

Contracts Answering Guide

- Frustration and consequences
 - If frustration, no one can sue for breach. Immediately terminated.
- Assess whether there has been a breach of contract? Discharge?
- Consequences of Breach? Termination? Damages.
- Remedies for breach?
 - Damages
 - Measure of Damages
 - Causation (*March v Stramere*)
 - Remoteness (*Hadley v Baxendale*)
 - Mitigation (*Burns v MAN Automotive*)
 - Equitable Remedies
 - Privity?

Frustration

Contractual obligation becomes incapable of performance because the circumstances in which performance is ordered is **radically different** from which was undertaken at the time of contract.

1. Event must occur after formation;
2. Must occur without fault of either party;
3. Event must render performance of the contract impossible or radically different;
4. Neither party must bear a responsibility under the contract to assume its risk.

Examples –

- Supervening impossibility (*Taylor v Caldwell*)
- Supervening illegality (*Fibrosa SA v Fairbairn, Codelfa*)
- Commercial foundation defeated (*Krell v Henry*)
- Delay (*Eugenia*)

Frustration not ordered if:

- Express clause exists to allocate risk;
- If event is self-induced;
- A diminution in supply is not an “interruption” (*AGL Sales v Dawson*)
 - E.g. if you contract for x amount of gas, and it does not exist → not frustrated!

Eugenia – contract to hire ship – war clause said dangerous zones should be avoided – D travels via dangerous canal – war begins – ship is stuck and delayed – D called frustration at the outset of war and stopped paying. Held: D in breach of clause. The route was not required by D’s contract with owners of goods. Alternative route was available but more expensive.

- The delay was self-induced; no frustration if own fault.
- The voyage via the alternative route, although more expensive and onerous, was not held to be “radically different”.
 - an extra 35% delay in time via alternative route was not enough!

Consequences

Contract is immediately and automatically terminated as to the future. Unconditionally accrued rights are still enforceable, and **no one can claim for breach**.

Fibrosa – P had a contract with D for delivery of goods – 1/3 price payable upon initial order – P paid some it – frustration occurs – P wanted money back, D argued substantial work on goods was complete. Held: P entitled to money back → total failure of consideration as goods never delivered.

Codefla – Work must be complete in 130 weeks - Injunction sought by local residents – was going to be costlier for contractor – contractor prohibited from working between certain times. Held: Injunction rendered the work within the agreed time an impossibility, and a supervening illegality – P's obligation was radically different from that contemplated.

Krell v Henry – D rented P a room to watch coronation – didn't happen – frustrated - 25\$ payable in advance (paid by tenant) – remaining \$50 to be collected after coronation procession. Held: the deposit was an accrued right, and the \$50 was not yet accrued.

Discharge for...

MUTUAL PERFORMANCE

Has the plaintiff exactly or substantially performed?

Exception = condition precedent.

Cutter v Powell – Seamen died, and widow wanted wage money – wages were only due upon completion of voyage – did not satisfy condition precedent.

Steele v Tardiani – PoW agreed to cut 1000's of firewood into 2m x 12cm. Held: Severable obligations for each tree – payment due if firewood that met the specifications [Severable Contract]

IF Substantial Performance –

Honeig v Isaacas – interior work for D – pay as you go, and balance on completion – D paid half and used furniture – alleged it was defective – P sued for the balance. Held: lump sum does not always mean 'full performance' is a condition precedent. **Courts unlikely to deprive contractor of any payment because a few defects arise**. Full amount payable – deduction for defects.

Bolton v Mahadeva – defective hot water system installed – D refused to pay – substantial performance not found because of the **nature of the defect**. It did not do its purpose and cost of repair high @ 30% of the contract price.

CONSENT

Compromise → *McDermott v Black* – P drops fraudulent misrep for an extension of time to pay for shares. This informal promise was contractually binding when P tried to sue anyway; estopped.

Mutual Abandonment: mutual inaction or mutual abandonment?

Fitzgerald v Masters – Contract to buy interest in farm – leaves farm – silence for 16 years between owner. D's estate tries to cancel interest – but M upholds contract. Held: A long period of silence or

inactivity can amount to an abandonment. But, here, if P regarded the contract as at an end, one would expect P to demand money back. Not abandoned!

DTR Nominees v Mona Homes – both parties unrightfully terminate – 4 months of inactivity pass – neither party treated it as being 'on foot' & or intended further performance → abandoned.

(In absence of a fixed term) Implied term terminable upon notice –

Lavers v Foothills Water – domestic water supply contract and no express termination provision. Held: Terminable upon reasonable notice – in commercial contracts, more likely to imply these terms.

Gloria Jean's Cofeee – Reasonable time was held to be the time to enable the other person to deploy his labour and equipment in alternative employment → 10 years. (Large Investment Involved)

Kocalidis – small building joint-venture between soon ex-friends – court found implied term that either could terminate prior to construction starting.

Non-Fulfillment of a Contingent Condition of Performance

Buyer v Coolangatta – S and B contract for house sale – agreement subject to purchaser selling its own property (condition precedent) – B asked for too much money and couldn't sell his house – S waits 4 months and then terminates. Held: reasonable time for condition to be satisfied was implied – not satisfied – neither party in breach.

Breach? (Right to terminate?)

Has there been a breach of a condition, intermediate term or anticipatory breach (repudiation)?

[A] Condition

Can be expressed by the parties; or implied which depends on objective importance.

Essentiality TEST – considering contract as a whole, or from particular terms, the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of strict or substantial performance of the promise. (*Luna Park*)

Luna Park Ltd v Tramways – adverts placed on trams by P for D – guaranteed “for 3 seasons and at least 8 hours a day” – In the last season, P doesn’t display for full 8 hours. Held: Parties intended a strict obligation and it didn’t matter that P could not control the Tram Department. It guaranteed D; and in effect it was a condition.

Associated Newspapers – cartoonist has contract with newspaper to display cartoon on front page – for 3 weeks, it was on 3rd page. Cartoonist argued serious breach and left. D argued breach by going to rival newspaper. Held: It was an essential term because it was vital for cartoonist to get the public exposure he contracted for; he terminated.

Sheveill v Builders – tenant constantly paying late – alleged breach of essential term. Held: Rent is not automatically an essential term without more.

Gough v South Sky Investments – buyer signed contract to buy property in tower – after signing, building name is changed – buyer argued that’s a different place. Held: not an essential term. No evidence the previous name had any value or significance. B was still purchasing a unit in the tower.

- Courts are reluctant to allow termination for technical or minor breaches.
- Note: a “condition” label may be misleading (*Schuler*) – colloquial sense or essential term.
- Note: SOGA says title/description/quality terms are essential.

[B] Intermediate Terms

If it’s breach-able in several ways – court will “wait and see” to determine if termination right exists.

Fundamental Breach TEST → Does the breach go to the **root of the contract (i.e. substantially deprived off the whole benefit of the contract)** (*Hong Kong Fir/Koompahtoo*)

Hong Kong Fir – contract to hire ship – 24-month term – term provided it was to be seaworthy – it wasn’t for 20% time – hirer cancelled.

Held: Not all terms can be classified as conditions/warranties because breach of seaworthiness could be major (tiny leak) or major. Answering the test – the Charterer not deprived of the whole benefit because it was seaworthy for 17 months of the contract.

Koompahtoo – Land Council (K) and S entered into a JV to develop land. For the development, the land needed to be rezoned. It became clear after considerable costs had been incurred by the JV. Administrator was appointed to K to sought seek information from S concerning the financial position of the JV, including details of the borrowing amount used to secure the land, which the contract required it to maintain. S couldn’t provide the information. K purported to terminate the JV venture on the basis of various alleged breaches by S.

HC held:

- Termination was valid.
- Accepted the classification of contractual terms into conditions, warranties and intermediate terms (a breach which may give rise to a right of termination depending on the seriousness of the breach).
- Decision does not rest on breach of a condition. Even if you accept all the terms S failed to comply with were inessential, in that **not every breach would justify termination and that the obligations were "intermediate terms"**, S's breaches of its administrative obligations under the agreements were nevertheless gross and their consequences were serious.
 - → They deprived LC's to make informed decisions; and led to the unsuccessful attempts at the trial to explain the use of all the funds borrowed on the security of the land.
 - Went to the root of the contract; and deprived K of a substantial part of the benefit of the contract.
- Rationale = majority saw 'practical utility' three type classification as providing greater flexibility which enables better outcomes. The interests of justice favours "intermediate terms" so as to prevent contracts being terminated on "technical or unmeritorious" grounds.
- Dissent: Kirby J argued for two categories: essential and everything else. If it is not essential, the court can consider if there was a "substantial loss of benefit" without needing to create a redundant third category.

*affirms Luna Park condition/warranty approach. [might be useful if parties have indicated something is a 'condition'] but also adopts tripartite classification from *HK*.

Want to the right to terminate for breach of time stipulation clause?

CAN DO IF EXPRESSED AS ESSENTIAL OR IMPLIEDLY 'OF THE ESSENCE'

Bunge Corp New York – "period of delivery during May was at buyer's call but B should give at least 15 days prior notice" – B only gave 10 days' notice – seller terminated for breach of an alleged condition – B argued it did not deprive S of substantially whole benefit. Held: time for giving notice was implied to be of the essence, as it normally is in commercial contracts. Found to be a condition because it was a condition precedent to the seller's ability to perform another term of the contract.

➤ 'string contracts' are more likely to be of the essence.

No time stipulation clause?

Serve a notice, and failure to comply may allow the notice giver to infer repudiation. Notice must:

1. Advise of the obligation to be performance;
2. Fix a reasonable time of performance; and
3. State time is essential or that failure to comply will give rise to a right to terminate.