

# CONTRACTS

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## Terms Implied by Custom

### Cooperation

**Rule:** General rule in all contracts that parties agree by implication to do all that is reasonably necessary to secure performance of the contract – **Secured Income**

- Easy to imply duty where the act is necessary to the performance of fundamental obligations under the contract – **Secured Income**
- Note: difficult to imply a duty to cooperate where the act in question is not essential to the performance of the other party's obligations and not fundamental to the contract (but necessary to entitle the other party to a benefit under the contract) – **Mason J, Secured Income**

**TEST:** Duty requires contracting parties to do such things as are 'reasonably necessary' to allow the other party the opportunity to obtain the benefits contemplated under the contract – **Secured Income**

- Assessed in reference to agreement itself
- Party is not required to disregard its own interests
- **Secured Income:** respondent did not 'capriciously or arbitrarily' refuse to grant lease
  - Respondent had grounds for denying lease; concerns about financial unsoundness
- **Beaton v McDivitt:** M had the obligation to do everything in their power to ensure that the land was subdivided

### Good faith

**Rule:** Where on party has a discretionary power, there is an implied obligation not to act too hastily to deprive the other party of the benefit of their contract – **Renard**

- Plays key role in qualifying the exercise of discretionary contractual powers
- Aus courts have understood the obligation of good faith as composite and interrelated to reasonableness – **Virk, Burger King, Renard**
- Reasonableness does not refer to the outcome, but rather to the quality of conduct – **Virk**
  - **Virk:** exercise of price-setting power was in line with acceptable norms of commercial conduct
  - **Renard:** Case suggests that party exercising a contractual discretion must act in an unbiased way, must not act unreasonably and perhaps must also make an attempt to verify the information in which the decision is based
    - Arbitrator found that principal's decision was grounded on 'misleading, incomplete and prejudicial information'
- Reasonableness can include a consideration of a party's real intention or purpose in exercising a contractual power – **Virk**
  - **Burger King:** suggests that duty should preclude a party from exercising a contractual power capriciously or for an extraneous purpose

- Franchisor refused to give approval needed for the franchisee to comply with the requirement
- Franchisor had sole discretion on approval
- Court found that franchisor was acting as part of a deliberate plan to prevent franchisee from expanding and to circumvent its contractual obligations in order to develop Aus market itself

Burger King – increasing acceptance that if terms of good faith and reasonableness are to be implied, they are to be implied as a matter of law

More readily implied in standard form contracts, particularly if such contracts contain a general power of termination

# Termination for Delay

A right to terminate may arise by breach of:

1. An essential time stipulation ('time is of the essence' condition)
2. where no time stipulation, by one party giving valid notice of reasonable time limit, which is breached – *Carr*

## 1. Is time of the essence?

**Rule:** Where time is of the essence, any delay amounting to breach of the time stipulation will entitle the aggrieved party to elect to terminate – *Carr*

### A. To determine whether time is of the essence:

#### **Likely**

- If a time is mentioned, this does not make it essential (needs to be something more)
- There is an express clause (stating that 'it is of the essence') with sufficiently precise language
- Commercial contracts: even without such a term, performance in a specified time is likely to be essential – *Burger King*
  - BUT *Sale of Goods Act* s 15 – the time for payment is deemed not to be of the essence of a contract of sale unless a different intention appears from the terms of the contract

#### **Unlikely**

- Where there is no time stipulated, time is unlikely to be of the essence - *Perri*
  - Court will infer that there is an implied term of 'reasonable time'
- Only an approximate time has been specified - *Laurinda*
- *Property Law Act 1958* (Vic) s 41 – in contracts for land, time is impliedly not of the essence (must be express)
  - In equity: performance on time is only essential if expressed or implied in contract

### B. Conclusion on essentiality question

- If time is of the essence and performance has not occurred in time, there is an immediate right to terminate – *Carr*
- If time is not of the essence, there is no immediate right to terminate and a notice to complete (with a reasonable time frame) must be given - *Laurinda*

## 2. If not, was reasonable notice given to make time of the essence?

### **Requirements for effective notice:**

- 1. Notice must specify a time for performance
- 2. Time given must be reasonable for completion:
  - Reasonability depends on circumstances: must consider what remains to be done, past notices, and importance of completion to the contract – *Laurinda*
  - 14 days is generally reasonable – *Laurinda*

- However, was not reasonable in that case because it was impossible to register the lease in that time
  - Expert evidence about time required to perform obligation may also be relevant - *Laurinda*
- 3. Notice must clearly convey either that:
  - A – the time fixed for performance is ‘of the essence’; or
  - B – that the party giving notice will regard themselves as entitled to terminate in the event that the notice is not complied with – *Laurinda*
    - *Laurinda*: phrase “if registration is not completed, then our clients naturally reserve their rights in respect of your client’s default” was not sufficiently clear

**Note:**

- The party issuing the notice must also be ready and willing to perform the contract
- A notice can only be given when the other party is already in breach of their temporal obligation, whether it is a stipulated time or implied as a ‘reasonable time’
- Notice can raise a term to essential status

## Effect of Termination

**Effect of Breaches**

- Voidable, not automatically terminated.
  1. Breaches of essential terms means voidable and damages.
    - Damages for loss of performance
  2. Serious breaches of intermediate means voidable and damages.
  3. Breaches of warranties means damages.
    - Damages are awarded to compensate loss.
- If termination is by express term (e.g. contract will come to end if breach occurs):
  - Then money paid under contract can be recovered through restitution

**Termination is prospective:**

- Comes into effect prospectively from the moment of termination
- Both parties are absolved from further performance
- Rights and obligations that have accrued generally remain on foot