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SAMPLE from:
TERMINATION FOR BREACH

Repudiation?

- i. Define: where a party demonstrates an unwillingness (words or conduct) or factual inability to perform K, either in the future (anticipatory) or currently
 - X will argue Y repudiated his obligations under the K, which gives X a right to validly terminate.
 - However, Y would argue that X wrongfully terminated which gives Y a right to terminate the K and claim damages.
- ii. **State high test:** repudiation is a serious matter and is not to be lightly found (Shevill)
- iii. **Test:** 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 OR Carr v Berriman**)
 - The party's inability or unwillingness to perform must:
 - Relate to the whole contract
 - Relate to a condition of a contract i.e. so fundamental 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**)
- iv. **Objective test:** the conduct of a repudiating party is judged objectively (Laurinda), would the words or conduct of the party lead a reasonable person to conclude repudiation?
- v. **Anticipatory Breach**
 - The future aggrieved party can repudiate obligations under contract prior to the time for performance, if the other party has shown he is not willing or able to contract prior to performance.
 - AP entitled to terminate before actual breach.
 - If AP chooses not to accept repudiation, the K will remain on foot and they will need to complete their side of bargain. AP can terminate K after completing their side of bargain and can claim damages after breach.
 - No right to damages unless & until breach actually occurs.
- vi. **Conduct Commonly Amounting to Repudiation**
 - a. **WORDS OR CONDUCT**
 - K may be repudiated if (Shevill per Gibbs CJ):
 - A party renounces his liabilities under K,

- He evinces an intention to no longer be bound by K, judged by his conduct (*Carr v Berriman*),
- He intends to fulfil K only in a manner substantially inconsistent with his obligations and not in any other way (ie wanting to fulfil K only in his own way).
- ***Carr v Berriman***: K to build factory: nothing had been done to ready site for delivery. Carr (building owner) failed to produce assurance of completion within a reasonable time. Lack of possession of site (vitally important). Carr hired another subcontractor (deciding factor, but against the backdrop of all the other actions)
- ***Shevill***: The lessee was consistently making serious efforts to meet its rent obligations. Insufficient evidence to show that lessee's financial position would improve or deteriorate and how long difficulties will last.
 - Constant late payments of rent are NOT SUFFICIENT to show repudiation – needs something more, eg *Progressive Mailing*
- ***Laurinda v Capalaba***: Capalaba's attitude, as shown by the correspondence, was 'cavalier and recalcitrant' (unconcerned and uncooperative) – delay was accompanied by an intention not to complete the contract until it suited it BECAUSE of:
 - Multiple incorrect statements as to progress and unfulfilled assurances,
 - Failure to take preliminary steps to register lease or provide registrable lease
 - failure to obtain mortgagee's consent to registration of lease
 - failure to get lease stamped by stamp duties office

b. COMBINATION OF EVENTS

- A series of breaches that are individually too inconsequential to amount to repudiation can combine to do so (*Progressive Mailing House v Tabali*)
 - ***Progressive Mailing House v Tabali***: the tenant refused to pay rent for 6 months, damaged the property, refused to fix it when they were asked to do so, sublet the premises without the landlord's consent and misused the premises against local laws. *Affirmed Shevill*: failure to pay rent alone insufficient HOWEVER principle: failure to pay rent IN ASSOCIATION WITH OTHER BREACHES amounted to repudiation.
 - ***Laurinda v Capalaba***: lessor's conduct viewed as a whole indicated that the lessor was not prepared to perform the contract (see above).

c. INSTALMENT CONTRACTS – separate scenario (consider only if relevant)

- An instalment contract is a contract where obligations are divided into a number of instalments.

- **Goods Act 1958 (Vic) s 38(2):** *it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of a contract is a repudiation.*
 - In Exam: 'As per s 38(2) of the *Goods Act*, courts must have regard to the terms of the contract and the circumstances of the case in determining repudiation in an instalment contract.'
- If breach only relates to one or more instalments, to determine if it is repudiation of the entire contract, two relevant objective factors need to be considered (***Maple Flock v Universal Furniture Products***):
 1. Quantitative ration the breach bears to the K as a whole; and
 - ***Maple Flock***: small ratio of breach to the whole – defective delivery was “no more than 1½ tons out of a contract for 100 tons”. Fairly insignificant.
 2. Degree of probability/improbability that such a breach will be repeated.
 - ***Maple Flock***: likelihood of repetition was “practically negligible” as the breach was an “isolated instance” out of 20 satisfactory deliveries and the seller’s business was carefully conducted; probability of breach insignificant ≠ repudiation.

d. ERRONEOUS INTERPRETATION OF THE CONTRACT

- Consider if in the scenario, a party erroneously interpreted their obligations under the contract
- In such a case, in addition to the normal objective analysis of repudiation, consider the following test:
 - TEST: Is the party persisting in its interpretation willy nilly in the face of a clear enunciation of the correct interpretation? (***DTR Nominees v Mona Homes***)
- IN EXAM:
 - X will argue that Y is incorrectly interpreting his obligations under the contract and is therefore repudiating the contract, entitling X to termination.
 - However, Y will argue that his interpretation IS CORRECT and X’s attempts at terminating the contract amounts to repudiation.
 - Y will further argue:
 - X never tried to indicate the correct interpretation of the contract to Y.
 - ***DTR Nominees***: DTR (the vendor) acted on its view of the contract without realising that the purchasers

were insisting upon a different view UNTIL they purported to rescind. It was not a case in which any attempt was made to persuade the vendor of the error of its ways or give any opportunity to reconsider its position in light of an assertion of the correct interpretation.

- **Eminence Property Developments v Heaney:** A reasonable recipient of the notices in Heaney's position would have appreciated that, had the error been pointed out, it would immediately have been acknowledged by Eminence (the vendor). A reasonable would not reasonably have believed an intention to abandon and not to perform obligations under the contract, but simply that a mistake in calculation had occurred.
- Y held an honest and bona fide belief that his/her interpretation was correct i.e. a genuine mistake is an EXCUSE to repudiation
 - i.e. can look to subjective mindset of Y
 - **Woodar v Wimpey:** Wimpey (purchaser) had bona fide relied upon the express stipulation in the contract regarding compulsory acquisition to rescind and objectively, it was assumed that they would abide by the decision of the court as to the proper interpretation. Repudiation a DRASTIC conclusion
- X will argue on the basis of the following cases:
 - **Tramways:** Luna Park was also entitled to terminate the contract on the basis of repudiation. Tramways was prepared to continue performance of the contract but only on the basis of IT'S construction of the contract i.e. an average 8 hours of display of the roof boards
 - **Lord Salmon's dissent in Woodar v Wimpey:** too difficult to assess when someone's ACTUALLY being honest or just saying they honestly believed in the interpretation of the contract. Genuine mistake NOT AN EXCUSE to repudiation.