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### REMEDIES

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# TERMINATION

## 1. METHOD - WHAT GIVES RISE TO TERMINATION

**INTRODUCTION:** "P will argue that there is a right to terminate the contract because..."

### CLAUSE IN THE CONTRACT; OR

- Has a fixed term e.g. K will expire 5 years from 1 January 2017
- Has express termination clause e.g.
  - Can terminate on 1 months' notice
  - Can terminate if A breaches clause 2

### SUBSEQUENT MUTUAL AGREEMENT (*McDermott*); OR

#### 1. A later contract that subsequently ends the earlier contract

- "Contract to end a contract" needs to be a valid contract formation – there must be consideration
  - Executory contracts (both parties still have obligations to perform under the contract)
    - No issue of consideration as both parties mutually release each other from future obligations
  - Contract fully executed by one party – consideration issue
    - Party A has fully performed obligations can promise to release other party from its contractual obligations and
    - Party B who has not performed must provide consideration

#### 2. Termination inferred from a subsequent agreement

- A subsequent contract covering similar ground can infer that the initial contract is terminated (termination versus variation)

#### 3. Abandonment

- After a period of inactivity or other conduct that indicates the parties no longer desire their contract to be valid, the courts may treat the parties as having mutually agreed to abandon that contract - No complaints for so long that the contract seems to be abandoned

### BREACH; OR:

A breach of contract is committed when a party without lawful excuse fails or refuses to **perform** what is due from him under the contract, or performs **defectively** or **incapacitates** himself from performing.

- **NOTE: every breach gives rise to the right to damages, but not every breach gives rise to the right to terminate.**
- ONLY: breach of condition, serious breach of intermediate term or repudiation allow for termination.

#### 1. BREACH OF A CONDITION:

The aggrieved party will be able to terminate, regardless of how minor or inconsequential the breach (*Arcos v Ronaasen*)

- NOTE: Classifying term as condition not conclusive (*Shevill*)

#### TEST:

1. **Statute:** E.G. *Goods Act 1958* (Vic) s 17-20. There is an implied condition that:
  - **S 17(a):** Seller has a right to sell the goods
  - **S 18:** Goods correspond with the description (see *Arcos Ltd v Ronaasen & Son* – timber did not match description on delivery. P able to terminate even though minor breach)
  - **S 19:** Goods are reasonably fit for purpose
  - **S 20:** Bulk of goods correspond with sample
- NOTE: can contract out of these implied conditions (S61)
2. **Expressly stated by the parties**
  - Condition expressly stated in the K → *Schuler* (the use of the word 'condition is not decisive') + look at intention
  - If warranty in the K → 16(2) + look at intention [s16(2) = even if it is in the K, doesn't mean a condition]
  - **'Time of the essence':** technical term, which means that performance is a condition, i.e. strict requirement to perform on time
3. **Intention of the parties:**
  - Absent express classification by the parties or statute, the parties' intention is decisive. A condition is a term that the parties' regarded as **essential**.
  - **Essentiality test in *Tramways*:** was it so important that the parties would never sign if not a condition?
  - **Banks affirmed above test:** 'X would not have entered into K w/out compliance from Y with a particular term'.

- **Arcos**: breach of a condition gives aggrieved party right to terminate, even if breach was of little gravity or consequence.
4. **Conclusion:**
- If a condition – even the slightest breach allows for termination (**Arcos v Ronassen**)

## 2. SERIOUS BREACH OF AN INTERMEDIATE TERM

If the breached term is an intermediate/innominate term, the aggrieved party may be entitled to terminate depending on the gravity/consequences of the breach.

- **TEST FROM HK FIR SHIPPING (STRICT TEST):**
  1. Can the term be breach in a variety of ways?
    - If no – condition
    - If yes – intermediate term.
  2. Does the breach deprive the innocent party substantially of the benefit (as intended by the parties) of the whole K?
- **BUT ALSO (for greater flexibility, practical utility) Use Kirby J in Koombahtoo:**
  1. Does the breach go to the root of the K?
  2. Look at the gravity and consequences of the breach.

## 3. BREACH OF WARRANTY:

- **Progressive Mailing House**: Breach of warranty does not give rise to terminate, **only claim for damages.**
- NO breach allows termination.
- However, breach of a number of warranties can amount to repudiation.

## REPUDIATION (Renunciation):

One party evinces unwillingness or inability to perform the K, the other party has the right to terminate the K (**Carr**)

- Can be demonstrated by words or conduct.
- May result from combination of events (**Progressive Mailing House**)
- May concern whole contract or single term
- Term repudiated must be essential to justify termination OR
- Innocent party should not be bound by a contract that defaulting party is unwilling or unable to perform.

## TEST:

- **Term repudiated must be essential:**
  - “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 of a **fundamental obligation** under it” (**Koombahtoo**)

### 1. ANTICIPATORY BREACH; OR:

- Prior to performance, aggrieved party is entitled to terminate
- E.G: other party makes it clear they cannot perform.

#### Aggrieved party may elect to:

- **Accept** repudiation, terminate and sue for damages; **OR**
- **Affirm** contract, lose right to terminate and get damages, unless/until another breach.

### 2. WORDS/CONDUCT; OR:

- Express words
- Express conduct (objective)
- *Could hardly draw from any other inference than that building owner does not intend to take contract seriously, that he is prepared to carry out his part of the contract only IF and WHEN it suits him → right to T.*
- Intention must be judged from acts (**Carr**)

### 3. ERRONEOUS INTERPRETATION; OR

1. **Willy-nilly Test:** is party persisting in its erroneous interpretation *willy-nilly* in the face of a clear enunciation of the correct interpretation (**DTR Nominees**)
2. Did party objectively intend to abandon and not perform contract? If YES → repudiation (**Woodar Investment**)
3. Mistakenly treat contract as ended, when it hasn't actually ended.
  - If you are relying on right to terminate, this is not necessarily repudiation, if you are trying to protect your rights under the contract (**Eminence Property Developments Ltd**)

### 4. DELAY:

Failing to perform contractual obligations by the time expressed or specified for performance.

**\*\*NOTE:** Is NOT a separate ground for termination. Delay justifies termination ONLY IF it amounts to a breach of condition; serious breach of an intermediate term; or repudiation.

1. 'Time is of the essence' = condition. OR;
2. **Serious breach of intermediate term?**
  - **S 15 GA:** in sale of goods contracts, time of payment is **not of the essence, unless expressly mentioned.**
  - **S 41 PLA:** in sale of land contracts, time is **not of the essence, unless expressly mentioned** in the contract. OR;
3. **Delay = repudiation?**
  - Delay is so long in circumstances (which const. serious breach of an intermediate term) or party evinces unwillingness to perform (**Carr**); OR
  - Breaching party **given notice** to perform within time frame and fails
    - Can give notice with reasonable time for performance **immediately after breach (Louinder)**
    - After reasonable delay (**Louinder**)

#### **SO – WHEN CAN YOU TERMINATE?**

- Time of performance is specified and is of essence: Party can terminate after due date
- Time is specified but is not of essence: after due date, Party cannot immediately terminate but can immediately give notice
- Time of performance is not specified: Party can give notice only after reasonable time

**\*\*Notice Requirement – where there is NO essential time stipulation (if notice not valid → wrongful termination) (Capalaba)**

#### **1. NOTICE PROCEDURE:**

- **If contract specifies time of performance:** can give notice immediately after that date.
- **If contract specifies no time:** can give notice only after reasonable time.
- **Notice must have:**
  1. Must specify breach;
  2. Specify time for performance;
  3. Consequences for subsequent failure to perform;
  4. Failure to comply → right to terminate, sue for damages.

#### **2. CONSEQUENCES OF VALID NOTICE:**

As long as –

- The notice is given at the correct time (depends on express time stipulation); and
- The notice complies with the requirements in **Laurinda v Capalaba**
- Failure to comply with that notice can constitute a repudiation, which will give rise to the right to terminate the contract

