

B. TERMINATION BY AGREEMENT

AGREED RIGHT TO TERMINATE

Rule: P may have right to terminate through either: (a) an express term of contract; **or** (b) where there is an implied right to terminate where D is given reasonable notice.

(a) Express Term

1. **Type of Clause?**

- (a) Cl specifying the length of contract (automatically expires)
- (b) Cl granting either party right to terminate:
 - (i) 'at will' = broad discretionary right allowing termination at anytime
 - (ii) right to terminate after specified time: only if P elects to do so after expiration
 - (iii) by a certain event: breach or failure of contingent condition

2. **Procedure?** to terminate, P must follow procedure set out in the contract but it should NOT be applied in a strict and technical manner (*Pan Foods Importers v ANZ*)

3. **Remedies:**

(a) **Loss of Bargain Damages**

- Termination for minor breach = only nominal damages (*Shevill v Builders Licensing Board*)
- If P can show he was entitled to terminate at common law due to sufficiently serious breach = full damages [see Remedies: loss of bargain damages]

(b) **Fix Sum under contract?**

OR

(b) Implied Right

1. **Contracts of Indefinite duration:** may be implied right on basis that P would not have intended to continue indefinitely (*Crawford Fitting Co v Sydney Valve & Fitting*)
 - e.g supply contracts
2. **Procedure?** to terminate, P must give reasonable notice of termination which will depend on the nature of contract and amount of expenditure/investment above ordinary expenditure (*Crawford Fitting*)

SUBSEQUENT AGREEMENT

Rule: P may have right to terminate through a subsequent agreement that (a) it expressly states so; or (b) inferred from terms of subsequent agreement.

(a) Express Subsequent Agreement

1. **Executory?** P maybe be discharged from subsequent agreement if both parties have not FULLY performed its obligation.
 - Each parties release from contract constitutes consideration

or

2. **Non-executory?** if one party has complete performance can terminate by subsequent agreement through use of (i) deed; or (ii) suppling fresh consideration - accord and satisfaction (*McDermott v Black*)

OR

(b) Implied from Terms of Subsequent Agreement

Principal: Where parties do NOT specify what is to happen to original agreement then as a matter of construction as to the terms of subsequent agreement and intention of parties; two possibilities arise:

- (i) Subsequent agreement terminates/replaces original; or
 - (ii) Subsequent modifies original
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1. **Inconsistent Terms?** if terms of subsequent agreement is inconsistent to ones of original agreement = likely termination/replace old (*Tallerman v Nathan's Merchandise*)
 2. **Intention of Parties?** if unlikely parties are to abandon their rights under original contract or if subsequent agreement cannot stand alone as independent agreement = likely modify old but NOT replace (*Concut v Worrell*) [accrued rights under contract from oral to written].

ABANDONMENT

Rule: court may infer terminated if both parties' conduct show they have abandoned the agreement by indicating that they no longer intend the contract to be performed.

Examples:

1. Both parties do not think contract should be performed further [e.g both issuing notices of terminations that are not valid but still assume its valid *DTR Nominees v Mona Homes*]
2. **Inordinate delay:** where neither party has taken steps to perform or call other to perform (*Fitzgerald v Masters*)

D. TERMINATION FOR BREACH

Principal: Party may terminate for breach of an essential term (condition) or a sufficiently serious breach of an intermediate term and also receive damages. Breach of warranty will not give right to termination but can for obtain damages.

Note: parol evidence applies, CANNOT use extrinsic evidence to construe the importance of terms. Can only use the language of the contract to determine which terms are essential.

1. Breach of Essential Term (Condition)

Need to first determine whether a term is considered a condition by construction and THEN consider if it has been breached.

Rule: a term is considered a condition if it appears, by objective intentions of the parties, that the party considers it so important that it would not have entered the contract without being assured of its strict performance (*Tramways v Luna Park*)

(A) Is it a condition?

1. Test of Essentiality

- promise of such importance that P would NOT have entered into the contract unless he was assured of strict or substantial performance of promise? (*Luna Park v Tramways*)
 - Determined by general nature of contract, particular provisions and importance parties attached by consideration of surrounding circumstances (*DTR Nominees v Mona Homes*)
 - Subject matter, intended benefit to be received under contract, and effect of consideration given is relevant (*Associated Newspapers v Bancks*)

2. Form/Language:

- language of provisions expressing certainty of compliance and not estimates but guarantees is persuasive (*Tramways v Luna Park*).

3. Likely (not actual) consequences) of breach:

- if every breach of the term likely have serious consequences, depriving P from “substantially the whole benefit of contract” (*Hong Kong Shipping v Kawasajr*)

4. Note: courts do not readily construe herms as conditions due to ramifications (*Ankar v NWF*)

(B) Was there a breach? did P fail to perform at the time or standard required by the condition? No matter how slight, if condition not strictly complied then is breach.

(C) Remedies: right to termination AND damages

2. Breach of NON- essential Term (intermediate term)

Rule: a term is considered intermediate if it can be breach in a variety of ways from sever to trivial. Breach of intermediate term will ONLY entitle right to terminate if the breach was sufficiently serious by going to the root of the contract (*Hong King Fir Shipping v Kawasaki*)

(A) Is it a non-essential term?

1. Once term is found not to be a condition, presumed to be an intermediate term
2. Capable of being breached in a number of different ways, not all of which is a serious breach (*Cehave NV*)

(B) Was there a sufficiently serious breach? deprives P of substantially the whole benefit of contract (*HK Fir Shipping*)

- the effect of breach on common intention of the parties expressed through the terms of contract (*Koompahtoo LALC v Sanpine*)
- commercial purpose, relationship between parties, degree of breach and nature of contract

(C) Remedies: right to termination AND damages

3. Breach of Warranty

Rule: a term is a warranty if it is not significant to overriding purpose of contract. Upon breach, does NOT entitle P to termination but YES to damages (*Hong King Fir Shipping*)

E. TERMINATION FOR REPUDIATION

Test: would the words or conduct of the repudiating party be such that a reasonable person would infer they intended not to be bound to the contract as a whole or fundamental part of it *Shevill v Builders Licensing Board*

1. Requirements:

- (a) must be deemed to repudiated entire contract OR;
- (b) if repudiating an obligation — only if essential term (*Foran*) OR
- (c) substantially of the whole benefit - combination of smaller breaches (*Tabli*)

2. Actual or Anticipatory?

- (a) Anticipatory breach: repudiation of a future term or obligation prior to performance.

- ii) Whether 'reasonable and ordinary person' (taking reasonable care) from that class would be misled in all the circumstances: *Campomar Sociedad v Nike International*
- b) **Towards specific individual:** Analyse the conduct, taking into account the particular parties (incl their expertise, advisors), nature of the transaction, and surrounding circs: *Butcher v Lachlan Elder Realty*

5. Remedies

Which remedy given is at the **court's discretion**, considering what is most appropriate to do justice in the circumstances: *Henjo Investments*

1. **Injunctions** – ACL s 232
2. **Damages if the P suffers loss that is caused by the conduct** – ACL s 236
 - i) Contravention of ACL need not be sole cause of loss, must merely be a material factor: *Henville v Walke*
3. **Compensation orders** to appropriately fix the situation – ss 237 and 238
 - s 239 – compensation orders under 237/8 may include declarations contract is void, variation of terms, orders to supply services, etc etc. Very broad.
 - **NB important** – Court is not limited by normal common law bars to rescission (but will still be informed by them) and will do what is just: *Henjo; Marks v GIO*

MISREPRESENTATION (CL)

The common law is broader in its inclusion of conduct OUTSIDE trade or commerce; but the ACL is broader in its ambit of 'conduct' rather than just misrepresentation as at CL. Is also strict liability.

Rule: Was there a (1) positive statement of fact (2) which is false (3) in order to induce another party's entry into contract?

1. **Was the statement a statement of fact?**
 - A statement of past/present affairs
 - Does not include:
 - a) **Puffs:** attractive sales talk (*Mitchell v Valherie*)
 - Precise or specific assertions may be classified as statements of fact (*Pryor v Given*)
 - b) Statements of **opinion**, however the opinion should be properly grounded or else a misrepresentation: *Bathurst Regional Council*
 - c) Statements of **present/future intention**, too uncertain unless promisor doesn't genuinely believe them, in which case there is a

B. VITIATING FACTORS MISTAKE

CATEGORIES OF MISTAKE

Common Mistake: where both parties have made the same mistake [e.g both believing ship existed]

- mistake as to subject matter
- as to quality of subject matter

Mutual Mistake: where both parties have made a mistake to an aspect of the contract but their understandings are different. [e.g. both believe that ship would arrive but at different times].

Unilateral Mistake: one party enters under a misapprehension of which the other is aware

COMMON MISTAKE

Common Mistake – where the parties are under a common misapprehension

The view from *Solle v Butcher* as to the availability of equitable remedies for common mistake has been overruled by the UK in '*Great Pearce Shipping*'. The HCA is inconclusive on this but state courts have supported the UK position (*Aus Estates v Cairns City Council, Manna v Manna*).

1. Common Law

- Common assumption as to the existence of the state of affairs?**
- Was this a mistake and was it **so essentially different** from thing that was believed to be? (*Great Pearce Shipping*)
 - Fact and degree - did it defeat the contractual purpose?
 - Not just a difference in characteristics or degree: *Svanosio v McNamara* [where 1/3rd of land missing as turned out to be Crown land]
- Did the **contract make any provision** for the non-existence of the state of affairs?
- Was the non-existence at **fault of any party?** (*McRae*)
 - Cth causing mistake in *McRae* - party at fault cannot rely on the mistake to rescind - if at fault then it was breach.
- Result: contract **void**