Serious Breach

An actual breach of contract, either in the form of non-performance or defective performance, will entitle the innocent party to discharge the contract where there is a serious breach, as distinct from a minor one in respect of which the innocent party can be adequately compensated by an award of damages.

Key issues here centre upon how to best characterize the breaches of contract that will permit rescission and how to determine, in a particular case, whether the breach involved was of this nature.

Characterisation.

Various characterisations to describe the kinds of breach that will allow a contract to be discharged, for a serious breach, have been adopted by the courts. Some have focused on the *nature* of the contract terms; i.e. whether the terms were dependent or independent covenants, or whether the term breached was a condition precedent, or not, to the obligations of the innocent party.

- The most important characterisation of the above approach has been the characterisation of terms as promissory conditions or warranties;
- Regarding the above, any breach of a condition, as opposed to warranty, allows the innocent party to rescind a contract.

It is not always possible to characterize a particular term as a condition or warranty. When this occurs, it is necessary for the courts to focus instead on the nature of the said breach. This allows there to be an inquiry into the effect of the breach on the innocent party to determine whether the breach is so serious that they should be excused from performing their side of the contract (Diplock LJ in ***Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd***).

***Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd,* (1938), Supreme Court of New South Wales, (1938) High Court of Australia.**

- [When Tramways brought an action claiming money under the contract, Luna Park argued that the contract had been discharged for breach and counter-claimed for damages for breach of contract;
- Tramways failed at first instance but succeeded on appeal to the New South Wales Full Court;
- Luna Park then appealed to the High Court;
- Luna Parks appeal to the High Court was successful, the judgment of Jordan CJ in the Full Court was accepted as a correct statement of the law and is seen as a seminal one in the area;
- For this reason, it has been extracted below in addition to extract from the reasoning of the High Court;
- ***Jordan CJ:*** *"…considering the legal consequences…from a breach of contract, it is necessary to remember that (i) the breach may extend to all or to some only of the promises of the defaulting party, (ii) the promises broken may be important or unimportant, (iii) the breach of any particular promise may be substantial or trivial, (iv) the breach may occur or be discovered (a) when the innocent party has not yet performed any or some of the promises on his party, or after he has performed*

them all, and (b) when the innocent party has received no performance from the defaulting party, or has received performance in whole or in part;...the nature of the remedies available to him may depend upon some or all of these matters."

- ***"The nature of the promise broken is one of the most important matters…*** *If it is a condition that is broken, i.e., an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and recover damages for the loss of the contract, or else to keep the contract on essential promise, only the latter is available to the innocent party:* ***in that case he cannot of course obtain damages for the loss of the contract: AH McDonald & Co Pty Ltd v Wells.****"*
- ***"The question whether a term in a contract is a condition or warranty, i.e., an essential or non-essential promise, depends upon the intention of the parties as appearing in or form the contract. 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."***
- *"If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight."*
- *If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge."*
- ***Latham CJ:*** *"I agree with the Full Court that the guarantee clause was a condition and not a warranty… It as a term of the contract, which went so directly to the substance of the contract or was so 'essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all'.*
- *"The breach of such a term by one party entitles the other party not only to obtain damages but also to refuse to perform any of the obligations resting upon him."*

Chapter 22 – Termination by frustration.

The doctrine of frustration deals with the allocation of risks and losses which occur as a result of unanticipated change in circumstances occurring *after* the parties have entered into a contract. This generally occurs when a contracting party refuses to perform or has failed to perform their obligations, in whole or in part, because of performance of the contract is either physically impossible, illegal or no longer commercially viable. This usually is the result of an unexpected supervening event.

The foundation of the modern doctrine of frustration.

- The harshness of strictly insisting on contractual performance where the performance has been rendered fundamentally different from that envisaged resulted in the development of frustration;
- Modern development stems from the decision in ***Taylor v Caldwell.***

Taylor v Caldwell, [1861-1873], **Court of Queen's Bench**

- [The defendants (Caldwell) agreed to let the plaintiffs (Taylor) use Surrey Gardens and Music Hall for a period of four days in exchange for a payment of $100 per day;
- The venues were to be used for concerts and other performances and the plaintiffs expended money promoting these events;
- After entering into this agreement, but prior to the first concert, the Music Hall burnt down;
- Therefore the concerts could not take place;
- The plaintiffs sued the defendants for their losses incurred;
- The defendants relied on destruction of the hall as an excuse.]
- ***Blackburn J:*** *"The principle seems to us that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person of thing shall excuse the performance…"*

The current position of frustration in Australia.

- Pursuant to ***Davis Contractors Ltd v Fareham Urban District Council:*** ***"[F]rustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."***
- This was demonstrated in ***Codelfa Construction Pty Ltd***: *"I come back then to the question whether the performance of the contract in the new situation was fundamentally different from performance in the situation contemplated by the contract. The answer must, I think, be in the affirmative…Performance by means of a two shift operation, necessitated by the grant of the injunctions, was fundamentally different from that contemplated by the contract."*

OOH! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd **[2011] VSCA.**

- [Diamond Wheel (the respondent) contracted to license a site in the Melbourne central business district to OOH! Media (the appellant) for five years for the purpose of outdoor advertising;
- Permission was given for the construction of an office tower that would obstruct the view of the site from cars travelling into the City along Kings Way;
- OOH! Repudiated the contract, and when sued for breach of contract raised as a defence that the agreement was terminated for frustration, arguing the construction created a situation radically different from that contemplated when the contract was made;
- Diamond Wheel succeeded at first instance and OOH! Media appealed.]
- ***Nettle JA:*** *"[Regarding the test for frustration] "Consistently with Codelfa, I take the law to be that a contract is not frustrated unless a supervening event:*

a) *Confounds a mistaken common assumption that some particular thing or state of affairs essential to the performance of the contract will continue to exist to be available, neither party undertaking responsibility in that regard; and*

b) *in so doing has the effect that without default of either party, a contractual obligation becomes incapable of being performed because the circumstances in*

which performance is called for would render it a thing radically different from that which was undertaken by the contract"

- *"[Regarding foreseeability of obstruction] …where a supervening event is not only foreseeable but actually foreseen at the time of entry into a contract, it is more difficult to conceive of the parties as having entered into the contract on the basis of a common understanding that the even could not occur during the life of the contract. Where, however, a supervening event, although foreseeable, was not foreseen at the time of entry into the contract, the fact that it was foreseeable may not be of much significance unless the degree of foreseeability is particularly high."*