

CONTRACT LAW – SECOND SEMESTER 2017

I TERMINATION

Definition: One party or both parties choose to end contract by agreement or breach – applies prospectively.

Advise: What each party is seeking?

Question: Is there a right to terminate?

1 TERMINATION BY AGREEMENT

Termination by Original Agreement

- (i) The contract has a fixed term, thus will expire or terminate at the end of term (OR)
- (ii) Contract includes an “express termination” clause (OR)
 - o I.e. defining a way in which to terminate (e.g. terminate on 30 day’s notice or if breaching cl 2)
 - o If an express clause is given, there is no need to determine a right to terminate (*Shevill Builders Licensing Board*) – [express right to terminate, rent unpaid for 14 days, lessor terminated under the clause]
- (iii) Where no termination clause, (e.g. indefinite clause), there may be an implied right to terminate on reasonable notice.

Termination by Subsequent Agreement

Express Agreement

- A contract to end a contract must comply with ordinary principles of contract formation, including good consideration (i.e. depending on whether contract is partly executed or wholly executory):
 - o If executory (both parties have remaining obligations to perform) – they both provide consideration in agreeing to release other party from obligations
 - o If full executed by one party, necessary to have a deed or ensure consideration is provided by party being relieved of performance.

Inferred Agreement

- Termination inferred from making subsequent agreement (i.e. subsequent covering similar ground, it can be inferred the intention was to terminate the initial contract)
- Abandonment (i.e. after a period of inactivity that indicates to parties there is no longer desire for contract to be on foot, the court may hold that the parties have mutually agreed to abandon the contract).
 - o DTR Nominees v Mona Homes
 - o Cedar Meats v Five Star Lamb

2 TERMINATION FOR BREACH

Step 1: Identify the breach – actual or anticipatory [if anticipatory, go straight to repudiation]

Step 2: “All breaches give rise to damages for breach of the particular term, to put the party in the position they would’ve been in had the K performed. However, not every breach gives rise to a RTT”.

Step 3: Is it a CONDITION?

- Three ways to classify breaches:

- (i) Statutory [Legislation may characterise term as a condition]

Goods Act 1958 (Vic)

- S 18: Where there is a contract for the sale of goods by description, there is an implied condition that goods correspond with condition (*Arcos v Ronaasen*) – HL 1933 [contract for sale of wood, contract specified length of pieces, some wood fractionally different which made no difference to use. Held: condition under s 18 as didn’t match description, although breach was minor it gave rise to RR, fact of no less was irrelevant.
- S 19: It should be fit for particular purpose where purpose and reliance made known to seller; merchantable quality

Limitations

- S 61 – Can be excluded by express provision in contract
- S 18 – Correspondence with description only applies if buyer has relied on the description AND description related to identity of product, not quality of product.

- (ii) Express classification in the contract [Parties can classify terms in the contract]
- Note: Terminology used by parties not decisive
 - o Goods Act s 16(2) – a stipulation may be a condition though called a warranty in a contract for sale of goods
 - o L Schuler AG v Wickman
 - Facts: clause 7(b) said “it shall be a condition”
 - Test: look at what parties intended the term to mean?
 - Held: Intended not to be a condition in the technical legal sense, not conclusive. Could just mean terms or provisions of contract.
- (iii) Intention of the parties [If no statutory classification or express (intended) classification]
- For the sale of goods:
 - o S 16(2) Goods Act - whether it warranty or condition “depends ... on the construction of the contract”
- Courts are reluctant to categorise a clause as a condition as contracts can be terminated too easily (high consequences)
- TRAMWAYS’ ESSENTIALITY TEST: Was the fulfilment of the clause of such importance to the promisee that he would not have entered the contract but for its strict & literal compliance? (Per Jordan CJ)
 - o Did it go so directly to the root of the contract?
- Factors to consider:
 - o General nature of contract, (*Tramways*) subject matter and particular term (*Bancks, Ankar*)
 - o Language used (*Tramways, Ankar*)
 - Clear precise language – more likely condition
 - Strong obligatory language – “we guarantee” (*Tramways*)
 - o Other terms of contract
 - If one party’s obligations are conditions, it may be likely the other party’s are too (*Bancks*)
 - OR parties expressly granting right to terminate for other clauses points to fact that they considered matter of termination for breach and decided not to provide an express right to terminate for breach of that term in question because it was not intended to be a condition
 - o Likely consequences of breach (*Bancks, Ankar*)
 - o If damages inadequate, more likely to be condition (*Ankar*)
 - o Whether breach is likely (*Schuler*) – if breach likely, unlikely strict compliance req. (1400 visits)
 - o Preliminary correspondence indication (*Tramways*)
 - o Payment not to commence until full performance (*Tramways*)
 - o Surety and creditor relationship (*Ankar*)
 - o If clause can be breached in a variety of ways, less likely to be a breach (*Hong Kong Fir*)
 - o Fairness if any breach gives right to terminate
 - o Prior court decisions
 - Schuler v Wickman
 - Facts: cl 7(b), express condition, required 1400 visits over contract term
 - Held: wording isn’t conclusive, further, the particular construction – nature of term is such that breach is likely – no strict compliance required
 - Tramways (HCA)
 - Facts: guarantee 53 boards on tracks at least 8 hours per day, contract for 3 seasons. Tramways displayed for on average 8 hours per day.
 - Held: went so directly to the substance, substantial failure to perform contract at all, language “we guarantee”, payment not to commence until 53 boards displayed, preliminary correspondence
 - Bancks (HCA)
 - Facts: 10 year contract for one page cartoon on newspaper, published on front page. 3 years into contract, 3 weeks in a row, newspaper did not publish on front page of comic section
 - Held: Bancks had RTT. Importance of front page. Affirmed legal test in Tramways.
 - Ankar (HCA)
 - Facts: Ankar acted as guarantor to GE who leased equipment to National Westminster finance, deposited \$125,000 security, NWF breached cl 8&9, to notify Ankar if GE assigns machinery and if GE was in default.

- Held: Were conditions, Ankar had RTT. For: special relationship between surety and creditor. Against: no time is fixed for giving notice. Unclear language.
- However, Courts are reluctant in construing clauses as conditions due to the extreme weight of the RTT.

Consequence: Every breach of a condition allows for termination, even the slightest breach (*Arcos v Ronaasen*).

Step 4: Is it a serious breach of an INTERMEDIATE TERM?

“Although previous law used to only recognise conditions and warranties, it was inflexible and seriousness of the breach was considered irrelevant. Thus, Australian Courts now recognise intermediate terms (obiter in Ankar. Koompahtoo c.f. Kirby J)”

“An intermediate term is a term which can be breached in a variety of ways”

If the breached term is an intermediate term, the aggrieved party may be able to terminate if:

- “deprives the innocent party of substantially the whole benefit of the contract (applying test in *Hong Kong Fir* – high threshold)” = [HKF owned ship, contract for 24 months, ship out of action for 20 weeks. Held: intermediate term, not sufficiently serious breach to justify termination – 20weeks/24 months, not substantially whole benefit.]
- Is “serious”, “goes to the root of the contract” or is “fundamental” (*Koompahtoo*)

Factors to consider (*Koompahtoo*):

- the nature of the contract and the relationship it creates
- the nature of the term
- the kind and degree of breach
- the consequences of the breach for the other party
- the adequacy of damages
- Length of contract (*Hong Kong Fir*)

Consequence: if SBIT, party X has the right to terminate.

Step 5: Is it a WARRANTY?

If not one of these, it is a warranty: where no possible breaches (no matter how small or big) deprive the aggrieved party of substantially the whole benefit which was intended to be received (*Hong Kong Fir*)

- Classification as warranty rare now due to intermediate terms. Courts will be reluctant to forego flexibility in dealing with the breach.

Consequence: No right to terminate, only entitled to damages.

Step 6: Further ADVICE

- Should avoid terminating as wrongful termination may be repudiation. Thus, a court declaration would be preferable. (For example: Ankar)
- Loss of bargain damages only where contract is terminated.

Step 7: Does it constitute REPUDIATION?

“A party repudiates if they are **unwilling** or **unable** to perform their obligations under the contract, either in anticipatory or actual breach (*Koompahtoo*; *Laurinda*). This can occur either by express words, or inferred from conduct or factual inability”.

- However, courts will be reluctant in finding repudiation as it is a “serious matter” and is “not lightly found or inferred” (*Shevill*) and a “drastic conclusion” (*Woodar*).
- **Test:** - OBJECTIVE - has the party evinced an intention to no longer be bound by the K or that they intend to fulfil it only in a manner substantially inconsistent with their obligations under the K? (*Shevill* per Gibbs CJ)
 - Parties’ unwillingness/inability must either:
 - Relate to the whole contract
 - Relate to a condition of a contract

- Be fundamental so as to deprive the innocent party substantially of the whole benefit of the contract (*Tabali v Progressive*)
- OR can be inferred from combination or series of breaches of warranties (*Tabali*)
- High threshold for repudiation by inability: constant late payments of rent does not necessarily indicate inability to perform in the future (*Shevill*)

Case summaries:

- *Carr v Berriman*: 2 breaches occurred: excavate the land and give possession to B, supply steel to B. Held: Carr repudiated. Does not take contract seriously as only carried part out “only if and when it suits him”.
- *Shevill*: Lease agreement Shevill tenant. Repeatedly late with rent. Lessor terminated relying on express termination clause (Cl 9(a): rent unpaid for 14 days can RTT). No repudiation. Late payments not enough.
- *Tabali*: Tenant refused to pay rent, combined with many other breaches. Repudiation may be inferred from a combination of events. Series of breaches amounted so.

Re: Instalment contracts

- Goods Act 1958 s 38(2) - whether breach of instalment is repudiation depends on circumstances of each case [depending on terms of contract and circumstances]
- Apply general test in *Maple Flock*
 - o The quantitative ratio the breach bears to the whole K
 - o How probable it is the breach will be repeated i.e. is it an isolated, unlikely occurrence?
- *Maple Flock*: contract to deliver 100 tons of rag flock by instalments – 1.5 tons per load, 3 loads per week. 16th delivery defective. Purchaser terminated. No repudiation. Small ratio of breach. Likelihood of repetition was “practically negligible” as breach was “extraordinary”.

Re: Erroneous interpretation and repudiation

- When a party is repudiated by breach/wrongful termination, but they are mistakenly acting on an erroneous interpretation of the contract as to their obligations, repudiation may not be made out.
- Consider test (*DTR v Mona Homes*) – OBJECTIVE - Is the party persisting in its interpretation willy nilly in the face of a clear enunciation of correct interpretation?

Case law examples:

- *DTR*: Vendor had to lodge plan of subdivision, misread obligation. Contract to sell 1-9 lots out of 35 lots. Misread to be: only for first 9 lots sold, but needs to be for all 35 lots. No repudiation. Not persisting willy nilly.
- *Woodar*: Wimpey purchased land w/ special condition allowing termination if new compulsory acquisition order affected land. Wimpey incorrectly thought it also covered pre-existing orders. No repudiation.
- *Eminence*: Contract for sale of 13 apartments. Purchaser failed to settle. Vendor miscalculated notice period, actual days rather than working days. No repudiation. Mistake in calculation.
- Advice:
 - o EI not defence where there is a right to terminate for actual breach. Only defence of repudiation.
 - o If correct interpretation unclear, get court determination/declaration to find so.

Consequence: The aggrieved party must elect one of two courses:

- Terminate the contract (and sue for damages); and
- Affirm the contract, lose RTT and get damages unless/until other breach occurs.

Step 8: Does it constitute DELAY?

“Party X may terminate for delay when the obligation of Party Y was not performed by the expected time”

Express [time for performance specified]

- If the parties have expressly indicated that the timing of performance is essential (usually by saying “time is of the essence”): courts will generally accept that time is of the essence.
- If the parties have not expressly stated that the timing of performance is essential: time will only be considered to be of the essence if that was what the parties intended:
 - o Apply *Tramways* essentiality test: - i.e. was performance on time so important to the promisee that it would not have entered the contract unless assured of strict compliance?
 - If there is no time for performance, this strongly indicates that time is not of the essence.
- *Goods Act* s15 – time of payment not considered essential (reflection of common law)
- *Property Law Act* s41 – equitable position applies – where time not expressly stated to be of essence – it will be a matter of construction (i.e. what did parties intend? It to be a condition?)

Consequence:

- If time is of essence: innocent party can terminate after due date.
- If time is not of the essence: innocent party cannot immediately terminate
 - Via notice - notice may be given immediately after due date requiring performance within a reasonable (specified) time and stating that party giving notice may terminate if performance not given by that time.
 - Law is unsettled as to whether time stipulation can be an intermediate term (no clear Aus authority)
 - May be repudiation (i.e. whether delay is so long it evinces intention not to be bound by contract (Laurinda)). Also after notice procedure. See below.

Notice Requirements

- Specify performance required (time for performance)
- Fix a reasonable time for performance. Consider:
 - All the circumstances of the case
 - What remains to be done under the contract by the party in delay
 - The subject matter
 - The behaviour of the parties
 - Effect of non performance on innocent party (*Laurinda*)
 - Acts still to be done (*Laurinda*)
 - Extent of previous demands to perform (*Laurinda*)
 - *Louinder v Leis*; *Laurinda v Capalaba Park Shopping Centre*
- Specify consequences

Implied [no time for performance specified]

- Implied term that performance to occur within “a reasonable time”. Time unlikely to be of the essence.
- Via notice:
 - The party must wait for a reasonable time to elapse. At that point, a breach has occurred but only giving rise to a right to damages.
 - Then give notice requiring performance within a reasonable (specified) time and indicating that termination may occur if no performance by that date. See above.

Case summaries

- Louinder: No fixed time for completion. Vendor gives notice to complete in 21 days. Unable to. Terminates. Vendor unsuccessful. No unreasonable delay.
- Laurinda: Lease agreement. No time specified. Capalaba to delivery registrable lease. Tenant serves notice requiring performance in 14 days. Notice not valid as time was not reasonable and did not communicate consequences.

If no delay, consider if amounts to repudiation, including: unreasonable delay, general test, serious matter (Shevill)

CONSEQUENCES FOR AFFIRMING AND/OR TERMINATING

Requirements for election (*Immer per Brennan J*):

- When faced with a breach giving rise to a RTT, parties can elect to affirm or terminate the contract. This requires:
 - Unequivocal intention to either elect/affirm via conduct and/or words
 - Knowledge of the facts that give rise to right to terminate (law is unsettled in re to knowledge of legal right terminate)

If have elected to **affirm**:

- Irrevocable (*Foran v Wight*)
- Aggrieved party:
 - Once and for all breach: Loses right to terminate unless another fresh breach occurs UNLESS it is a continuing breach
 - Can get damages for breach (= their losses)
 - If anticipatory breach, no losses yet so not entitled to damages until actual breach occurs
- Both parties:
 - Still have to perform K (*Bowes v Chaleyer*)

- Are still entitled to benefit from the K (*White and Carter*)
- Can rely on subsequent events to terminate for breach (*Bowes v Chaleyer*)

If have elected to **terminate**:

- Irrevocable (*Bowes v Chaleyer per Higgins J*)
- Aggrieved party:
 - Can claim loss of bargain damages (loss of other party's further performance)
 - Can rely on different ground to terminate retrospectively
- Both parties:
 - Are relieved of their future obligations
 - Remain bound to perform accrued obligations
 - Are entitled to get their money back for total failure of consideration

Has the party communicated their election?

- Via words or conduct? Are they consistent with each other?

Right to cure a breach under CISG and UPIC

- CISG: Applies as part of domestic law for international sale of goods contracts
- UPICC: only apply if the parties adopt them themselves (i.e. "these provisions will govern our contract").
- Under these conventions, it makes it more difficult to terminate a contract.