



CONTRACT B

LAW2102

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Notes

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Restrictions on the Right to Terminate

Restrictions on the Right to Terminate

- Where one party has the prima facie right to terminate, the other party may claim this right is **restricted** when:
 - The party purporting to terminate was **not ready and willing** to perform the contract
 - The party purporting to terminate **elected to affirm** the contract
 - The party purporting to terminate is **estopped from terminating** the contract
 - There has been a **waiver**
 - There is **relief against forfeiture**
 - The termination is a **breach of an implied duty of good faith**
 - There is an **express contract restriction** on the right to terminate

Ready and Willing

General Principle: At common law, to be entitled to terminate a contract for breach, an aggrieved party must show that they are **ready and willing** to perform the contract.

- However, a number of controversies and complexities exist

Readiness and Willingness: Overview

- A requirement to tender performance for concurrent obligations
 - **Goods Act s 35**
- **Non-essential breaches** are no bar to termination
 - *Sharjade v Commonwealth*
- How does the requirement of readiness and willingness apply after **anticipatory breach / repudiation**?
 - *Foran v Wight*
- Debate – Is there a requirement of readiness and willingness for **termination** or only if seeking **damages**?
 - *Foran v Wight*; *Sharjade v Commonwealth*

Must Tender Performance for Concurrent Obligations

- If a party wants to terminate for a breach, where the aggrieved party had a **concurrent obligation** to perform, the aggrieved party **must have tendered performance**
- There is a presumption that, in a contract for the sale of goods, **delivery and payment** are concurrent obligations:

➤ **Goods Act 1958 (Vic) s 35 – Payment and delivery:**

Unless otherwise agreed, delivery of goods and payment of the price **are concurrent conditions** (that is to say) the **seller must be ready and willing** to give possession of the **goods** to the buyer in exchange for the **price**, and the **buyer must be ready and willing** to pay the **price** in exchange for possession of the **goods**.

What Standard Required?

- Not all breaches will disqualify a party from terminating
- Only those breaches that **would have given the other party the right to terminate** will disqualify a party from terminating – for example:
 - In *Hong Kong Fir v Kawasaki*, the breaching party (who had failed to keep the vessel seaworthy) were not disqualified from terminating when the other party repudiated (by wrongfully terminating)
 - In *Sharjade v Commonwealth*, the terminating party breached a non-essential term, and was entitled to terminate the contract

Impact of Anticipatory Breach / Repudiation

- Principles relating to the readiness and willingness requirement differ between situations of **actual breach** and **anticipatory breach**

Termination After Actual Breach Only:

- Wronged party must show that they were **ready, willing and able to perform at the time** of the breach
- In the case of concurrent obligations, this requires **tendering performance** e.g. **Goods Act s 35**

Termination After Anticipatory Breach:

- At time of repudiation – low standard – wronged party needs to show that, **at the time** of repudiation, they were **not substantially disabled or incapacitated** from performing:
 - Approach by Mason CJ, Brennan and Dawson JJ in *Foran v Wight*
 - Cf. approach by Deane J in *Foran v Wight* and in *Sharjade* – no requirement of readiness and willingness **unless seeking damages**
- However, higher standard if **loss of bargain damages** are claimed – the wronged party must show they would have been **ready, willing and able to perform** at the required time – *Foran v Wight*; *Sharjade v Commonwealth*

- After repudiation – **estoppel** may arise if **detrimental reliance** – if the repudiation was not immediately accepted, the wronged party may not need to perform if the repudiation makes it **futile or pointless** for the wronged party to attempt to perform their obligations (on basis of estoppel) – *Foran v Wight*
- **Issue:** Does the aggrieved party have to **continue to perform** after the other party has repudiated (but prior to electing to terminate)?

Election to Affirm

Affirmation as a Restriction on Right to Terminate: Overview

- Affirmation will result in the **loss of a right to terminate** in respect of the breach that gave rise to the right to terminate

Key Issues:

What are the requirements for affirmation?

- **Knowledge:** Of at least the **facts that give rise** to the right to terminate – law unsettled as to whether also need knowledge that have legal right to terminate; and
- **Unequivocal conduct:** Consistent with only the exercise of either **affirmation** or **termination** (and inconsistent with the other) – *Immer*; *Tropical Traders*
 - **Examples:** **Accepting or insisting** on performance; **performing** acts under the contract; **unreasonable delay** in terminating (aggrieved party not required to elect immediately – may keep the question open so long as no affirmation or unreasonable delay that would prejudice the other party)
 - **Extension of time** unlikely to be an affirmation – *Tropical Traders*

When will a right to terminate arise after affirmation?

- If there is a **new breach or repudiation** – *Tropical Traders*; *Carr v Berriman*
- If the breach is a **continuing breach** as opposed to a "once and for all breach" – *Immer*

Estoppel

- Estoppel can restrict a right to terminate where there is **detrimental reliance** on an **assumption induced by the other party** that the **right to terminate would not be exercised**

Elements of Estoppel (AIDRUD)

The following elements are requirement to establish an estoppel claim:

1. **Assumption:** Relying party must have adopted an assumption, either of **fact** or about **future conduct**
2. **Inducement:** Assumption must have been **induced by the conduct** of the representor
3. **Detrimental reliance:** Relying party must have **changed their position** based on the assumption in such a way that he/she will **suffer detriment** if the representor **does not adhere** to assumption
4. **Reasonableness:** Relying party has acted reasonably in **adopting** the assumption, and in the **detrimental action** they took in reliance on the assumption
5. **Unconscionability:** It would be unconscionable in the circumstances for the representor to **depart from the assumption** – consider:
 - The nature of the inducement i.e. the role the representor took in creating the assumption
 - The reasonableness of the relying party's actions
 - The representor's knowledge of the detrimental reliance
 - The extent of detrimental reliance
6. **Departure:** Representor has **departed** or **threatened to depart** from the assumption adopted and acted upon the relying party

→ No single case / High Court authority articulates the elements in this manner – closest to doing so is *Waltons Stores v Maher* (Brennan J)

→ AIDRUD should be applied, cognisant of the fact that a number of the elements remain controversial

Waiver

- Waiver probably does not exist as an **independent** doctrine
- Cases of "waiver" are usually cases of:
 - Election to affirm
 - Estoppel
 - Contract variation

➤ *Agricultural and Rural v Gardiner*

Relief Against Forfeiture

- The court may, in extreme cases, **restrict the right to terminate** a contract and **grant relief against forfeiture** of a proprietary interest:
 - In **land** (e.g. sale of land, mortgage or lease); or
 - Possibly **personal property** (e.g. patent, shares in private company, finance lease of machinery)
 - Not a mere contractual right (e.g. rights under a services contract)
- Relief against forfeiture concerned with protecting against the **unconscientious exercise of legal rights**

Requirements:

- Termination would involve the **forfeiture of a proprietary right**; and
- Termination would be **unconscientious** because of fraud, accident, mistake or "surprise"
 - *Tanwar v Cauchi*

Good Faith

- An implied duty of good faith might **restrict a right to terminate** a contract – *Renard Constructions*; *Burger King*; *Garry Rogers*
- Where there is an implied duty of good faith, it will restrict the terminating party from **acting capriciously** and **for extraneous purposes** e.g. *Burger King*
 - However, this does not mean that they cannot protect their legitimate interests e.g. *Garry Rogers*
- The implied obligation of good faith is an **emerging principle** of the common law in Australia, and the High Court has not determinatively ruled on it

Express Contractual Restriction

- The contract may contain an **agreed express clause** restricting the right to terminate, which **will be effective if clearly expressed**

Summary

What to Know:

1. What constitutes an **election**
2. How to tell **"once and for all" breaches** from **continuing breaches**, and the different significance each has with regard to election

3. The **consequences and possible pitfalls** of electing to terminate or affirm a contract
4. The circumstances in which **equitable estoppel** may operate to restrict the aggrieved party's right to terminate
5. The circumstances in which it may be appropriate for **relief against forfeiture** to be granted
6. Whether there has been any **"waiver"** of rights that does not fall within the above categories
7. **Good faith** as a restriction on the right to terminate