

## Termination for Breach

Australia uses the tri-patriate classification to determine if the CL confers a right to terminate, which was adopted by the High Court in *Koompahtoo*, from *Hong Kong Fir* per Lord Diplock. X will want to terminate the K, whilst Y will want to keep the K on foot.

Termination: the contract is brought to an end and each party's future rights and obligations under it are extinguished (*Bowes v Chaleyer*).

### Termination by agreement

Parties can mutually decide to end their contract.

- Agreement under original contract: including fixed term contracts and contracts which provide for how termination occurs, e.g. landlord can terminate lease if rent is late (*Shevill*).
- Subsequent agreement: parties form a second contract (satisfying all elements of formation) agreeing to release each other from future obligations under the original contract.
- Abandonment: parties stop performing/enforcing contract for a significant period (e.g. *Mona Homes, Cedar Meats*).

### Termination for breach

#### 1. Intro

If the defendant breaches a condition (*Arcos*) or seriously breaches an intermediate term (*Hongkong Fir*) of the contract, the aggrieved party ('AP') will have a right to terminate ('RTT').

\*NB: all breaches entitle to aggrieved party to damages

X will argue that Y breached a condition or intermediate term ('IT').

#### 2. Identify breach

A breach is a failure to act in accordance with a contractual obligation, e.g. inadequate or late performance. Fault/moral culpability is irrelevant.

X will argue that Y's failure to complete [OBLIGATION] as per Cl[a] constitutes a breach of the K. Y may contend that his/her actions do not constitute a breach.

#### 3. Classify the term breached

'Tripartite' system.

##### 3.1 Warranty

Term is inconsequential; breach has no chance of depriving AP of their contractual entitlements (*Hongkong Fir* per Lord Diplock). (very uncommon)

Guarantee or assurance; express or implied promise that certain facts are as they are represented to be.

##### 3.2 Intermediate Term

A term which may be breached in many ways ranging from minor to serious (*Hongkong Fir, Koompahtoo*). (most common)

Courts prefer this classification as it is flexible.

The term could be an intermediate term, in which case [X] may be entitled to terminate depending on whether the breach deprived the innocent party of substantially the whole benefit of the contract *Hong Kong Fir* per Diplock LJ

- The assumption of the court is that when terms are inessential, there is no right to terminate *Koompahtoo*
- OTF, it does/does not deprive [X] of 'a substantial part of the benefit for which it contracted' *Koompahtoo*

## Termination for Delay

A delay or lateness in performing is not a distinct ground for termination but it may constitute a breach and/or repudiation.

*If [X] can establish that [Y's] delay is a breach of condition as time was of the essence, or amounts to repudiation, this is a serious breach that will give rise to a RTT for [X].*

### Has there been delay?

*X will argue that time was of the essence and therefore they have RTT as soon as there is delay.*

If express time for performance → Failing to perform contractual obligations by the time expressed specified for performance

If no express time for performance → Failing to perform within a “reasonable time” in all the circumstances

### Time is of the essence

If time is of the essence: timing is a condition, any breach of which entitles AP to terminate AND delay strongly suggests repudiation

If the parties have expressly indicated that the timing of performance is essential (usually by saying “time is of the essence”): courts will generally accept that time is of the essence.

If the parties have not expressly stated that the timing of performance is essential: time will only be of the essence if that was what the parties intended:

- Apply **Tramways** essentiality test: was performance on time so important to the promisee that they would not have entered the K unless assured of strict compliance?
- If there is no time for performance, this strongly indicates that time is not of the essence. Failing to perform in ‘a reasonable time’ in circumstances

### Time stipulations

**Goods Act s15**: “*Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.*”

- The time for delivery of goods is often construed as being essential
- But, the time for payment is generally not considered to be essential

**Property Law Act s41**: “*Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with the same rules.*”

Historically

- Under the common law: time stipulation presumed to be a condition (unless stated otherwise)
- Under equity: time stipulation presumed not to be a condition (unless expressed or intended to be)
- Under PLA Historical equitable position: where time not expressly stated to be of the essence – whether time is of the essence is a matter of construction – did the parties intend it to be a condition?
- Sale of goods/land: time is not ‘of the essence’ unless parties provide otherwise (**Goods Act s 15/Property Law Act s 41**).

### Time is not of the essence

If time is not of the essence: no RTT for breach, but a delay may still amount to repudiation, especially if there are multiple delays (**Laurinda**).

## Restrictions on RTT

Whilst prima facie X may have a RTT, Y will argue that certain restrictions may apply.

### Affirmation

If X has affirmed the K, then he/she is unable to terminate it and the K will remain on foot (*Immer; Tropical Traders*)

However, an RTT can still arise after affirmation if:

- If there is a new breach or repudiation (*Tropical Traders, Carr v Berriman*)
- If the breach is a continuing breach as opposed to a “once and for all breach” (*Immer*)

An example of affirmation and right to terminate for further breach (*Carr v Berriman*):

- Carr failed to excavate site for building within specified period, Berriman nevertheless made a subcontract for the supply of steel for the building.
- Affirmation: Making the contract for the steel after expiry of the excavation period was an affirmation as it was an act “consistent only with the continued existence of the contract”.
- Subsequent repudiation (new RTT): Berriman had a RTT as Carr had subsequently repudiated the contract when it appointed a different contractor to do the steel fabrication work.

### Ready and Willing

At common law, to be entitled to terminate a contract for breach, an aggrieved party must show that they are sufficiently ready and willing to perform the contract.

#### Actual Breach

X must show that they were ready and willing to perform the contract at the time of the breach

- A party must be ready to meet/tender their concurrent obligations  
*Sale of Goods Act s35*: seller must be ready to deliver goods and purchaser must be ready and willing to pay the price

#### Anticipatory Breach

##### General Test

X must show that at the time of repudiation they were not substantially disabled or incapacitated from performing (*Mason CJ, Brennan and Dawson JJ, in Foran*)

- CF: No requirement of readiness and willingness unless seeking damages (Deane J in *Foran* applied in *Sharjade*)

*Foran v Wight*: purchasers were not “substantially incapable” of raising finance at time of purchaser’s repudiation (two days before settlement due)

##### If Seeking Bargain Damages

Wronged party must show they would have been ready, willing and able to perform at the required time (*Foran; Sharjade*)

- Decided on the balance of probabilities
- Higher standard

##### After Repudiation

If the repudiation was not immediately accepted, the wronged party may not need to perform if the repudiation makes it futile or pointless for the wronged party to attempt to perform their obligations (on basis of estoppel)

*Foran v Wight*: the purchasers weren’t required to perform on the 22nd on the basis of estoppel as the vendor represented that it would have been “futile or pointless” for them to, and purchasers acted to their detriment in relying on this assumption in not continuing to seek finance

### Estoppel

If there is detrimental reliance on an assumption induced by the other party that the right to terminate would not be exercised, then X’s RTT will be restricted (*Legione*)

The representation must be clear and unequivocal

# Termination for Breach

## Termination under original contract

*Shevill v Builders Licensing Board* (1982) 149 CLR 620

### Facts

- Lease agreement
- Tenant repeatedly late with rent due to financial difficulties
- Lessor terminated relying on express termination clause
- Shevill owned bus company, was always falling behind on rent and suffering financial difficulties
- LL relies on express termination clause in contract:
  - o Clause 9(a) of the lease provided that if the rent is unpaid for 14 days the lessor can terminate the lease.

### Held

- Each little breach had cumulative effect of amounting to repudiation
- Held - test for repudiation: "... a contract may be repudiated if one party renounces his liabilities under it – if he evinces an intention no longer to be bound by the contract ... or shows that he intends to fulfill the contract only in a manner substantially inconsistent with his obligations and not in any other way ..." Gibbs CJ
- Held – application to facts - no repudiation: No evidence that lessee evinced unwillingness or inability to perform contract (lessee tried to meet its obligations). Constant late payments of rent, without more, not enough to show repudiation.

## Termination for breach of a condition

*Arcos v Ronaasen* [1933] AC 470

### Facts

- Contract for the sale of wood to be used to make barrels.
- Contract specified the thickness of pieces of wood to be half an inch.
- Some of the wood was of a fractionally different thickness (which made no difference to the use of the wood).
- The buyer purported to terminate the contract.

### Held

- The buyers had the right to terminate the contract.
- Correspondence with description was a condition under UK Sale of Goods legislation – here the goods didn't match their description (even though they were merchantable and the commercial equivalent).
- Where a term is classified as a condition, there is the right to terminate for every breach (regardless of the gravity of the breach).
- Here the breach was relatively minor but because it was a condition, even the most trivial breach gave rise to a right to terminate.
- The buyer's commercial / economic motivation for terminating was irrelevant (price of wood had dropped dramatically between signing of contract and buying the wood, so they wanted to go somewhere else to get it cheaper)
- "half an inch does not mean about half an inch"

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

### Facts

- Obligation that required Wickman to send sales reps to all car manufacturers in the big six every week, would be 1400 visits by sales reps
- Clause 7(b):

It shall be [a] condition of this agreement that (i) [Wickman] shall send its representatives to visit [the six largest United Kingdom motor manufacturers] at least once in every week for the purpose of soliciting orders for panel presses.
- This clause required Wickman to make 1400 visits over the contract term. Wickman didn't make all these visits.
- OTF in the first 8 months they failed materially on this
- Following 6 months there were minor failures
- Schuler sought to terminate

### Held

- not a condition – no right to terminate
- If it is clear that the parties intended a condition in a technical legal sense – then it is a condition. Here it was not clear. "Condition" may have different meanings. "Condition" may mean just the terms or provisions of the contract. (e.g. Terms and Conditions on any website)

# Frustration

## Destruction of subject matter

- Taylor v Caldwell* (1863) 3 B & S 826
- Held**
- Contract to hire music hall and gardens for grand concerts
  - Hall destroyed by accidental fire
  - Plaintiff argued: defendant in breach (not providing the hall) – sought recovery of advertising expenditure
  - Defendant argued: contract was frustrated (so not liable for damages for breach of contract)

**Held**

- Principle of frustration:
- “The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.”
- Application: The contract was frustrated:
- The parties contracted on the basis of the continued existence of the music hall.
- The music hall ceased to exist.
- Both parties are excused from performance of their obligations under the contract

- Goods Act 1958 (Vic), s 12*
- Goods perished after agreement to sell:** Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided.

## Disappearance of basis of contract

- Krell v Henry* [1903] 2 KB 740
- Facts**
- Contract to hire apartment in Pall Mall for two days (not nights), when the coronation procession of Edward VII was to take place and pass along Pall Mall. A deposit was paid.
  - The procession was cancelled due to the King’s illness (appendicitis).
  - The defendant refused to pay the balance of the agreed rent.

**Held**

- **Principles to be applied:**
  - o Each case must be judged on its own circumstances. Ask:
    - What, having regard to all the circumstances was the foundation of the contract?
    - Was the performance of the contract prevented [with such foundation]?
    - Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?
  - o If these questions are answered in the affirmative, the contract is frustrated.
- **Application to facts:** The contract **was** frustrated.
  - o The coronation procession was the foundation of this contract.
  - o The coronation procession’s cancellation prevented the performance of the contract.
  - o The cancellation of the procession couldn’t reasonably be supposed to have been in the contemplation of the parties when they made the contract.

- Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683
- Facts**
- Hutton contracted to hire a boat from Herne Bay Steamboat, to take passengers to view the Royal naval review and for a day’s cruise around the fleet. The review was cancelled at the same time as the coronation procession. The fleet was still there.

**Held**

- The contract was not frustrated.
- Mr Hutton’s purpose was not the basis of the contract: Mr Hutton, in hiring this vessel had two objects in view: first, of taking people to see the naval review, and secondly, of taking them around the fleet. Those, no doubt, were the purposes of Mr Hutton, but it does not seem to me that because, as it is said, those purposes became impossible, it would be a very legitimate inference that the happening of the naval review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of *Taylor v Caldwell*. On the contrary, when the contract is properly regarded, I think the purpose of Mr Hutton, whether of seeing the naval review or of going round the fleet with a party of paying guests, does not lay the foundation of the contract within the authorities.
- The object of the hire becoming limited was at the risk of Mr Hutton.