Kirby J):*

The right to terminate a contract arises in respect of the following scenarios:

- Breach of an essential term;
- Breach of a non-essential term causing substantial loss of benefit; and/or
- Repudiation.
This scheme of classification still affords flexibility, but avoids the need to invent so-called ‘intermediate terms’. It simplifies the determination of the consequences of breach, whilst removing needless steps from the process of reasoning. In essence, either the term breached is essential or non-essential. It cannot somehow be somewhere in between.

Regardless, Sanpine’s breach of clause 16.5(a) had the effect of depriving Koompahtoo of the substantial benefit of the contract. Therefore, they are allowed to terminate the contract in accordance with the second scenario above – Koompahtoo successful.
**Conduct showing an inability or unwillingness to perform**

**Case:** *Carr v Berriman (1953)*

**Facts:** Carr, a landowner, entered into a contract with Berriman, a building company, for the construction of a factory. The contract provided that Carr would carry out excavations on the site before 29 May, and provide Berriman with the necessary steel. Berriman, or a subcontractor of Berriman, would manufacture ('fabricate') the steel.

The site was not excavated by the time specified in the contract; rather, it was covered by heavy machinery at this time. Meanwhile, Berriman had retained a subcontractor to fabricate steel. Carr was aware of this sub-contract, but nevertheless retained its own sub-contractor for the supply and fabrication of steel work.

On 31 July (2 months after excavations were meant to be completed), Berriman’s solicitors informed Carr that their failure to excavate, as well as their own retention of a fabricator, amounted to two distinct breaches of contract. Berriman purported to cancel the contract and claim damages. Carr refuted this, but failed both at trial and in the Supreme Court. Carr appealed to the High Court.

**Issues:**

- Could Berriman terminate the contract for Carr’s breaches - both for its failure to excavate and for its retention of a sub-contractor?5

**Ruling:**

(Fullagar J):

It is apparent that two breaches of contract had been committed:

1. Carr had not excavated or given possession of the building site to Berriman by the required date;
2. Carr had retained his own subcontractor eventhough it was agreed only Berriman would retain their own.

**Breach 1: Failure to excavate**

Where there is a failure to remedy a breach that continues so long that it *evinces an intention to no longer be bound by the contract*, such failure will amount to repudiation. Carr’s failure to perform within the stipulated time arguably amounted to repudiation. However, Berriman’s decision to leave the contract on foot afforded Carr room to remedy the breach by performance. This failing was not remedied.

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5 If Berriman could terminate, it could receive damages for loss of bargain; if it couldn’t terminate – and did so – it would amount to repudiation, and Carr could get damages for loss of bargain.
Instead, Carr’s conduct in failing to move any of the machinery from the site and failure to provide an adequate explanation for such suggested they did not intend to be bound by the contract.

**Second Breach – Retention of own-subcontractor**

The second breach went to a very substantial (‘root’) part of the contract. Berriman stood to gain a profit of £450 on the steel fabrication from their sub-contractor. Carr’s breach in retaining their own sub-contractor not only meant Berriman lost that profit, but also became liable for damages to their sub-contractor.

Thus, it could be argued that this second breach alone amounted to enough of a breach to warrant repudiation. Indeed, it suggested to Berriman that the contract ‘would not be performed according to its true construction’. Moreover, Carr retained their sub-contractor without inviting the discretion of Berriman.

**The intention must be judged from the** acts. When the breaching party evinces an intention that they are not to be bound by the contract, the aggrieved party is entitled to repudiate the contract. Berriman thought such an intention was shown, and acted accordingly. This was justified, and Berriman can sue to recover damages for loss of bargain – *Berriman successful.*

**Reputation inferred from a Combination of Events**

*Case: Progressive Mailing House v Tabali (1985)*

**Facts:** Tabali leased factory premises to Progressive Mailing House for 5 years. Clause 10.1 of the contract provided for the following:

“If the rent is unpaid for 14 days, Tabali could terminate the contract in respect of breach”

In addition to paying rent, Progressive was to carry out work on the premises. But not only did Progressive fail to pay rent; they also committed a number of other breaches, including:

- Damaging the property;
- Failing to rectify said damage; and
- Sub-letting the premises to another party without consent.

Tabali subsequently terminated the contract on grounds of unpaid rent, in accordance with clause 10.1. They also brought an action in the Supreme Court in an effort to recover the outstanding rent and sue for damages. The Supreme Court found in their favour, but Progressive appealed.

**Issues:**

- *Could Tabali terminate the contract for breach of a number of terms?*

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6 Dixon CJ, Williams, Webb and Kitto JJ agreed with Fullagar J.
Ruling:

(Mason, Brennan and Deane JJ):

Alone, Progressive’s failure to pay rent does not amount to breach of contract. However, accumulatively, the range of breaches of the lease amounted to a repudiation of contract, and Tabali is right to terminate and sue for loss of bargain. Furthermore, an express right to terminate under contract – as found in clause 10.1 – does not preclude the Common Law right to terminate - Tabali successful.

Instalment Contracts

Case: Maple Flock v Universal Furniture Products (1934)

Facts: Maple Flock entered into a contract with Universal Furniture Products to sell 100 tons of rag flock to Universal at a rate of 3 loads per week of 1.5 tons per load. It was a term of the contract – albeit, a warranty – that delivery would comply with statutory regulations.

It was realised, after 18 deliveries had been made, that all but the 16th delivery had complied with statutory regulations. Universal accepted two further deliveries, but then purported to terminate the contract on the grounds of defective instalment. Maple opposed this termination.

Issues:
- Was Universal’s termination valid?

Ruling:

(Lord Hewart CJ):

The main tests to be considered in assessing whether breach of an instalment in an instalment contract amounts to repudiation are:

- The quantitative ratio the breach bears to the whole contract i.e. whether it is a small or large portion of the contract; and
- The degree of probability that such a breach will be repeated.

In this instance, the defective delivery amounted to no more than 1 ½ tons out of a contract for 100 tons, representing a very minute quantitative ratio. Furthermore, the chance of the breach being repeated is practically negligible, considering that the breach was extraordinary and isolated, and the business was carefully conducted. Accordingly, Maple Flock’s delivery of one defective instalment did not amount to repudiation of the entire contract – Maple Flock successful.
Evincing an Intention not to be Bound

Case: Shevill v Builders Licensing Board (1982)

Facts: Shevill were guarantors on a land lease granted to Shevill Truck Sales & Service. Shevill Truck Sales had entered into the primary lease agreement with the Builders Licensing Board for three years. The lease had a yearly rent, which had to be paid in advance in equal monthly instalments.

Clause 9(a) provided that:

“Should the rent remain unpaid for a period of 14 days, or if there was a breach or default in any of the provisions of the lease, the lessor had the right to terminate the contract and re-enter the premises”.

Consequently, Shevill Truck had financial difficulty, and was constantly in arrears with rent. Finally, with 2 month’s rent outstanding, Builders purported to terminate the lease, serving a statement of claim to Shevill Truck informing of their intention to re-enter the land. At the same time, Builders sought damages for breach of lease. The trial judge found for Builders. Shevill appealed.

Issues:

- Was the non-payment of rent a repudiation of the contract?
- Did Builders have the right to terminate the contract under both Common Law and contract clause?7

Ruling:

(Gibbs CJ):

A contract may be repudiated if one party renounces his liabilities (obligations) under it, evincing an intention to no longer be bound by the contract; or, if he shows that he intends to fulfil the contract in a manner substantially inconsistent with his obligations.

There was no evidence to suggest that Shevill Truck would renege on its rental obligations; merely that it was probable that they would continue to be late with payments. In fact, rent never truly went unpaid – it was only sometimes two months in arrears. Therefore, it is impossible to conclude that Shevill Truck was unwilling to comply with its obligations; it can only be deduced that it was experiencing financial difficulty. Builders are not entitled to the damages prescribed by the trial judge – Shevill successful.

7 This would be relevant to the amount of damages.
Erroneous Interpretation of Contract

Case: DTR Nominees v Mona Homes (1978)

Facts: DTR entered into a contract with Mona Homes to sell lots 1-9 of a piece of land to Mona, out of a proposed 35 lots. Condition 4 of the contract stated that:

“A plan of sub-division had been lodged to the municipal council, and that DTR would proceed to have the subdivision plan lodged for registration”.

Mona Homes was not required to complete purchase of the land prior to registration, but paid a deposit on signing the contract, the balance of which was payable within 14 days of registration.

DTR had not in fact lodged a deposited plan of subdivision as purported in the contract: instead of lodging a plan for subdivision of all 35 lots, they had only lodged a plan for subdivision of lots 1-9! DTR was under the impression that the contract of subdivision was allowed to proceed in two stages: firstly lots 1-9, then the remainder of the lots.

Meanwhile, the municipal council approved the plan and registered it. DTR then required settlement from Mona within 14 days. Two weeks later, Mona purported to terminate the contract on the grounds that the lodged plan was not that referred to in the contract, and that DTR was unwilling to perform its obligations under contract. DTR opposed it, asserting wrongful repudiation, but accepted the repudiation and retained the deposit anyway.

Issues:

- Was Mona entitled to repudiate the contract on DTR’s erroneous interpretation of their obligations?

Ruling:

(Stephen, Mason and Jacobs JJ):

The question to ask is whether the erroneous plan evinced an intention on the part of DTR to repudiate the contract. Mona asserted that such an intention could be inferred from DTR’s continued adherence to the incorrect interpretation, and that DTR was not willing to perform the contract according to its terms.

There is no doubt that there are cases in which a party, by insisting on an incorrect interpretation of their obligations, evinces an intention that he will not perform the contract according to its terms. However, there are other cases in which a party, although asserting an incorrect interpretation, is doing so because he believes it to be correct and is willing to perform the contract if corrected. An intention to repudiate cannot be drawn in such an event.
In this case, DTR acted upon its erroneous interpretation without realising that Mona was insisting on a different view until Mona purported to rescind. No attempt was made to notify DTR of their error. As such, there is no basis to infer that DTR was persisting in its wrongful interpretation willy nilly in the face of clear enunciation of the true agreement.

Thus, Mona was not entitled to terminate the contract on grounds of repudiation by DTR. However, DTR was also not entitled to terminate for wrongful termination because it was itself in error. Mona was simply insisting on a correct interpretation of the contract, and did not evince an intention not to be bound if the contract was correctly interpreted.

Thus, on the day Mona incorrectly repudiated, and DTR incorrectly terminated in return, the contract itself was still on foot. However, there is no doubt that on the day these proceedings commenced, neither party intended for the contract to be further performed. In light of these circumstances, the parties must have regarded the contract as mutually abandoned. The contract fails for abandonment – neither party successful.


Facts: Woodar entered into a contract to sell land to Wimpey for development. Inherent within the agreement was a special condition allowing Wimpey to terminate the contract if a compulsory acquisition was commenced. This meant that the contract could only be terminated on the basis of a new compulsory acquisition, not a pre-existing compulsory acquisition.

Consequently, Wimpey proceeded to terminate on the basis of an existing compulsory acquisition. This was an incorrect interpretation of the contract. Woodar contested the termination citing that Wimpey had wrongfully terminated.

Issues:

- Was Wimpey’s wrongful termination a repudiation of the contract?

Ruling:

It would be regrettable if a party, relying on an express right to terminate a contract, should be treated as repudiating the contract if he turns out to be mistaken. Repudiation is a drastic conclusion that should only be held to arise in clear cases of refusal that go to the root of the contract. Wimpey showed no intention to repudiate by relying on the term which allowed him to terminate, and it would be undesirable to extend the doctrine of repudiation into this area – Wimpey successful.
Case: Eminence Property Developments Ltd v Heaney (2010)

Facts: Kevin Heaney, a property developer, entered into a contract with Eminence to purchase a block of 13 flats. Inherent within this contract were a range of clauses, including the following:

- Condition 1.1(m): “Working day means any day from Monday to Friday inclusive, which is not Christmas Day, Good Friday or a statutory Bank Holiday”.
- Condition 6.1.1: “Time is \textbf{not of the essence} of the contract unless a notice to complete has been served”.
- Condition 6.8: “At any time on or after the completion date, a party who is ready, able and willing to complete may give the other a notice to complete. The parties are to complete the contract \textbf{within 10 working days} of giving a notice to complete. For this purpose, \textit{time is of the essence} of the contract”.\(^8\)

On the 5\textsuperscript{th} of December, Eminence served a \textit{notice to complete} under condition 6.8. The notice read as follows:

“\textbf{We calculate the final date for completion under the notice is 15\textsuperscript{th} December, 2008}”

This was a mistake. Eminence took into account non-working days. The final date for completion should have been the 19\textsuperscript{th} of December.

Subsequently, Eminence terminated the contract on the 15\textsuperscript{th} of December when Heaney failed to complete by the date. Heaney promptly counter-terminated, claiming that Eminence’s \textbf{premature termination} amounted to a repudiation of contract.

Issues:

- \textit{Was Eminence’s wrongful termination a repudiation of the contract?}

Ruling:

In order to determine whether Eminence’s wrongful termination amounted to repudiation, the following test must be conducted: if, looking at all the circumstances \textit{objectively} (i.e. from the perspective of an innocent party), the contract breaker clearly shows an \textbf{intention to abandon and altogether refuse to perform the contract} - that will amount to repudiation.

In this case, Eminence’s termination was \textbf{not repudiation}. Any reasonable person in the position of Heaney would not have reasonably believed an intention to abandon and not perform obligations under contract: rather, they would simply have thought that a mistake in calculation occurred – \textit{Eminence successful}.

\(^8\) When time is deemed to be \textbf{of the essence}, it becomes a condition of the contract. Any delay will give rise to a right to terminate.
**Time as a Condition - Notice**

**Case: Louinder v Leis (1982)**

**Facts:** Louinder entered into a contract to sell land to Leis. **No date was fixed for completion of the sale** and time was not stated to be ‘of the essence’. Clause 4 of the contract provided that:

“The purchaser (Leis) was to tender a transfer document to the vendor (Louinder) within 28 days of receiving the vendor’s statement of title”.

In January, Louinder informed Leis that it required settlement of the transfer within a week. By early February, no tender of transfer had been made. Louinder proceeded to issue a notice to complete with 21 days. It further stated that if Leis failed to complete within this time, Louinder would terminate the contract.

By early March (over 21 days later), Leis had not completed the contract. Louinder then terminated the contract. Leis contested the termination. In response, Louinder claimed a declaration that the contract had been validly terminated. Nevertheless, the trial judge refused the declaration. Louinder appealed to the High Court.

**Issues:**

- **Was Louinder entitled to terminate for unreasonable delay?**

**Ruling:**

(Gibbs CJ, Mason J):

The only ground on which to argue was whether there was an **unreasonable delay** on Leis’ part, which would constitute repudiation. In the circumstances of this case, it is impossible to conclude that there was an unreasonable delay on Leis’ part – **Leis successful**.
Case: Laurinda v Capalaba Park Shopping Centre

**Facts:** In October 1985, Capalaba entered into a contract to lease a shop to Laurinda within its shopping centre. The lease stated the period of the agreement, but the time for delivery of the lease was not fixed. Capalaba was required to deliver a registrable lease.

In December, Laurinda went into possession of the shop, paying costs incidental to the preparation of the lease. In March of the following year, Laurinda’s accountants asked Capalaba’s solicitors to forward a copy of the lease. 2 weeks later, Capalaba’s solicitors responded, advising that the lease had been sent in October of the previous year, and should be expected “in the near future”.

Meanwhile, Laurinda discovered in April that Capalaba was intending to sell its business. By 21 August, when still no lease had arrived, Laurinda’s solicitors pointed out to Capalaba’s solicitors that the lease should have been registered 10 months previously, that they had already provided the funds for registration, and that it was important that the lease be registered. Laurinda proceeded to issue a notice to complete, stating:

“In view of the lengthy delay, our clients require your client to complete registration within 14 days. If registration is not completed in this time, our client reserves their right [to terminate]”.

Capalaba’s solicitors received the letter the following day. However, only on 3 September did they respond, advising that they had referred it to Capalaba. On September 5th, Laurinda proceeded to terminate the contract on the grounds that Capalaba had both repudiated the agreement, and was in breach of an essential term.

The following month, Laurinda commenced an action for a declaration that the lease was validly terminated and to recover damages. Capalaba denied that it was guilty of an unreasonable delay, purporting that Laurinda had wrongfully terminated. The trial judge held that, whilst the notice to complete was ineffective, the agreement had been validly terminated for Capalaba’s repudiation. Capalaba appealed, was successful, and Laurinda appealed to the High Court.

**Issues:**

- Was Laurinda’s termination on the grounds of unreasonable delay by Capalaba valid?

**Ruling:**

**On Notice**

The notice in this instance was ineffective, on the following grounds:

- The time allowed was unreasonable. Evidence shows that it usually takes longer than 14 days to register a lease.
- Notice did not communicate the consequences of inaction, nor did it indicate that the time fixed for performance was ‘of the essence’, or that Laurinda could terminate if the notice was not complied with (Deane, Brennan, Dawson JJ).

**On Repudiation**

Despite the defective notice procedure, **there was repudiation** on Capalaba’s part. Their conduct was “more than a mere case of delay”; it was “delay accompanied by an intention not to complete the contract until it suited it”.

Additionally, Capalaba’s attitude, as shown by the correspondence, was “cavalier and recalcitrant”. They issued multiple incorrect statements and assurances as to progress, failed to register the lease and failed to obtain the mortgagee’s consent to registration.

Accordingly, whilst the notice was defective, Capalaba’s conduct indicates that it was more than a mere case of delay, but a complete repudiation to only perform contractual obligations if and when it suited it. Laurinda is entitled to terminate – *Laurinda successful.*
Consequences of Affirmation

Case: Bowes v Chaleyer (1923)

Facts: Chaleyer entered into a contract to sell tie silks to Bowes. The contract contained the following term –

“Goods to be shipped per sailer/steamer. Half as soon as possible. Half two months later”.

This inferred that two shipments would be made. A short time after the contract was made, Bowes wrote to Chaleyer announcing that the contract would have to be cancelled over an issue surrounding pricing. This amounted to a wrongful repudiation of the contract. Nevertheless, Chaleyer proceeded to import the tie silks – thus affirming the contract.

Shortly after, the silk ties were imported in three instalments, all within 2 months. Bowes proceeded to terminate the contract on the grounds that the condition of timing was breached. Chaleyer challenged this position, alleging that Bowes had wrongfully repudiated the contract.

Issues:

- Did the shipment of tie silks in three batches, all within 2 months, amount to breach of condition, entitling Bowes to terminate the contract?

Ruling:

(Knox CJ, Higgins J):

It is clear that Bowes’ repudiation was never accepted by Chaleyer. Instead, Chaleyer elected to affirm and proceed with the contract. As a general rule, if the aggrieved party elects to affirm, they remain liable to perform their part of the contract, enabling the terminating party to take advantage of any supervening circumstance which would justify the refusal of performance.

In this case, it is clear that Chaleyer – by delivering the tie silks in 3 batches, all within 2 months - breached the condition that the shipment would be delivered in two instalments, “half as soon as possible, half two months later”. Chaleyer had previously had the right to terminate following Bowes’ wrongful repudiation, but by choosing to perform their delivery obligations, affirmed the contract. This allowed Bowes to take advantage of the ‘supervening circumstance’ i.e. Chaleyer’s subsequent breach. Bowes’ subsequent termination for breach of the stipulated delivery condition was correct – Bowes successful.

Higgins J: “A door must be either open or a shut; a contract must either subsist or be at an end. The contract was not at an end, meaning the failure here must be treated as fatal”
**Consequence of Termination**

*Case: McDonald v Denny Lascelles (1933)*

**Facts:** The Rye Grazing Company (‘the purchasers’) entered into a contract to purchase land from the original vendor (2nd contract). The vendor himself was a purchaser of the land (1st contract).

Rye’s payment requirements were as follows: a **deposit, instalments** and the **balance on settlement**. The vendor assigned his interest under the contract with to Denny Lascelles. Rye Grazing defaulted in payment of an instalment of the purchase money. In consideration of allowing Rye Grazing an **extension of time** to pay, McDonald – one of its directors – guaranteed payment of the instalment, along with another director. However, this instalment went unpaid.

Denny Lascelles never purported to affirm or terminate the contract in response to these breaches. Subsequently, Denny Lascelles failed to pay the balance of the purchase price under the 1st contract, which was terminated as a result. This termination meant that Denny Lascelles was unable to complete the contract with Rye Grazing.

Rye Grazing proceeded to terminate its contract with Denny Lascelles, which was accepted by Denny. Following this, Denny Lascelles proceeded to sue McDonald for recovery of Rye Grazing’s instalment unpaid and overdue.

**Issues:**

- **When a contract of sale involving part payment by instalments is terminated, and the land is not conveyed to the purchaser:**
  - Does the purchaser have to pay instalments due? And;
  - Does the vendor have to repay instalments already paid?
  - **Ruling:**

  (Dixon J):

When a party to a contract, upon breach by the other party of a condition, elects to treat the **terminate**, the contract is **not rescinded from the beginning**. Whilst parties are discharged from further performance, rights and obligations already accrued will continue unaffected.

It does not follow, however, that with an executory contract for the sale of property where the price is payable in instalments, the vendor may both retain the money he has received and at the same time, treat himself as relieved from the obligation of transferring property. “A vendor cannot have its land and its value too”.

Therefore, as the land was not conveyed, neither Rye Grazing nor its guarantor, McDonald was obliged to pay the overdue instalment – **McDonald successful**.
**Election**

**Case:** *Tropical Traders Ltd v Goonan (1964)*

**Facts:** Tropical Traders entered into a contract to sell land to Goonan. The purchase price of the land was £47,500, payable by:

- A deposit of £10,000;
- 4 annual instalments of £5,000 each; and
- The balance payable a year after the final instalment.

The contract stipulated that:

- Cl. 12: *Time was of the essence*;
- Cl. 11: If Goonan failed to pay the deposit or any other money payable by the respective times, Tropical Traders could rescind the contract and all moneys paid would be forfeited.

Subsequently, part of the deposit was paid one day late. The first three annual instalments were too paid late, but 4th and final instalment was paid early.

When the balance of the purchase price was due, Goonan sought an extension of time to pay the final sum. Tropical Traders accepted, but its solicitors wrote to Goonan, stating:

“...The Company will not take action under the contract until Monday, 14 January, but this must be regarded as an act of grace on the part of the Company and without prejudice and in no way varying the Company's right to the strict enforcement of the contract”.

Goonan did not make the final payment by the 14th of January, and Tropical Traders terminated the contract. Goonan counter-claimed for specific performance, arguing, amongst other things, that voluntary acceptance of previous late payments waived with the condition of contract that time was of the essence.

**Issues:**

- *Was Tropical Traders’ termination valid? Or;*
- *Had Tropical Traders’ acceptance of previous late payments amounted to a wavering of the condition that time was of the essence for payment?*

**Ruling:**

(Kitto J):

Goonan is asserting that by granting a time extension for payment of the balance, Tropical Traders made the stipulation that the clause claiming time was of the essence was no longer applicable.
However, I can see no justification for reaching such a conclusion. It is incorrect to say that whenever instalments are accepted late, the accepting party is precluded from asserting that time is a condition of contract. On the contrary, Tropical Traders made plain that time was a condition by insisting on its right to terminate if payment was further delayed after the date of notice.

Thus, Tropical Traders became entitled to elect or rescind the contract as soon as the time for performance arose. However, they were not bound to elect at once; they could keep the opportunity to elect open, so long as they did nothing to affirm the contract. By telling Goonan that it would not rescind until the date of performance, Tropical Traders did no more than make a promise.

 Accordingly, the granting of a time extension does not amount to an election to affirm the contract. As payment had not been made by the specified date, and time was still of the essence, it was well within Tropical Traders’ right to terminate – Tropical Traders successful.

**Election – Unequivocal Conduct**

*Case: Immer (No 145) v Uniting Church in Australia Property Trust (1992)*

**Facts:** The Uniting Church owned a historic building. Historic buildings, by law, cannot be developed upwards. However, as owners, the Uniting Church was entitled to transfer air space rights above the building, subject to the their completion of a building refurbishment. The refurbishment had to be given approval by the Council.

The Uniting Church agreed to sell its rights to Immer for $2.3m. However, the contract stipulated that should the Council’s approval not be given by a specific date, Immer was entitled to rescind the contract. The Uniting Church did not complete refurbishments by that date.

Immer’s solicitors – in the mistaken belief that the Council had approved the transfer – sent a draft deed of assignment to the Uniting Church for settlement of the contract. This deed was going to give effect to the transfer of air space. The Uniting Church responded by informing Immer that the air space could not be transferred until refurbishments were complete. Three days later, Immer purported to terminate the contract based on the clause allowing it to do so if refurbishments by the previously specified date. More than 1 year later, the Council approved the transfer of air space.

The Uniting Church contested Immer’s termination, arguing that their sending of a draft deed of assignment amounted to an affirmation of the contract. The Court of Appeal held such. Immer appealed to the High Court.

**Issues:**

- Was the sending of a draft deed of assignment an affirmation of the contract?
**Ruling:**

(Brennan J):

For there to be a **valid election** of affirmation, two requirements must be met.

- Firstly, the aggrieved party must have at least the *knowledge* of the facts giving rise to a right to terminate;
- Secondly, the aggrieved party’s conduct must be *unequivocally consistent* with the decision to continue the contract on foot.

In this case:

- Immer **did not know** that the Council hadn’t approved the transfer of air space on April 1st. Therefore, it did not have knowledge of the facts which would have given it the right to terminate.
- Furthermore, the letter itself was **not an unequivocal affirmation** of the contract; rather, it only intimated that if the Uniting Church was in a position to complete the contract i.e. had Council approved, it wished to proceed.

Therefore, whilst Immer exercised its right to terminate the contract, its draft deed did not amount to an election to affirm. Immer is entitled to rescind the contract – *Immer successful*.

**Readiness & Willingness**

*Case: Foran v White (1989)*

**Facts:** Foran entered into a contract to sell land to White. White paid a 10% deposit of $7,500, with the date for settlement being June 22 of the following year. The contract stipulated that *time was of the essence.*

On June 20, Foran’s solicitors informed White that they would be unable to settle by June 22 as they wouldn’t have registered the land in White’s name in time. By the time June 22 came around, **no action was taken** by Foran or White. However, two days later, White served a notice of rescission based on Foran’s inability to complete by settlement date.

Foran refused to recognise the validity of this termination, asserting that it was invalid because White would not have been able to raise the purchase money by June 22. In response, White sought a declaration that the termination was valid, and to raise an entitlement to have their deposit returned.

The trial judge found for White, based on Foran’s anticipatory breach. This was overturned on appeal. White subsequently appealed to the High Court.
Issues:

- Did White validly terminate the contract?

Ruling:

(Brennan, Deane & Dawson JJ):

As Foran’s breach was anticipatory, White only had to prove at the time of breach that they weren’t “substantially incapable” of raising the finance for settlement – which it was able to do so. Accordingly, the termination was valid and White is entitled to the return of the deposit.9 – White successful.

Estoppel

Case: Legione v Hateley (1982)

Facts: The Legiones entered into a written contract with the Hateleys whereby the Legiones agreed to sell their land to the Hateleys for $35,000. It was agreed that a deposit of $6,000 was payable on signing the contract, with the balance of $29,000 due a year later. The contract also provided that ‘time was of the essence’, and that neither party could enforce their contractual rights unless written notice of default was given.

A short while later, the Hateleys moved onto the land and built a house. However, a year later the Hateleys defaulted on the settlement date by failing to pay the outstanding $29,000. The Legiones served a written notice of default, stating that if the payment was not made for the purchase price plus interest within 15 days, the contract would be rescinded.

The Hateley’s solicitor rang the Legiones and spoke with Miss Williams, the Legione’s secretary. Hateley’s solicitor told her that his clients would be ready to settle the following week. The secretary responded saying:

“I think that will be alright, but I will have to get instructions first”

Nonetheless, the Legiones purport to rescind the contract. The Hateleys later submit the payment balance, but the Legiones refuse to accept and seek repossession of the land.

The Hateleys then decide to bring an action on the basis of promissory estoppel. They claimed they had relied on the assumption that the Legiones would not demand full payment if the money was paid by 17 August 1979, in accordance with the secretary’s wording, or within a reasonable time of the Legiones telling the Hateleys that they would not extend settlement to that date.

9 In coming to his judgment, Deane J rejected the notion that a party has to show that they were substantially capable of performing their obligations in response to an anticipatory breach: “I do not accept the proposition that party must incur the expense necessary to put himself in a position where he can positively demonstrate actual or potential readiness and willingness to perform a contract before he can accept the repudiation of the other party and thereby rescind. In my view, that proposition is unjustified by either principle or common sense”.


Issue:

In order for estoppel to arise: a) Was the Hateleys reliance on the secretary’s statement that settlement would be extended, and their action in delaying settlement on that assumption to their detriment; b) thereby making the Legiones refusal to accept settlement at the later date unjust or unconscionable?

Ruling:

(Mason and Deane JJ):

The Hateley’s solicitor acted on the representation that settlement would be postponed, and in doing so, failed to arrange settlement prior to the expiry of the time of settlement. Therefore, there was material disadvantage.

However, a representation on the part of the representor, and their subsequent departure, or threat of departure, from that assumption must be clear and unequivocal. In this case, the Legione’s secretary’s wording was not clear and unequivocal. The assumption was never clear, so the Hateleys had no right to claim estoppel in reliance on that assumption – Hateleys unsuccessful.

(Brennan J):

Hateley’s solicitor must have known the limits of Miss William’s authority, so it was not reasonable that any promise or representation could be inferred from her conduct. By saying that she ‘had to get instructions’ first, she made it clear she did not have the authority to make the representation for an extension of settlement. Hateleys should have known not to act on the assumption of a representor who has no authority in representation. Estoppel is not allowed – Hateleys unsuccessful.

(Gibbs CJ and Murphy J) – dissenting:

Based on the facts, an estoppel could be made out. 4 elements had been satisfied to support the conclusion:

I. Miss William’s statement “I think that will be alright, but I need to get instructions” induced the Hateley’s solicitor into the assumption that the Legiones’ right to rescind the contract would not be exercised until instructions were obtained and communicated by the Legiones;

II. The Legiones, acting through Miss Williams, were bound by her conduct;

III. The Hateley’s solicitor reasonably acted on the faith of the inducement, desisting from making payment on time. Otherwise, Hateley’s solicitor would have attempted to make payment on time – detrimental reliance; and

IV. It is unconscionable/inequitable for the Legiones to rely on their rights to rescind the contract without giving the Hateley’s notice that there would not be an extension of time for settlement.

Having met the above criteria, promissory estoppel against the Legiones would be allowed – Hateleys successful.

By a vote of 2:3, Hateley was unsuccessful.
Relief Against Forfeiture

Case: Union Eagle Ltd v Golden Achievement Ltd (1997)

Facts: Union Eagle entered into a contract to purchase land from Golden Achievement. The contract stipulated that settlement was to be on or before 5pm on the 30th of September, and that time was of the essence.

Union Eagle managed to settle on 30 September – by 5.10pm. Nonetheless, Golden Achievement terminated the contract for breach of time condition! Union Eagle disputed this.

Issues:
- Was Union Eagle entitled to relief against forfeiture against Golden Achievement for unconscientious exercise of its contractual rights – terminating when breach is 10 minutes late?!

Ruling:

The court held that, even though the outcome might seem harsh there was no relief against forfeiture. Time was of the essence – a condition – and any breach, no matter how slight, gives rise to the right to terminate. Therefore, the termination was valid.


Facts: In 1999, Tanwar entered into a contract to purchase land from Cauchi. Clause 2 of the contract stipulated the following –

“Completion of the sale to take place by 4pm, 25 June 2001. Time is of the essence”.

The purchase price of the land amounted $4.5m. Tanwar paid roughly $700,000 in deposits and instalments, but by the time 4pm on the 25th of June, 2001, arrived, they were unable to pay the balance as the funds were not yet available from Singapore. However, the following day, the funds had arrived and Tanwar was able to pay the balance. Nevertheless, Cauchi terminated the contract for breach of the time condition. Tanwar disputed this termination, claiming – amongst other things - a relief against forfeiture.

Issues:
- Was Tanwar entitled to a relief against forfeiture on grounds Cauchi had used its contractual rights unconscientiously?
Ruling:

(Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ):

The essential issue in this case is the following:

Where is the unconscientious use by Cauchi of their legal right to terminate on failure of Tanwar to complete in accordance with the essential time stipulation?

Relief against forfeiture may be granted only where there is unconscientious conduct. In a broad sense, this requires one of four ‘special heads’: Fraud, Accident, Mistake or Surprise.

- **No fraud or surprise**: In this case, Cauchi did not cause or contribute to the breach. There is nothing to suggest that Cauchi helped lull Tanwar into the belief that they would accept completion of the contract, provided it occurred within a few days.
- **No mistake or accident**: The possibility that there might have been failure of a third party to provide finance was reasonably contemplated by Tanwar.

Although the court recognised that relief against forfeiture does not only arise in these four circumstances, Tanwar’s case falls beyond the pale” i.e. no accident or mistake was prevalent.

Equity will not intervene simply because one side’s situation becomes more favourable. Accordingly, the Cauchi’s rescission is valid, as Tanwar had breached an essential time stipulation – Cauchi successful.

**Waiver**

*Case: Agricultural and Rural Finance v Gardiner (2008)*

**Facts**: Agricultural and Rural Finance (ARF) loaned money to Mr Gardiner so that he could participate in an agricultural project. Mr Gardiner also entered into indemnity agreements with an associated company of ARF, Oceanic Agricultural Ltd (OAL). OAL became an indemnifier of Mr Gardiner’s loan.

Clause 2 of the indemnity agreement made punctual payment of the loan a condition of the indemnity’s enforceability. Mr Gardiner subsequently failed to make punctual repayments. In such circumstances, the indemnity gave ARF the right to accelerate the obligation to pay. ARF did not enforce such, and Mr Gardiner eventually met his loan obligations.

Subsequently, when the agricultural project collapsed, Mr Gardiner sought to rely on the indemnity agreement. OAL asserted that it was not bound to indemnify Mr Gardiner because the condition in clause 2 of the indemnity had not been satisfied. In response, Mr Gardiner argued that ARLs acceptance of late payments waived compliance with the condition that he had to punctually make his repayments. If the term had been waived, OAL’s indemnity would be enforceable.