

Contracts Recap:

What is a contract?

A contract is an agreement or set of promises that the law will enforce, for breach of which the law will provide a remedy

What are the underlying themes of contracts?

- Freedom of contract
 - Parties are free to make their own bargain and obligations
- Economic/commercial efficiency
 - Aim to promote efficiency in businesses
- Objective approach
- Fairness
- Clarity

What are the various ways in which a contract can come to an end?

- Termination
- Rescission
- Frustration
- Repudiation
- Discharge

Termination of a Contract

There must firstly exist a right to terminate.

A contract can be terminated in various ways:

- By agreement
 - Under the original contract
 - Under a subsequent contract
- Through the common law right to terminate for a breach
 - For a breach of a condition
 - For a sufficiently serious breach of an intermediate term
 - For repudiation

TERMINATION BY AGREEMENT

Termination under the original agreement

Expiry of fixed term

- Many contracts have a fixed term that expire or terminate at the end of the term
- Eg. gym membership contracts

“Express termination” clause

- Eg. can terminate the contract at any time on 30 days written notice
- Eg. Shevill v Builders Licensing Board – lessor terminated under the express clause because the lessee was paying the rent late

Implied right to terminate

- If there is no termination clause, and the contract is indefinite, there may be an implied right to terminate on reasonable notice

Termination under subsequent agreement

Express agreement

- A “contract to end a contract”
- Must comply with ordinary principles of contract formation
 - Sufficient consideration depends on whether the contract has been wholly or partly executed

Subsequent agreement

- It can be implied that parties intend to terminate the initial contract from a subsequent contract that covers similar ground

Abandonment

- Abandonment can be inferred from the parties’ inactivity that indicates they no longer want to keep the contract on foot

IS THERE A COMMON LAW RIGHT TO TERMINATE FOR BREACH?

1) Identify the breach

- What is the contractual obligation?
- On the facts, how has there been non-compliance? Specify what the breach is
- If anticipatory breach, go straight to repudiation

2) Damages claimable

- State that the client can claim damages for a breach
- BUT not every breach gives the right to termination of the contract

3) Classify the term as one or more of the following

1) Condition

- Statutory classification
 - Legislation may characterise the term as a condition
 - Eg. Goods Act 1958 (Vic)
 - S.18 – implied condition that goods correspond to their description
 - Arcos v Ronaasen: Contract specified wood to be ½ inch thick, but the wood supplied was thicker. Held the buyer could terminate, no matter how big or small the breach.
 - S.19 – implied condition to be of merchantable quality/ fit for particular purpose
- Express classification in contract
 - Parties can classify terms themselves as a condition in the contract
 - Terminology used by parties is not decisive
 - Court will decide whether the ‘condition’ is intended to have a technical legal meaning or be used in a layman’s sense
 - Eg. s.16(2) Goods Act 1958 – a stipulation may be a condition though called a warranty in the contract for the sale of goods
 - Shuler v Wickman – Contract stated it was a condition that Wickman make 1400 factory visits over the term of the contract. Court held it was unreasonable and not a condition, despite the contract’s wording
- Intention of the parties
 - If there is no statutory or express classification by the parties, then the parties’ intention is decisive
 - Tests:
 - Tramways Essentiality Test
 - Was the fulfilment of the promise of such importance to the promisee that he would not have entered into the K but for its strict compliance?
 - Hong Kong Fir Shipping Co v Kawasaki
 - The term is a condition if the breach deprives the innocent party of substantially the whole benefit of the contract
 - Factors to consider:
 - General nature of the contract, subject matter and particular term

- Associated Newspapers v Bancks – was a condition to have the cartoon exclusive to the newspaper
- Language used
 - Clear and precise language more likely to be a condition
 - Strong obligatory language “we guarantee” (Tramways)
- Other terms of the contract
 - If one party’s obligations are conditions, it may be likely that the other party’s obligations are too (Associated Newspapers v Bancks)
 - Parties expressly granting the right to terminate for other clauses points to the fact that they considered the matter of termination for breach, and decided not to provide an express right to terminate for the breach of that term in question because it was not intended to be a condition
- Likely consequences of the breach on the other party (Ankar v National Westminster Finance)
- Whether damages are an inadequate remedy
 - If yes, then not likely to be a condition
 - If no, then likely to be a condition
- Whether the breach is likely
- Note: courts not willing to construe as conditions – see intermediary terms

2) Intermediate Term

- Australian courts now recognise intermediary terms, and acknowledge a substantial breach of them (Koompahtoo Local Aboriginal Land Council v Sanpine)
 - Note: Kirby J dissent in Koompahtoo – no need for intermediate term; law would be clearer if it stuck with simply conditions and warranties
- If the term can be breached in various/trivial and serious ways, or will not deprive the whole benefit of the contract, it is likely to be an intermediate term
- Must consider the gravity and consequences of the breach

3) Warranty

- Classification as a warranty is rare now that there are intermediate terms