

TERMINATION - BREACH

Arcos Ltd v EA Ronaasen and Son [1933]

Termination for Breach of a Condition

Facts

- Arcos (P) entered into a contract of sale for timber from Ronaasen (D) and specified that they wanted the timber to be 0.5-inch thickness as they were being used to make cement barrels.
- When D delivered the wood, most of the timber was bigger than 0.5 inch thickness.
- P rejected the wood as they did not conform to the specification they had expressed at the time of sale.
- An arbitration found that the delivered timber was still merchantable as they remained fit for the purposed of making cement barrels, therefore P could not reject the timber.

Issues

- Does P have the right to reject the goods as they did not conform to the specification within the contract of sale, even if they are merchantable?

Held

- A buyer in a contract is not bound to accept goods that do not conform to the contractual specification made at the time of sale.
 - This is upheld even if the goods are found to be commercially within and merchantable.
- P could reject the goods.

Principle

- Conditions of contract must be strictly performed. A breach of a contract no matter how trivial will entitle the aggrieved party to terminate.

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

Termination for Breach of a Condition

Facts

- Schuler (P) had a contract with Wickman (D) which included a clause which stated that D must send a sales person to every single company of car makers, on a specific list every week.
- Initially, D did not manage to make any visits, and this was waived by P.
- But when D did start making visits P was dissatisfied that not all visits were being made.
- P contended that the clause 7b stipulating that D had to visit all the companies on the list was a 'condition'.
- D had breached this condition and therefore, P could terminate the contract.
- P argued that the contract had been terminated wrongfully.

Issues

- Does calling a term of the contract a 'condition' make it a condition?

Held

- The clause was found to be a warranty upon the full reading and interpretation of the contract.
- Calling a clause, a condition does not make it a condition.
- P could not terminate the contract without giving D notice and allowing D to remedy the situation.

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938)

Termination for Breach of a Condition

Facts

- Luna Park (D) entered into a am agreement with Tramways (P) where P agreed to advertise for D on their trams for 3 seasons.

- An express term of the agreement provided that the ad will be on display for a least 8 hrs a day every season.
- D found out that the ads were not being put on display for 8 hrs.
- P admitted to this but argued the agreement was that the ads would be on display for an average of 8 hrs.
- D still considered P's actions to be a breach of contract and said they were no longer bound to the contract.
- P against the protestations of D continued to display the ads.
- D did not pay P for displaying these ads and P sued.
- D counter sued and argued that there was a breach of contract and therefore it was terminated.

Issues

- Did P breach the contract and as a result was the contract terminated?
- Was the term 'minimum 8 hours' or 'on average 8 hours' and is it a considered a condition?
- Does P's action constitute repudiation?

Held

- Set out test for how to determine whether a term is a condition (essential term), what is an essential term, forfeiting the right to terminate and wrongful termination. Also set out some relevant factors to whether a breach of the term justifies termination. – LONG NOTES*.
- NOTE: Condition – justifies termination. Warranty – does not justify termination.
- In this case the term was found to be a condition.
- The condition was that the ads should run 8 hours a day not an average of 8 hours per day.
- A condition was therefore breached, and the contract could be terminated by D.
- P was not entitled to damages, but D was.
- In terms of repudiation P's decision to continue to display ads on average of 8 hours per day was not pursuant to what was set out in the contract and therefore the D was allowed this to be viewed as repudiation and D could terminate the contract.

Associated Newspapers Ltd v Bancks (1951)

Termination for Breach of a Condition

Facts

- Bancks (D) agreed to produce weekly comics for Associated Newspapers (P)
- There was a clause in the contract which stipulated that D's comics would be published on the front page of its comic section on Sundays.
- D alleged that P repeatedly broke its undertaking to publish his comic on the front page and gave notice to P that they were terminating the contract.
- The week after D gave notice P printed the comics on the third page instead of the first.
- P argued that they had not breached the contract as the clause was a warranty not a condition.

Issues

- Was the clause a 'condition' of the contract?
- Could D rescind the contract?

Held

- The clause was found to be a condition not a warranty.
 - The exchange between the two parties were 1. Full page of comics. 2. Every week. 3. On the front page.
 - There is no argument that D's obligation to supply a comic is a condition. Therefore, the correlating obligations of the P would also be conditions.
- The court found that P had breached the clause and D could rescind the contract.

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962]

Termination for Breach of an Intermediate Term

Facts

- Hong Kong (P) leased one of their vessels to Kawasaki (D) for a period of 24 months.
- Cl 1 of the contract obliged P to deliver a 'seaworthy' vessel.
- Cl 3 obliged P to maintain the vessel's seaworthiness and good condition.
- Upon initial delivery the vessel was described as in 'reasonably good condition' yet required constant maintenance due to the age of the vessel.
- P's chief engineer was an incompetent and inefficient and the vessel suffered from many breakdowns and delays.
- D repudiated the contract, alleging a breach of the obligations of Cl 1 and 3.

Issues

- Are the clauses conditions of the contract?
- Does the breach cause delays of a sufficient degree to entitle D to repudiate the contract?

Held

- Discussed the three different types of contractual terms: warranty, condition and intermediate term. – LONG NOTES*.
- The term in question was an intermediate term.
- A lot of small defects could easily be dealt with and it would be unjustifiable for the D to terminate on these small defects. However, if the ship was out of order (serious breach) and brought about such serious delays that the D could not obtain benefit from having the ship then it was justifiable that the D could terminate. Therefore, this made this term an intermediate one.
- **Diplock LJ** – "substantially the whole benefit"
- In this case, a serious breach did not occur, and the delays were not enough to deprive the D of substantial benefit.
- D could not terminate the contract.

Ankar Pty Ltd v National Westminster Finance (Aust) Ltd (1987)

Termination for Breach of an Intermediate/ Conditional Term

Facts

- Ankar (P) entered into an agreement with Westminster (D) guaranteeing the performance of a hirer Manufacturing (M) under the contract for the hiring of machinery.
- Under Cl 8 D agreed to notify P if M was under default under the lease. Under Cl 9 if this was to happen then P and D would meet to consult on D's next course of action.
- M defaulted under the lease and D did not inform P of the default and there was no consultation.
- P sued for breach of contract and termination.

Issues

- Was the termination valid?
- Were Cl 8 and 9 a condition??

Held

- In this case P is entitled to terminate the agreement.
 - Obiter: Approval for intermediate terms – if these clauses were found to not be conditions, they would be intermediate and seriously breached.
- Factors Favouring it was a condition
- Neither clause is enforceable by way of an action for damages.
 - Both clauses had an obligation to give P notice so P could take action to safeguard its position
 - P would be liable, but the machinery on which the liability was owed was no longer owned by P.

- It is not an ordinary contract but a suretyship contract – there is a special relationship between surety and creditor.

Factors Favouring it was NOT a condition

- The clauses were not expressed to be conditions.
- There was no time fixed to give notice.
- The language was not clear on whether the clauses should be conditions or not.

Kompahtoo v Sanpine Pty Ltd (2007)

Termination for Breach of an Intermediate Term

Facts

- Kompahtoo (P) a land owner enters into a joint venture agreement for a development with Sanpine (D) who manages the project.
- The land never proceeded to be rezoned even after \$2 millions of liabilities were incurred due to a range of issues.
- P declared the contract breached due to administrative issues as D had not kept proper account of financial records of their joint venture.
- D said the terminate was invalid and the contract was still on foot.

Issues

- Was the termination valid?

Held

- The high court unanimously found in favour of the P however, they came to this conclusion through a different course of reasoning.

Gleeson, Heydon, Crennan and Gummow JJ (Joint Judgement)

- Upheld the judgment in *Hong Kong Fir* about the three different types of contractual terms.
- They also differentiated repudiation and renunciation. – LONG NOTES*.
- Stated that repudiation and termination should not be used interchangeably.
- In this case the term was an intermediate term and as this was a ‘sufficiently serious breach’ of a non – essential term that P could repudiate.

Kirby J

- Disagreed with the approach in *Tramways* regarding essential terms because it observes subjective intentions. Instead, essential terms should be determined by the objective result of the breach (Note: the actual consequence is not relevant).
- Disagreed with the endorsement of the tripartite classification system of warranty, condition and intermediate terms.
- He instead said that a bipartite classification system of contractual terms should be used, terms are either essential or non-essential.
- An aggrieved party can terminate for breach of an:
 - Essential term.
 - Non-essential term if the breach caused substantial loss of benefit.
 - Renunciation.
- In this case the second category was satisfied, and P could terminate.