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TERMINATION FOR BREACH

Step 1 – Identify Breach

Here, [Party X] has potentially breached their contractual obligation/s to [PARTY Y] by:

1. [BREACH 1 – CLAUSE X]
2. [BREACH 2 – CLAUSE Y] ...

Every breach gives rise to damages but not necessarily termination.

Courts will encourage the performance of contracts, meaning the right to terminate will only be found in exceptional circumstances.

Step 2 - Classify the terms

In order to terminate for breach of contract, [PARTY Y] would have to show either:

- Breach of an essential term/condition (*Tramways*) i.e. [CLAUSE X] is a condition (actual)
- Sufficiently serious breach of an intermediate term (*Koompahtoo*) (actual)
- Repudiation (*Shevill*) by [PARTY X] (actual or anticipatory)

Whenever [PARTY Y] has a right to terminate for breach, he/she can elect to terminate the contract and sue for damages, or affirm the contract, lose the right to terminate and get damages for the particular breach.

Essential Term/Condition

If [CLAUSE X] is a condition, [PARTY Y] will be entitled to terminate the contract for any breach of that term regardless of the gravity (*Acros*). There are three ways of classifying a term as a condition...

1. Statutory Classification

If it is a contract for the sale, consider whether *Goods Act* applies.

s 18 Goods Act – Sale by Description: goods shall correspond with their description (*Acros*) – only if buyer relied on description – only applies to description of identity (not quality) of product (e.g. incorrect wood specifications in *Arcos* gave right to terminate despite only slightly not corresponding with description)

s 19 Goods Act – Implied Conditions as to Quality or Fitness: goods must be fit for the particular purpose made known to the seller – no implied condition where buyer has examined goods

s 61 Goods Act – Can be negated by express provisions in the contract

2. Express Classification in Contract

The parties may classify the term as a condition/warranty, but terminology is not decisive – depends instead on the construction of the contract (s 16(2) *Goods Act*; *Schuler*). In *Schuler*, the term was not a condition despite being expressly stated as such. It had been used in a general, non-technical sense.

Relevant considerations:

- Is the language promissory? (*Tramways*)
- Is the particular term emphasised over others?
- Correlative terms generally bear the same nature (*Bancks*)
- If nature of the term is such that breach is likely, it is unlikely that strict compliance is required (*Schuler*).
- If a proclaimed condition was used in a general, non-technical manner (*Schuler*; *HongKong Fir*)

[Party Y] will argue... [Party X] will argue...

3. Intention of the parties

The test for essentiality (per Jordan CJ in *Tramways; Bancks*) will be satisfied if [PARTY Y] would not have entered into the contract unless assured of strict or substantial performance of [CLAUSE X] and that ought to have been apparent to [PARTY X]. Consideration must also be given to the intention of the parties.

Whether this is satisfied depends on the construction of the contract (s 16(2) *Goods Act*) and is to be determined objectively (*DTR Nominees* [431]), at the time when the contract was made (*South Dowling* [59]).

Factors to consider:

1. General nature of contract, subject matter, and particular term
2. Preliminary correspondence (*Tramways*)
3. Prior court decisions
4. Language used – not definitive (*Schuler*)

An obligation described in clear and precise language is more likely to be a condition than one expressed in more general or vague terms (*Tramways*). In *Tramways* [303], “we guarantee” were words of strong obligation which emphasised the importance of the term to the parties.

By contrast, in *Amann* [558], a term requiring performance “as soon as possible” expressed a relative concept and, accordingly, was not a condition.

If language not clear, it may still be a condition (or intermediate term) (*Ankar*).

5. Other terms of contract

Whether the term is essential may sometimes be drawn from the other terms of the contract (*Gumland*), e.g. where there is an express contractual right to terminate in respect to breaches of some terms but not others may suggest that the latter terms are not essential (*DTR Nominees*).

6. Likely character of the breach

If every breach of a term is likely to deprive “substantially the whole of the benefit” of the contract – then the term is likely to be classified as a condition (*Schuler; HongKong Fir*).

But a term which may be breached in a variety of ways, from the trivial to the significant, is more likely to be an intermediate term than a condition (*HongKong Fir*). In *Hongkong Fir* [71], term requiring the ship to be “seaworthy” was not a condition because possible breaches ranged from minor matters to serious defects.

7. Damages adequate remedy?

If damages would not be adequate or would be difficult to prove, courts may be more inclined to treat the term as a condition (*Ankar* [556]). (e.g. lost sales or loss of reputation)

8. Whether breach likely

9. Corresponding obligations (*Bancks*)

10. Fairness if any breach gives right to terminate

The present case can be analogised/distinguished [CASE] ... [Party Y] will argue... [Party X] will argue...

Here, it appears that [PARTY Y] would not have entered into the contract with [PARTY X] unless assured of strict performance of [CLAUSE X] and [PARTY X] ought to have realised that. Accordingly, [CLAUSE X] is an essential term and [PARTY Y] may terminate and claim damages.

[OR]

Here, it appears that the parties would not have intended that any breach of [CLAUSE X] – no matter how inconsequential – would entitle [PARTY Y] to terminate and that the term is rather an inessential term capable of a variety of breaches [APPLY FACTS], i.e. an intermediate term. [Party Y] will still have grounds for termination if the breach is sufficiently serious.

TERMINATION FOR BREACH

Shevill v Builders Licensing Board (1982) 149 CLR 620

FACTS	Lessee was in financial difficulty and constantly late with rent payments. Lessor terminated under Clause 9(a) which provided that if the rent is unpaid for 14 days the lessor can terminate.
ISSUE	<i>Could the lessor terminate? Could he claim money owed and loss of future monies?</i>
HELD	Right to terminate only under express contract clause – could claim money owed but not loss of bargain damages (i.e. future monies)
PRINCIPLE	No breach of condition so no right to terminate under common law and claim loss of bargain damages.

Arcos v Ronaasen [1933] AC 470

FACTS	Contract for the sale of wood to be used to make barrels – some of the wood was fractionally different width to that specified under contract – made no difference to the use of the wood. The buyer terminated.
ISSUE	<i>Could the buyer terminate for breach?</i>
HELD	The buyers had the right to terminate the contract.
PRINCIPLE	Correspondence with description was a condition under Sale of Goods legislation. Where a term is classified as a condition, there is the right to terminate for every breach (regardless of the gravity of the breach).

L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235

FACTS	Clause 7(b): It shall be [a] condition of this agreement that (i) [Wickman] shall send its representatives...at least once in every week... Clause required W to make 1400 visits over contract term. W didn't make all these visits.
ISSUE	<i>Could S terminate the contract if W failed to make a single visit out of the 1400?</i>
HELD	Not a condition – no right to terminate – just because it is called a condition isn't conclusive. Courts will have regard to the terms and subject matter of the contract to decide whether the parties intended a condition in a technical legal sense.
PRINCIPLE	Just because it is called a condition isn't conclusive Where a particular construction leads to a very unreasonable result (where the nature of the term is such that breach is likely), it is unlikely that strict compliance is required

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 61 CLR 286

FACTS	"We guarantee that these boards will be on the tracks at least 8 hours per day throughout the season" – Tramways did not comply – only displayed for an average period of 8 hours.
ISSUE	<i>Was there a breach?</i>
HELD	Clause was a condition – Luna Park could terminate – it was a term of the contract which went so directly to the substance of the contract or was so 'essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all'
PRINCIPLE	The test of essentiality: is the promise of such importance that the promisee would not have entered into the contract unless assured of a strict [or a substantial] performance, and was this apparent to the promisor? Importance/essentiality derived from the words "we guarantee". Preliminary correspondence demonstrated importance of continuity of display