

SAMPLE

Termination for Breach

[P] can terminate the [contract] with [D] if [D]'s actions constitute a breach giving rise to an express or common law (CL) right to terminate.

Significance of right to terminate:

- *Can get out* – aggrieved party can exit the contract and avoid future obligations
- *Self-help remedy* – no need to go to court, simply stop performing; in contrast, damages requires 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**

Identify the Breach

[D] has breached [clause] by [conduct]. Therefore, [P] is entitled to damages for [D]'s breach regardless of whether she has a right to terminate.

Express Right of Termination

OTF, a breach of [clause] [does/doesn't] give rise to an express right to terminate under [clause/contract].

If there IS an express right to terminate: Per [clause], [P] is entitled to [remedy pursuant to clause]. However, if [P] wishes to obtain loss of bargain damages, [D]'s conduct must also give rise to CL right to terminate (*Shevill*).

Note:

- If there is an express right of termination, where aggrieved party has failed to comply with the **specified procedure**, his/her purported termination may be valid if the breach also gives rise to a right to terminate at CL
- CL rights to terminate may be excluded where the express terms provide a comprehensive code governing termination

Common Law Right of Termination

An express contractual right to terminate does not exclude the CL right to terminate (*Progressive Mailing House v Tabali*). Therefore, [aggrieved party] may have a right to terminate under the CL if:

1. [Clause breached] is a condition (*Arcos*)
2. [D's conduct that breached clause] constituted a serious breach of [clause breached] as an intermediate term (*Hongkong Fir; Koompahtoo*)
3. [D's conduct that breached clause] amounts to a repudiation of the contract.

Breach of a Condition

Regardless of whether [D]'s breach was trivial, [P] can terminate for [D]'s breach] if [clause breached] is a condition (*Arcos v Ronaasen*). Ultimately, this depends on the intention of the parties as determined by construction of the contract.

- Buyer's commercial/economic motivation for terminating not relevant where there has been breach of a condition (*Arcos v Ronaasen*)

Arcos v Ronaasen:

- Facts:
 - Contract for sale of wood to make barrels which specified thickness of pieces of wood to be half an inch

- *Breach*: some of wood was of a fractionally different thickness (which made no difference to use of wood)
- Buyer terminated contract as buyer could buy timber cheaper elsewhere
- Decision: breach of a condition and valid termination
 - Condition under UK Sale of Goods legislation that goods match their description
 - Still valid termination even though goods were merchantable

Express Designation by the Parties

OTF, [clause breached] has been expressly classified as a condition. The word 'condition' must have been intended to be used in its technical or legal sense and not its layman sense (*Schuler v Wickman*). Therefore, while the use of the word 'condition' is an indication, even a strong one, of an intention that [clause breached] be a condition in the legal sense, it is not conclusive (*Schuler v Wickman*).

Where unclear whether/not 'condition' used in legal sense, court will decide what intention of parties was having regard to:

- Terms of the contract (*Schuler v Wickman*)
- Subject matter of the contract (*Schuler v Wickman*)
- Where a particular construction leads to a very unreasonable result (where nature of the term is such that breach is likely), unlikely that strict compliance is required (analogue to *Schuler*)
- Where contract confers an express right to terminate for breach, this can support conclusion that it is condition as any breach will give rise to a right to terminate (only one factor)

Schuler v Wickman:

- Facts:
 - Contract for distribution of panel pressers where S manufacturer and W distributor
 - Clause 7(b) said 'it shall be [a] condition of this agreement that' W make 1400 visits over the contract term
 - *Breach*: W didn't make all visits
- Decision:
 - Not a condition, no right to terminate
 - 1, 2 visits out of 1400 visits may be missed due to sickness or car manufacturer asking them not to visit → too easy to breach

No Express Designation by Parties

Since there is no stipulation that [clause breached] is a condition, the parties' intention is decisive. [Clause breached] will only be a condition if the [content/requirements of the clause] was so important to [P] that [s/he] would not have entered into the [contract] unless [s/he] had been assured of [the clause]'s strict or substantial performance and this ought to have been apparent to the promisor, [D] (per Jordan CJ in NSW SC in *Tramways*, approved by HCA on appeal and affirmed in *Associated Newspapers*). The quality of essentiality depends on the K itself and its particular provisions as applied to the surrounding circumstances (*Tramways*). → consider factors from cases and OTF

- Note: courts prefer a construction that encourages continued performance rather than avoidance of the contract (*Ankar v NSW*)

Tramways Advertising v Luna Park:

- Facts:
 - Contract to advertise LP by 53 boards on trams
 - Contract stated 'we guarantee that these boards will be on the tracks at least 8 hours per day through the season'
 - *Breach*: T not displaying boards for at least 8 hours on each and every day