

TOPIC OVERVIEW

1	TERMINATION <ul style="list-style-type: none">• BREACH OF CONDITION• SUFFICIENTLY SERIOUS BREACH OF INTERMEDIATE TERM• REPUDIATION• DELAY• CONSEQUENCES OF AFFIRMATION OR TERMINATION• RESTRICTIONS
2	REMEDIES <ul style="list-style-type: none">• DAMAGES• LIQUIDATED DAMAGES AND PENALTIES• SPECIFIC PERFORMANCE• INJUNCTIONS• ACTIONS FOR DEBT
3	FRUSTRATION
4	DURESS UNDUE INFLUENCE UNCONSCIONABLE DEALING
5	IMPROPRIETY FOR VITIATING FACTORS REMEDIES FOR VITIATING FACTORS
6	MISLEADING OR DECEPTIVE CONDUCT STATUTORY UNCONSCIONABILITY
7	REMEDIES FOR MISLEADING OR DECEPTIVE CONDUCT REMEDIES FOR STATUTORY UNCONSCIONABILITY

OVERVIEW

LOOK AT MARK ALLOCATION

- 12/15 mark question - don't do in-depth in the structure (if some bits aren't relevant)

BLIND SPOTS-

- Restrictions on right to terminate/election
- Restrictions e.g. of damages, AFD
- Restitution (and mitigation as defences to AFD)
 - Think restitution about after termination and frustration
- Remedies

CONCLUDE-

- Conclude at the end of each contentious issue/paragraph - include which party will win
- At the final conclusion state what the remedy is for the winning party

TOPIC 1 – TERMINATION

OVERVIEW

- **Step 1 - Identify the breach.**
- **Step 2 - Classify the term:**
 - Is it a **condition**? Was the term so important that the promisee would not have entered into the contract unless assured of strict performance?
 - Is it a **warranty**? (unlikely) Where no breach is likely to deprive the innocent party of substantially the whole benefit of the contract
 - Is it an **intermediate term**? Where the term can be breached in a variety of ways, from the trivial to the serious (preferred because gives greater flexibility)
 - Is it **termination for repudiation**?
 - **It is termination for delay**?
- **Step 3 - Identify the consequences of the classification:**
 - Breach of warranty - no right to terminate (damages only)
 - Breach of intermediate term - look at gravity of breach and its consequences- Does it deprive the innocent party of substantially the whole benefit of the contract? If yes = right to terminate. If no = no right to terminate (damages only)
 - Breach of condition - right to terminate for any breach
 - Consider also - Is there a repudiation or delay?
- **Step 4 – restrictions on the right to termination**
 - Readiness and willingness
 - Election
 - Estoppel
 - Waiver
 - Relief from forfeiture
 - Good faith
- **Remember:**
 - Damages will be available to compensate for any particular breach (but loss of bargain damages are available only where contract is terminated).
 - The right to terminate is a rare occurrence and courts encourage performance, rather than avoidance, of contracts.
 - Be careful when terminating, as wrongful termination may be a repudiation.
 - If unsure, get a court declaration on the right to terminate.

IS THERE A RIGHT TO TERMINATE?

INTRODUCTION: “P will argue that there is a right to terminate the contract (because of one of the following breaches).....”

- **TERMINATION BY AGREEMENT**

- **Under the original contract**

- Contract in which agreement was made:

- (i) Has a fixed term e.g. K will expire 5 years from 1 January 2017
- (ii) Has express termination clause
 - E.g. can terminate on 1 months’ notice
 - E.g. can terminate if A breaches clause 2
- (iii) If no express termination clause, may have implied right to terminate on reasonable notice

- **By subsequent agreement**

- (i) A later contract that expressly ends earlier contract
- (ii) A later contract that impliedly ends earlier contract by covering similar ground
- (iii) Abandonment inferred from parties’ inactivity

INTRODUCTION: “P will argue that there is a right to terminate the contract (because of one of breach – state from facts).....” Note that P can claim damages for breach, but not every breach gives right to terminate the contract and get loss of bargain damages.’

• TERMINATION FOR BREACH OF A CONDITION

1. What is a condition?

If the term requires strict performance then a condition.

(look for contractual classification on the facts) – but note that classifying a term as a condition is not conclusive (*Shevill*)

Any breach, however slight, allows for termination (*Arcos v Ronaansen; Tramways v Luna Park*).

‘a substantial failure in the performance would enable the defendant to treat the contract as at an end’ (*Associated Newspapers Ltd v Bancks*).

2. How do you check if a term is a condition?

STATUTORY CLASSIFICATION IF APPLICABLE

- *Goods Act 1958 (Vic) implied conditions*

S18: implied condition that goods correspond to their description (*Arcos v Ronaasen*)

Note: only applies when description is to the identity of product and description has been relied on by buyer.

S19: implied condition to be of merchantable quality/fit for particular purpose

Note: can contract out of these implied conditions (S61)

COMMON LAW:

Test of essentiality – is promise so important that promisee would not have entered into the contract unless the term was strictly performed? (*Tramways v Luna Park*).

Hong Kong Fir – condition if even the slightest breach deprives the innocent part of substantially the whole benefit

3. What factors help determine that a term is a condition?

The character of a term – e.g. ‘seaworthy’ is very general and party could fail term by one missing nail up to the sinking of the ship (*Hongkong Fir v Kawasaki; Bancks; Ankar*).

Have previous decisions classified term as a condition?

Need for certainty – if a court calls a general term a condition, does it cast doubt into all similar contracts?

Language :

Clear and precise language more likely to be a condition

Strong obligatory language ‘we agree’ (*Tramways*)

Is the language promissory (*Tramways v Luna Park*)?

Is this particular term emphasised over others? e.g. One term says 'we guarantee...', the others don't.

If one party's obligations are conditions, it may be likely that the other party's are too (*Bancks*)

Likely consequences of breach on other party (*Bancks, Ankar*)

Damage inadequate remedy (*Ankar*)

Whether breach likely (*Schuler*)

4. Does labelling a term a 'condition' mean it is a condition?

Not necessarily, as word often used in a non-legal manner.

Essentially, if the nature of a term means that it is likely to be breached then strict compliance unlikely to be required (*Schuler v Wickman Machine Tool Sales*).

5. Conclude: Is it a condition? What are the consequences of classification?

If a condition – even the slightest breach allows for termination (*Arcos v Ronassen*)

Courts are not so willing to construe clauses as conditions

- for the reason above

- also undermines contractual certainty