

3. Has the contract been terminated?

➤ By performance

- Entire contract or severable contract?
 - In an entire contract, exact performance is a condition precedent to payment (Cutter v Powell). ^ Only strict performance is allowed, but can excuse minor defects or trivial breaches (de minimis rule). ^
 - In a severable contract, work is priced accordingly to work done (Steele v Tardiani).
 - Whether a K is entire depends on the intention of the parties (Pacific Carriers v BNP)
- Doctrine of substantial performance (applies to both entire and divisible contracts)
 - If breach goes to root of K (essential condition), no substantial performance (Denning MR in Hoenig v Isaacs).
 - If ineffective for its primary purpose, no substantial performance. (Sachs LJ in Bolton v Mahadeva).
 - Takes into account the nature of defect and if the cost to remedy is a high proportion of K price: no substantial performance (Cairns LJ in Bolton v Mahadeva).
 - If SP: adjust K price by cost of cure (Hoenig v Isaacs, Bolton v Mahadeva).
 - If cost of replacement is too high, damages will be difference in value (Jacobs & Youngs v Kent).
- If not entitled to K price, consider whether a claim for quantum meruit as restitution for the work performed?
 - If freely accepted the work, or had the opportunity to reject the work but did not, obliged to pay a reasonable sum for work performed (Sumpter v Hedges).
 - May not be paid for time, but may be paid for expenses on materials used.

➤ By agreement

- Is there an express power to terminate according to terms of original agt?
- Can termination be inferred from a subsequent agt? (accord & satisfaction)

➤ By failure of a contingent condition

- Condition precedent → if condition fails, K void: (*Masters v Cameron* category III; *Meehan v Jones*) eg subject to finance.
- Condition subsequent → if condition fails, K voidable.

➤ For breach of a term

- Look for an express right in the clause to terminate for breach of K.
- *Determine the type of term in the clause:*
 - The **essentiality** test: The promise is of such importance to the promisee that he would not have entered into the K unless assured of a strict or substantial performance of the promise, AND this ought to have been apparent to the promisor (*Tramways v Luna Park*).
 - If breach goes to the root of K (*Associated Newspapers v Banks*) OR if the breach deprives the innocent party of substantially the whole benefit of the K (*Hongkong Fir Shipping*) → **condition** → right to terminate.
 - More inclined for a term to be a condition if damages would not adequately compensate the aggrieved party for the breach of the term (*Ankar v NW Finance*).

- **Warranty** → no right to terminate for being late. Damages only. (Bunge v Tradax)
 - An accumulative breaches of warranties may entitle the innocent party of the right to terminate.
- **Intermediate term:** The consequences of the breach can be serious or trivial. If serious, has the right to terminate; if less serious, damages only (Koompahtoo).
 - In “good condition” not a condition because it may be breached in a variety of ways (The Hansa Nord).
- **Is time of the essence?**
 - Does a clause expressly state that time is of the essence? If yes, there is a right to terminate. A notice may be served immediately on breach.
 - Test if time is of the essence: (i) nature of K and (ii) nature of clause (Bunge Corp v Tradax):
 - i. Sale of goods or services, who sets the dates for delivery or completion.