

## TOPIC 5 – TERMINATION OF CONTRACT; REMEDIES

### TERMINATION OF CONTRACT

Outline –

1. Termination by performance
2. Termination by agreement
3. Termination by breach
4. Termination by frustration
5. Termination by operation of law

### TERMINATION BY PERFORMANCE

When the parties perform fully and exactly their obligations to one another, the contract is terminated.

#### Is exact performance always required?

Where performance not as promised, this can be a breach of contract.

It becomes a question of fact whether –

- Entire contract
- Divisible contract
- The ‘substantial performance’ rule applies
- There is acceptable of partial performance
- Time for performance is a consideration

#### **Entire contract →**

- Exact performance of the whole contract is required before the other party’s obligations are triggered.
- Where there has not been exact performance, the party is not discharged from their obligations under the contract and may be sued for breach of contract: *Cutter v Powell*

#### **Divisible contract →**

- Provides, either expressly or impliedly, that performance by one party is due after the other has performed particular stages of the contract.
- Most construction contracts are structured in this way

### The 'substantial performance' rule →

- Unless exact performance is a condition of the contract, contracting parties who 'substantially perform' their obligations will be able to claim the contract price, subject to the right of the innocent party to deduct the amount required for exact performance against the full contract price: *Hoeing v Isaacs*.
  - o *Hoeing v Isaacs* → where Hoeing agreed to redecorate and furnish Isaacs flat for \$750. There was a minor defect, which would have cost \$55 to remedy. Court held that there has been substantial but not exact performance. Hoeing was entitled to recover the contract price less the amount required to finish it exactly.
- Note that defects in workmanship mean that the party has not substantially performed the contract: *Bolton v Mahadeva*

### Acceptance of partial performance →

- If the innocent party voluntarily accepts the partial performance of the other party, the person who chooses to accept the benefit under contract must be paid for on a quantum meruit basis, that is, a reasonable amount for the work done.
- Otherwise the innocent party is unjustly enriched
- Innocent party can accept partial performance → effectively, this is a new contract
- *Sumpter v Hedges*

### Time for performance →

- Performance should take place within the time specified or, if none is specified, within a reasonable time, taking into account the particular circumstances
- Damages is the usual remedy
- Termination for breach of condition will occur if it is expressly or impliedly agreed by the parties (or notice is given by the innocent party) that time should be 'of the essence'.

## **TERMINATION BY AGREEMENT**

Parties may agree to terminate contract in various ways –

1. Termination under the original contract
2. Termination by subsequent agreement
3. Contingent conditions

### **Termination under the original contract**

Express power to terminate → a contract may be terminated through the happening of an event as provided for in the original agreement: *Pan Foods Company Importers & Distributors Pty Ltd v ANZ*

Implied right to terminate → where a contract does not contain a provision as to its duration, the court may imply a right to terminate on giving reasonable notice to the other party:  
*Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd*

### **Termination by subsequent agreement**

A contract can be terminated by a further valid agreement.

A void agreement cannot rescind or vary a valid earlier contract: *Coghlan v Pyoanee Pty Ltd*

A subsequent agreement may be –

- Cancellation of original contract
  - o Mutual termination → both parties agree to cancel the original contract (where there are still obligations)
  - o Release → if one party has completed their undertaking and the other has not, then either by (i) agreement under seal OR (ii) by the giving of some further fresh consideration, the defaulting party can be released from obligation
  - o Accord and satisfaction → in discharging obligations under a contract, there must exist accord (agreement) and satisfaction. That is, the plaintiff accepts something else (new consideration) from the party who broke the contract in place of their cause of action.
- By substituted agreement
  - o A new agreement may be made providing for an alteration in the terms of the original contract so that a new contract is substituted for the old one

### **Contingent conditions**

The parties to a contract may make the performance of their contract conditional upon the occurrence of a specified event.

Such contingent conditions may take the form of –

- Condition precedent → either:
  - o A condition precedent to the formation or existence of a contract: *Whittle v Parnell Mogas Pty Ltd*
  - o A condition precedent to the performance of a party's obligations under a contract: *Sandra Investments Pty Ltd v Booth*
- Condition subsequent
  - o A condition contained in a contract upon the happening of which at a subsequent time the contract will be terminated
  - o In such a case the parties' obligation to perform the contract is immediately binding but will come to an end should the event specified in the condition occur: *Geipel v Smith*