

LAWS1702 Final Exam Revision

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Example intro: “The outcome of this dispute turns on whether, 28 July, Damina had the legal right to terminate the contract. Damina can argue that, in breaching clauses 1 and 3, Paula had seriously breached the contract, entitling Damina to terminate. Damina might also argue that Paula’s breaches, taken together, manifest her repudiation of the contract.”

Talk about the effect, talk about election, talk about remedy, use headings

Procedural Questions:

1. Has an otherwise-good contract come to an end?
2. Are the parties obliged to complete the contract?
3. What remedies are available?

DISCHARGE -

Question 1: Has an otherwise-good contract come to an end?

1. Has the contract been discharged through *performance*?
2. Has there been *non-fulfillment of a contingent condition*?
3. Has the contract been *repudiated*?
4. Has there been a *breach*?
 - a. How do we classify terms?
 - b. What choices are available as a result?

1.0 ELECTION

TWO OPTIONS AVAILABLE:

Affirmation and termination

1. An innocent victim of a serious breach or repudiation can either affirm the contract:
 - Asserting a right to hold the other party to the existing and valid contractual relationship inter s; or
 - a. innocent party must await a fresh reason to terminate
 - affirmation is permanent, “irreversible”, “final and binding,” even in the absence of form, consideration or proof of detrimental reliance on the part of the non-electing party
2. Terminate the contract
 - Exercising an inconsistent legal power allowing that contractual relationship to be put to an end

- a. Where the breach renders future performance impossible, election becomes irrelevant and discharge will occur independently of election
 - must be clearly communicated (*Vitol SA v Norelf LTD*)
- b. no general duty of reasonableness in making the election (*White & Carter (Councils) Ltd v McGregor*)
- c. Effective upon notification:
 - i. [*McDonald v Dennys Lascelles Ltd*]
- d. “what is dead is dead”
 - cannot be unilaterally revived
- e. 2 questions:
 - i. Has the right (power) to terminate arisen?
 - ii. If so, has it been effectively exercised?

1.0 POSTPONING ELECTION RULE

- Innocent party need not terminate immediately (*Tropical Traders v Goonan*)
 - But the delay must not be unreasonable, or adverse or prejudicial to the party in breach.
- An innocent party may temporarily waive their power to terminate without thereby affirming the contract.
- *Coastal Estates v Melvende*: ‘he is not bound by acts which on the face of them are referable only to an intention to affirm the contract unless those acts are ‘adverse’ to another party’

EXCEPTION: indefinite postponement

- But election cannot be postponed indefinitely, especially by a party with knowledge of their rights
- While an express reservation or denial of an intention to affirm may serve to postpone an election for a time if that is reasonable and harmless in the

circumstances, it cannot ultimately deprive an unequivocal act of its elective character

- Legal consequences of such an act must follow however much the party entitled to elect might desire to repudiate them

Croft v Lumley

In all cases, a party confronted with the necessity of choosing between inconsistent legal alternatives has in the end to make his election not as a matter of obligation, but in the sense that if he does not do so, the time may come when the law takes the decision out of his hands by either:

- (a) holding him to have elected not to exercise the right which has become available to him OR
- (b) sometimes by holding him to have elected to exercise it

2.0 TWO TYPES OF AFFIRMATION

(Coastal Estates v Melvende)

1. Actual

- Intentional/conscious
- Requires knowledge of:
 - The facts giving rise to the right to terminate i.e. knowledge of the breach; and
 - One's legal rights in relation to the breach i.e. one's resultant power to terminate the contract
- Decision to affirm must be unequivocal, involving either express communication or conduct from which a clear inference may be drawn
 - Ask: Did P do any acts that recognised continued existence of the contract?
 - might involve a neutral or an adverse exercise of rights

2. Imputed

- Deemed election

- Doesn't require knowledge of one's legal rights
- Can be explained as an application of
 - a. the principles of estoppel OR
 - b. the rule against approbating + reprobating + more broadly, general considerations of justice
- Ask: Did P exercise any rights under the contract adversely to the other party, which, were on the contract not on foot, could not be justified

EXCEPTION: SILENCE/NON-PERFORMANCE

- As a matter of law, silence or non-performance may be sufficient to communicate an election to terminate.
- Failure to perform a contractual duty (or 'silence') is not necessarily always equivocal. An omission to act may be as pregnant with meaning as a positive declaration (Vitol SA v Norelf Ltd)

AFFIRMATION REQUIRES MORE THAN MERE LAPSE OF TIME (Coastal Estates v Melvende):

'He is not bound by acts which on the face of them are referable only to an intention to affirm the contract unless those acts are 'adverse' to another party'

- Has to be actual actions

Decision to affirm instead of terminate means the contract is still on foot and all rights are still enforceable.

2.0 PERFORMANCE:

1.1 EXACT PERFORMANCE

- Unless it can be constructed that all the parties contracted for was “substantial performance,” the general rule is that only exact performance can discharge a contract.
- Courts will inquire as to whether or not the obligations in question are ‘entire’ or severable. If an obligation is found to be entire, meaning that the exact and complete performance of the obligation is a condition precedent to enforcement, then the contract price is not recoverable (*Cutter v Powell*)
- Entire obligation – have to complete the entire thing, it’s whole and undivisible, before payment (*Baltic Shipping v Dillon*).

1.2 DIVISIBLE OBLIGATIONS:

- A contract that is found to include divisible obligations which apportion payment for distinct parts of the party’s performance, such as instalment agreements, generally requires exact performance of each segment in order to recover the contract price for that segment (**Government of Newfoundland v Newfoundland Railway Company**). Payment obligations arise, and become enforceable, upon performance of each part of the contract.

1.3 DOCTRINE OF SUBSTANTIAL PERFORMANCE:

- There is a tendency of the courts to construe against entire obligation
- The doctrine of substantial performance grants that a promisor may recover the contract price if performance was substantial, as long as the parties have not agreed that the performance must be exact and entire (*Boone v Eyre*).
 - a. The courts have put a common law gloss on the meaning of s18.