

**Principle:** the test for substantial performance is whether the failure goes to the root of the contract.

(2) **Bolton v Mahadeva**

**Facts:** the plaintiff sued to recover 636 as the balance alleged to be due for work done and materials supplied pursuant to a contract to supply and install a combined heating and domestic hot water system and to supply and fit a bathroom suite. Defendant alleged that the plaintiff had failed to complete the work. Fumes were given out and the heating was below what it should have been.

**Held:** (Cairns LJ) in considering whether there was substantial performance, the test is the nature of the defects and the proportion between the cost of rectifying them and the contract price.

Here the cost to repair is between 1/3 and 1/4 of the contract price. Considering the nature and amount of the defects, the contractor had not been substantially performed.

(Sachs J) there was no substantial performance because the work was ineffective for its primary purpose.

**Principle:** (1) the test for substantial performance is the proportion between the cost of rectifying the defects and the contract price. (2) The doctrine of substantial performance applies to entire contracts.

(C) **Adjustment of contract price**

The promisee may be held liable to pay the contract price, but retain the right to claim compensation in respect of the promisor's failure to perform.

- Cost of cure
- Difference in value

(1) **Jacob & Youngs Inc v Kent**

**Facts:** plaintiff built a country residence for the defendant. One specification in the contract was that wrought-iron pipe was to be of 'Reading Manufacture'. Some of the pipe used by the plaintiff was off-spec.

**Held:** (Cardozo J) in most cases the cost of replacement is the measure. Owner is entitled to money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.

(D) **Remedy if the promisor haven't performed to get contract price**

- (1) Quantum meruit
- (2) Unjust enrichment

4. **DISCHARGE FOR BREACH**

4.1 Express rights to terminate in contract for breach

4.2 **Common law principles**

Whether there is a common law right to terminate for breach of contract depends primarily on a tripartite classification of terms:

- If a term is a condition, there will be a common law right to terminate
- If a term is an intermediate term, the right to terminate depends on the gravity of the breach and its consequences
- If a term is a warranty, a breach of the term will not of itself give rise to a right to terminate (but a series breach of warranties may raise the issue of repudiation)

### 3. HAS THE CONTRACT BEEN TERMINATED

#### 3.1 Is the party justified to terminate the contract...

The promisee may rely on any available ground to terminate even if they did not actually rely on the valid ground (*Rawson v Hobbs*<sup>37</sup>)

##### 3.1.1 By agreement

- (A) Is there an express right to terminate
- (B) Is there a subsequent agreement to terminate the original contract (consider formation rules)
- (C) Has parties abandoned the contract

where an “inordinate” length of time has been allowed to elapse, during which neither party has attempted to perform, it may be inferred to that the contract has been abandoned (*Fitzgerald*<sup>38</sup>)

##### 3.1.2 For failure of a contingent condition

- (A) If the contingent condition is a condition precedent, the contract is void if the condition failed (*Lewes Nominees v Strang*<sup>39</sup>)
- (B) If the contingent condition is a condition subsequent, the contract is voidable if the condition failed (*Maynard v Goode*<sup>40</sup>; *Coolangatta*<sup>41</sup>)

##### 3.1.3 By performance

###### (A) Is the contract an entire contract or divisible contract

- (1) An entire contract is one in which completion of performance is a condition precedent to recovery of the contract price (*Cutter v Powell*<sup>42</sup>)

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#### <sup>37</sup> *Rawson v Hobbs*

**Facts:** Rawsons agreed to purchase property from Hobbs. Clause 12 of the contract provided for the Rawsons to obtain the consent of the Minister and conferred an option on both parties to annul the sale if the Minister refused consent. Rawsons purported to annul the sale on the basis that information indicated that the Minister would refuse consent.

**Held:** Rawsons cannot rely on express terms to terminate, but can terminate because Hobbs is unable to complete.

#### <sup>38</sup> *Fitzgerald v Masters*

**Facts:** Masters contracts with the deceased to purchase an interest in his farm. Masters pays a deposit and instalments, and works in partnership with the deceased for some years. By 1931 he has paid more than half. Masters leaves the farm in 1932, and has been contacting the deceased about the agreement since 1948.

**Held:** if he had at any time regarded the contract as at an end, the first thing one would have expected him to do was to demand repayment of his money.

#### <sup>39</sup> *Lewes Nominees Pty Ltd v Strang*

**Facts:** Strang granted Lewes an option to purchase land which had to be exercised by 11/11/80, and exercise must be by notice accompanied by payment of 10% of the purchase price.

**Held:** notice and payment is a condition precedent to the exercise of the option.

#### <sup>40</sup> *Maynard v Goode*

**Facts:** Goode agreed to buy land from Crosby, subject to a proviso that the transfer of land owned by Goode went through in a reasonable time.

**Held:** the proviso is a condition subsequent in relation to the whole contract as a binding obligation. It was not necessary for the sale of Goode's land to be completed before the contract with Crosby was binding.

#### <sup>41</sup> *Perri v Coolangatta Investments Pty Ltd*

**Facts:** Perri entered into contract with Coolangatta to purchase land. Special condition provided that the contract is subject to Purchaser competing a sale of their property at Lilli Pilli.

**Held:** the special condition is a condition subsequent. A binding contract came into existence immediately upon signature, and parties were from that moment subject to certain obligations. There was implied a promise by Perri that they would do all that was reasonable to find a buyer for the Lilli Pilli property.

#### <sup>42</sup> *Cutter v Powell*

**Facts:** Powell agreed to pay Cutter, as second mate, 30 guineas provided he proceeds, continues and does his duty on the ship for a voyage from Jamaica to Liverpool. Cutter died before the vessel's arrival at Liverpool.