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## TERMINATION

*[A] will argue that the contract is terminated by agreement/breach/repudiation of [B]*

### (1) Termination by Agreement

#### 1.1 Terminate under original contract

[A] will argue that agreement under the original contract allows termination of the contract.

##### 1.1.1 Fixed Term

- Many contracts have a fixed term, after which the contract will terminate (e.g. the term of this lease is for a period of 2 years from 1 January 2016 to 1 January 2018)

##### 1.1.2 Express Termination Clauses

- The original contract may contain a clause specifying the date for cessation of the contract (*Shevill*)
  - e.g. B may terminate on 1 months notice, if A breaches clause 2, etc.

##### 1.1.3 Implied Right to Terminate

- If no express clause specifying termination date is included (i.e. an indefinite contract), an implied right to terminate may exist upon reasonable notice

##### 1.1.4 Contingent Condition

- If a non-party obligation does not occur, the contract may come to an end
  - o E.g. buying a car subject to passing a road-worthy

#### 1.2 Termination by subsequent contract

[A] may argue that the original contract was terminated by effect of the subsequent contract

##### 1.2.1 Express

- A “contract to end a contract” must comply with ordinary principles of contract formation, including good consideration
- What will be sufficient consideration depends on how much of the contract has been executed
  - o If wholly executory, promise to release other party from their contractual obligations is sufficient consideration for both parties
  - o If fully executed by one party, the party yet to perform must provide further consideration (“accord and satisfaction”)

##### 1.2.2 Implied

- Where parties make a subsequent contract covering similar ground, it can sometimes be inferred that they intended to terminate the initial contract (termination vs variation)

#### 1.3 Abandoned Contracts

After a period of inactivity or other conduct that indicates the parties no longer desire their contract to be on foot, the courts may treat the parties as having mutually agreed to abandon that contract

## (2) Termination for Breach

*[A] will argue that [B]'s is in breach as they have/have not done [action]* (identify obligation and nature of non-performance on the facts, if anticipatory, go straight to **2.3 Repudiation**)

Every breach will give rise to damages, but only breach of condition or serious breach of intermediate term may give rise to the right to terminate.

### 2.1 Classification of Term

#### 2.1.1 Condition

*[A] will argue that the [term] [B] has breached was a condition, thus any breach (regardless of gravity) will entitle [A] to termination.*

##### 2.1.1.1 Statutory Classification

*[A] will argue that the term is a condition, as it is covered by statute.*

*Goods Act 1958 (Vic)* specifies terms which are always conditions.

- s18 – implied condition that goods correspond with their description (*Arcos v Ronaasen*)
  - o Only applies where the description as to the identity of the product has been relied upon by the purchaser
- s19 – implied condition that goods are fit for particular purpose

NB: can contract out of these implied conditions (s61)

##### 2.1.1.2 Express Classification

*[A] will argue that [the term] was expressly classified as a condition in the contract.*

[A]/[B] may argue that terminology used by parties when drafting contract is not decisive (*Schuler v Wickman*).

- Court will decide the intention of the parties having regard to the terms and subject matter of the contract (to give effect to right to contract freely)
  - o i.e. “did the parties intend that any breach however small would allow [A] to terminate?”
  - o relevant consideration includes whether a particular construction leads to an unreasonable result (where the nature of the term is such that breach is likely)
    - in this case, unlikely that strict compliance is required (*Schuler v Wickman*)

##### 2.1.1.3 Intention of Parties

*In the absence of express identification, [A] may argue that it was the parties' intention that the term be a condition, on the construction of the contract.*

##### 2.1.1.3.1 Tramways Test of Essentiality

*The importance of the term to the promisee when the contract is formed is determined by reference to the test of essentiality set out by Jordan CJ in *Tramways v Luna Park*.*

Test has regard to whether 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, and this ought to have been apparent to the promisor...”

Application of the test

- If the corresponding obligation on the promisor is a condition, indicates this term is also a condition (*Associated Newspapers v Banks*)
- Special nature of a clause will emphasise conditional nature (*Ankar v NWF*)

NB: Court will not readily construe a clause as a condition -> seek to keep contract on foot and encourage performance (*Ankar v NWF*)

### 2.1.1.3.2 Factors to Consider

- General nature of contract, subject matter, and particular term
- Prior court decisions
- Language used
- Other terms of the contract
- Likely consequences of the breach
- Are damages an adequate remedy?
- Is breach likely?
- Fairness if any breach gives right to terminate

If still not a condition, move to 2.1.2 Serious Breach of an Intermediate Term.

### 2.1.2 Intermediate Term

[A] will argue that [B]'s actions were a **serious** breach of an intermediate term (as established in *Koompahtoo*), entitling [A] to terminate.

- If a term can be breached in a variety of ways (ranging from trivial to serious), likely an intermediate term

#### 2.1.2.1 Sufficiently Serious Breach?

“Does the occurrence [B]'s [action] deprive [A] of **substantially the whole benefit** for which [A] contracted?” (*Hongkong Fir*)

- Breaches that “go to the root of the contract” are likely to be sufficiently serious (*Koompahtoo*)

If YES to both, A has the right to terminate.

### 2.1.3 Warranty

If breached term cannot be classified as either a condition or an intermediate term, it is a warranty, and thus no breach however serious will entitle [A] to the right to terminate.

## 2.2 Repudiation

*[A] will argue that [B] evinced unwillingness or factual inability to perform their obligations under the contract due to [action] entitling [A] to terminate the contract for repudiation.*

### 2.2.1 Test for Effective Repudiation

- Repudiation is a serious matter and is not found lightly (*Shevill*)
- Has [B] evinced to a reasonable person, that [B] no longer intended to be bound by the contract (renounced his liabilities under the contract), or that they intend to fulfil the contract only in a manner substantially inconsistent with their obligations? (*Shevill*)
  - o Obligations must (*Laurinda*):
    - Relate to the whole contract;
    - Be conditions; or
    - Be otherwise fundamental to the contract (would deprive the other party substantially of the whole benefit of the obligations remaining to be performed)
  - o NB: Where a series of breaches individually too inconsequential to amount to repudiation are combined, repudiation may be made out (*Tabali*)
- Language from cases
  - o “**only if and when it suits him**” (*Carr v Berriman*)

### 2.2.2 Instalment Contracts

Does breach of a single instalment constitute repudiation of the entire contract?

- **Goods Act s38(2)**
  - o “it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach is a repudiation”

### 2.2.1.2 Relevant Factors (*Maple Flock*)

- The quantitative ration that the breach bears to the contract as a whole
- Probability that such a breach will be repeated

### 2.2.3 Erroneous Interpretation Defence

*[B] may argue that they were acting on erroneous interpretation of the contract, and were mistaken about their obligations under the contract, meaning that their premature termination does not constitute repudiation.*

#### 2.2.3.1 Test

- Is the party persisting in its interpretation 'willy nilly' in the face of clear enunciation of the correct interpretation? (*Mona Homes*)
- Would a reasonable/objective person have believed that [B] evinced an intention to not be bound? (*Eminence*)
- "Drastic conclusion which should only be held to arise in clear cases of a refusal" (*Woodar*)
- C.f. Lord Salmon dissent in *Woodar* – honest mistake should be no excuse due to difficulty in assessing honesty

### 2.2.1 Election

If [A] successfully argues that [B] repudiated the contract, they will be faced with a choice to either accept repudiation, terminate the contract and sue for damages; or to affirm the contract and lose the right to damages unless another breach occurs.

### 2.3 Delay

*[A] may argue that [B]'s delay in performance of his contractual obligations constitutes breach.*

#### 2.3.1 Time is of the Essence

- If time is expressly stated to be essential, it is a condition
  - Terminology usually conclusive
- If not expressly stated to be "of the essence", time condition can be construed from the intention of the parties
  - *Tramways* Essentiality Test
    - Was performance on time so important to the promisee that they would not have entered into the contract unless assured of strict compliance?
  - NB: Time is not of the essence in goods or land sales unless expressly stated (*GA s15* or *PLA s41*)

If YES, can terminate at any time after performance is due.

#### 2.3.2 No stipulation as to time

If no express stipulation that time is of the essence, [A] can still terminate if:

##### 2.3.2.1 Serious breach of intermediate term (apply analysis from 2.1.2);

Law is unsettled as to whether a time stipulation can be an intermediate term

- Technically only one kind of breach (on time or late)
- But, the degree and consequences can vary

##### 2.3.2.2 Repudiation

[A] can terminate by satisfying general repudiation test, or if there is failure to perform after being issued with notice.