

Termination of Contract

Terminology:

Term	Definition	Nature
Termination:	one part or both parties choose to end the contract by agreement or for breach.	Applies prospectively
Rescission:	remedy which can be sought by an aggrieved part where a vitiating factor exists.	Applies retrospectively
Frustration:	Ends the contract automatically when a frustrating circumstance exists	Applies prospectively
Repudiation:	A ground for termination; when a party is unwilling or unable to perform a contract	Ground for termination
Discharge:	Contract brought to an end (by performance, agreement, frustration or breach)	General term to describe ending of a contract
Condition:	Essential term that goes to the root of the contract	Gives right to terminate
Warranty:	Inessential term	May give right to terminate
Intermediate term	Also called innominate, and is in the middle of the preceding terms	Does NOT give right to terminate

When Can Termination Occur:

- By agreement under the original contract
- By agreement under a subsequent contract
- Common Law Rights:
 - For breach of condition
 - For sufficiently serious breach of an intermediate term
 - For repudiation
 - Delay

TERMINATION: UNDER THE CONTRACT

- Those found within the contract, either the original one, or a subsequent one.

Termination by AGREEMENT UNDER ORIGINAL CONTRACT:

- A contract can either have a fixed term (the contract ends at a specific date), or an express termination clause (something is stipulated that must happen before party X can terminate) to indicate its end.
- Absent a termination clause, an implied term can be made to indicate the end of a contract; it is impractical to have a contract which does not have an end period, binding parties forever.

Termination by AGREEMENT UNDER SUBSEQUENT CONTRACT:

- An example is a "contract to end a contract," which must comply with ordinary principles of contract formation (including consideration)
 - If the contract is executory (ie both parties still have obligations to perform under the contract), each party provides consideration in agreeing to release other party from obligations
 - If the contract is fully executed by one party (but not the other), it is necessary to have a deed, or ensure there is consideration provided by the party being relieved of performance. (These agreements are often called "accord and satisfaction")
 - "Accord and satisfaction": agreement where one party releases a non-performing party from any further obligation to perform a contract.
 - In return, a non-performing party provides fresh consideration (buys the release from further obligations)
- Termination can be inferred from a subsequent agreement where such an agreement covers similar ground to the original one.
- Abandonment can occur after a period of inactivity or other activity that indicates parties no longer desiring their contract to be existent.

TERMINATION: COMMON LAW RIGHTS

- Even if there is a right to terminate under the contract, CL rights are still relevant for:
 - identifying damages.

- “the adequacy of damages”.
 - In this case, since it was difficult for the administrator to be remedied by damages, it was a contributing factor for a breach to be found.
 - Breach of terms of **WARRANTY**:
 - No breach of a warranty gives right to termination, only entitlement to damages. Moreover, if a party terminates based on a breach of a warranty, they are allowing the other party to then terminate the contract based on that conduct, and seek damages
 - If a term can be classified into either an intermediate term or a warranty, the courts will prefer an interpretation for the former as there is more flexibility.
 - A term will only be a warranty only if no possible breach could give rise to an event which would deprive the aggrieved party of substantially the whole of the benefit of the contract (unless clearly expressed otherwise) (Lord Diplock in *Hongkong Fir Shipping*).
- EFFECTS OF RIGHT TO TERMINATE**
- When an aggrieved party has a right to terminate, they must **elect** to take one of two courses:
 1. **Terminate** the contract and sue for damages; **or**
 2. **Affirm** the contract and lose right to terminate (can't get damages for loss of bargain but can get damages for the particular breach).
 - If a contract is terminated, it is technically, 'frozen,' meaning:
 - Relieves both parties from further performance;
 - Does not affect rights already accrued (ie. those fallen due before termination), which are binding and enforceable.
 - NOTE: This differs from rescission for vitiating factors which invalidates/avoids the contract retrospectively
 - Significance of the Right:
 - **Can get out:** It means that the aggrieved party can exit the contract and avoid future obligations.
 - **Self-help remedy:** It is a “self-help” remedy. No need to go to court. Simply stop performing. In contrast, damages require legal proceedings.

- **Stakes are high if you get it wrong:** Serious consequences if a party purports to terminate when they don't have the right – amounts to repudiation – gives the other party the right to terminate and sue for damages for loss of the contract.

ANSWER OUTLINE

- Step 1 – Identify the breach.
- Step 2 – Classify the term:
 - Is it a warranty? Where *no* breach is likely to deprive the innocent party of substantially the whole benefit of the contract.
 - Is it an intermediate term? Where the term can be breached in a variety of ways, from the trivial to the serious (preferred because gives greater flexibility).
 - Focus is on consequences of breach, such as loss suffered by promise.
 - Is it a condition? Where *every* breach is likely to deprive the innocent party of substantially the whole benefit of the contract. (statutory or designated by the parties)
- Step 3 – Identify the consequences of the classification of the term:
 - Breach of warranty - no right to terminate (damages only).
 - Breach of intermediate term- look at gravity of breach and its consequences- Does it deprive the innocent party of substantially the whole benefit of the contract? If yes = right to terminate. If no = no right to terminate (damages only).
 - Breach of condition - right to terminate for any breach.
- Step 4 – Is there repudiation?
 - NOTE:
 - Right to claim for damages are present for any breach, no matter how trivial. However, the loss of bargain damages (highest form) are only available where contract is terminated.
 - Best to advise a part to get a court declaration for their right to terminate.

TERMINATION FOR REPUTATION

- A ground for termination where a party is **unwilling** and/or **unable** to perform their obligations under the contract

NOTE: Overlap between grounds for termination

- A breach of condition can constitute repudiation of a contract
- A sufficiently serious breach of an intermediate term can also constitute a repudiation
- The distinguishing point for repudiation is that it may occur before the time set for performance and give rise to a RTT before an actual breach occurs (anticipatory breach)
- Repudiation has been deemed by the courts as a serious outcome:
 - “a serious matter and is not to be lightly found or inferred” - *Shevill v Builders Licensing Board*
 - “a drastic conclusion” - *Woodar v Wimpy*
- **Test (objective):** The party’s inability **or** unwillingness to perform, either in words or conduct, to a reasonable person, must:
 - relate to the whole contract (ie all of the promisor’s obligations); or
 - to a condition of the contract; or
 - otherwise be “fundamental” (deprive the innocent party of substantially the whole benefit of the contract).
- *Carr v Berriman HCA 1953*
 - Carr, the landowner, contracted to have Berriman, the builder, construct a factory on his land. Carr fails to clear and excavate land, and turn possession of site to Berriman, breaching a section of the contract.
 - Berriman subcontracted the steelwork of the project to Arcos.
 - However, Carr entered into a separate contract with Arcos, disregarding B’s liabilities of having subcontracted the steelwork already to Arcos; Carr did not utilise the arrangement of B for the steel supply.
 - Berriman terminated, and Carr disagreed.
 - PRINCIPLE:
 - Carr was “prepared to carry out his part of the contract only if and when it suits him”
 - This “evinces an intention no longer to be bound by the contract... or shows that he intends to fulfill the contract only in a **manner**

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substantially inconsistent with his obligations and not in any other way”

- COURT HELD:
 - Termination was valid because Carr failed to rectify first breach of not moving the machinery, and actively sought another source of steel, despite Berriman having had arranged the subcontracting already.
 - The combination of the two breaches amounted to repudiation where Carr collectively evinced an unwillingness to perform the contract
- *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) HC:*
 - The parties entered into a lease agreement, where Capalaba undertook to procure the registration of a formal lease or to deliver a registrable lease to Laurinda. Laurinda authorised Capalaba to complete details for the registration and paid the relevant fees. Laurinda took possession of the shop.
 - A few months later, Laurinda sought the lease, and was told by Capalaba it would be delivered “shortly” and in the not “too distant future.” A total of 10 months after the original agreement, Laurinda solicited from Capalaba the lease within 14 days.
 - Capalaba replied on the 13th day and stated they were seeking instructions. The lease was in fact unregistered and Laurinda terminated.
 - COURT HELD:
 - Capalaba had repudiated and so Laurinda had a valid RTT. Capalaba evinced conduct to Laurinda that was “not only dilatory but also cavalier and recalcitrant”
 - Whilst time was not of the essence in the contract, Capalaba’s conduct in their delayed fulfilment of obligation to send the lease, and provision of inadequate responses when Laurinda followed-up on the matter amounted to repudiation.
 - PRINCIPLE:
 - “repudiation turns upon objective acts... disavowal either of the contract as a whole or of a fundamental obligation under it”
- *Shevill v Builders Licensing Board HCA 1982:*
 - There was a lease agreement between the two, RE land for a term of 3 years.
 - The Shevill’s guaranteed obligation of tenant (their company) of all the T’s and C’s, including that rent had to be paid monthly. Further, a termination clause was present (lessor can terminate after 14 days of unpaid rent)

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