

## 2: Termination for Repudiation and Delay

### Termination for repudiation

- ❖ Where one party manifests an unwillingness or inability to perform their obligations, the other party may have the right to terminate
- ❖ Repudiation “is not to be lightly found or inferred” (majority in *Shevill v Builders Licensing Board*) and is “a drastic conclusion” (*Woodar v Wimpay*)
- ❖ Repudiation gives aggrieved party the right to elect whether to affirm or terminate the contract
  - If aggrieved terminates they may also sue for damages
  - If they affirm they lose the right to termination and damages unless a further breach occurs
- ❖ Repudiation is established objectively on the basis of words or conduct
- ❖ Repudiation overlaps with both breach of a condition and breach of an intermediate term
- ❖ An important aspect of this doctrine is anticipatory breach
  - Occurs when one party repudiates their obligations under the contract prior to the time set for performance of these obligations
  - If an aggrieved party chooses not to accept a repudiation occurring before the set time, contract will continue on foot and there will be no right to damages unless and until a breach occurs
  - Anticipatory breach also covers when a real breach indicates that further obligations will not be carried out
- ❖ This doctrine is perhaps based on an implied term not to render future performance futile
- ❖ An aggrieved party should not be bound to a contract that the other party has indicated they will not perform

### Effective test for repudiation

- ❖ Are the circumstances such as to make a reasonable person believe that the party was unwilling or unable to perform obligations that related to the whole, were conditions, or were otherwise fundamental?
- ❖ *Carr v Berriman*: “A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him”
- ❖ Gibbs J in *Shevill v Builders Licensing Board*: “a contract may be repudiated if one party renounces his liabilities under it – if he evinces an intention no longer to be bound by the contract... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way”

- ❖ Deane and Dawson JJ in *Laurinda v Capalaba*: “an issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention... It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it”
- ❖ *Koompahtoo v Sanpine*: “The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or a fundamental obligation under it”

## Conduct amounting to a repudiation

- ❖ Express statements
  - A party who states “I will not or cannot perform” will be taken at their word
  - This is sometimes done to allow contracting partner to make other arrangements or to save face
- ❖ Repudiation based on words or conduct
  - Conduct showing an inability or unwillingness to perform
  - Repudiation inferred from a combination of events (where each event individually would not constitute repudiation)
  - Instalment contracts (breach of one or more instalments may indicate unwillingness or inability to meet other instalments)
- ❖ Erroneous interpretation of contract
  - The only situation where subjectivity is allowed for
  - Courts have held that the honest of a party propounding an incorrect interpretation of a contract will be relevant in assessing repudiation
  - Also relevant in cases where a party has repudiated by terminating wrongfully
  - This is only a defence to repudiation, not breach

### *Carr v J A Berriman Pty Ltd (1953) 89 CLR 327*

Re: conduct showing inability or unwillingness to perform

- *Involved a contract to build a factory*
- *Carr breached by failing to clear land (issues with wet weather) and failing to supply steel (a third party was appointed to ensure this happened)*
- *Berriman terminated for these breaches – if Carr had repudiated Berriman would gain loss of contract damages; if Berriman repudiated by wrongfully terminating Carr would be entitled to damages*
- Court held that Carr’s conduct constituted repudiated and Berriman’s termination was valid
- Clearly evinced an intention not to be bound by the contract by appointing another contractor to carry out a large part of his obligations
- Berriman obtained loss of bargain damages accounting for loss of profit