

Discharge for Breach

1. This depends on whether the term was a condition, intermediate or a warranty.

1. **Condition/Essential Terms require strict performance:** Ag party is entitled to terminate for any breach, however slight.
2. **Intermediate are capable of variety of breaches (*Bunge Corp*):** The right to terminate depends on the **gravity of the breach** and its **consequences**. Only a **serious breach** will permit termination. (*HK Fir Shipping; Koompahtoo*)
3. **Warranty:** Breach of that term will not itself give rise to right to terminate the contract. Party is restricted to damages.

Condition

- a. **Test of Essentiality:** Having regard to terms of contract and surrounding circumstances at time of contract formation, courts will objectively consider whether the promise is of such importance that promisee **would not have entered into the contract** unless **assured of a strict performance of the promise** and this **ought to have been apparent to the promisor**. (*Luna Park; Associated Newspaper*)

4. There are factors that need to be considered.

- **Promoting certainty:** More likely to be classified as a condition in a mercantile contract than non-commercial contracts. Is there need for certainty in dealings?
- **Language:** Obligations described in clear/precise language is more likely to be a condition. “we guarantee” compared to “as soon as possible” were words of strong obligation which emphasised the importance of the term to the parties. (*Luna Park*)
- **Likely character of the breach:**
 - If breach results in serious consequences and deprives aggrieved party of “substantially the whole of the benefit” which it was intended he/she should obtain from the contract- likely a condition.
 - Term which may be breached in a variety of ways (trivial to significant) more likely intermediate term.**Courts presume that parties are generally interested in performance and are unlikely to have intended one party to be able to terminate merely for a trivial breach.**
 - “seaworthiness clause” (*HK Fir Shipping*) and “good condition” (*Cehave Hansan Nord*) could be breached by the slightly failure or in variety of ways
- **Whether damages would be an adequate remedy:** If damages cannot adequately compensate the aggrieved party for breach of a particular term/damage difficult to prove, courts more inclined to treat the term as a condition. (*Koompahtoo*)
- **Previous decisions:** If term has been classified in previous decisions, it is likely to be followed in subsequent cases.
- **Importance of terms:** Inferences about the **probable importance to the parties** of strict performance of a particular term may sometimes be drawn from the other terms of the contract.

5. Weigh out the factors and draw a conclusion.

Intermediate terms

1. **Test:** The breach must deprive the innocent party “**a substantial part of the benefit for which it is contracted**” and **go to the root of the contract** (Majority in *HK Fir*)
2. **These are the factors that need be considered.**
 - **Koompahtoo**
 - Majority asked whether the breach went to the root of the contract. This takes into account
 - the nature of the contract
 - the relationship it creates
 - the nature of the terms
 - the kind and degree of breach
 - consequences of the breach for the other party

3. **Effect:** If sufficiently serious, there is right to terminate. If insufficiently serious, it is restricted to an action for damages (*HK Fir Shipping; Koompahtoo*)
 - Some delay caused by the need for repairs, ship was still made available for about 17 months -> Court held that it did not justify termination (*HK*)

Discharge by Repudiation

1. **Definition:** Where one party manifests an **unwillingness or inability to perform his/her contractual obligations**, the other party may have the right to terminate.
2. **Effect of Repudiation:** Both parties are released from all future obligations under the contract; Exemption clauses, limitation of damages clauses still continue to operate. Unconditionally accrued rights and causes of action which have accrued because of the breach are also unaffected by termination (*McDonald v Dennys*).
3. **Objective Test for Repudiation:** Whether or not a party has repudiated is determined on an **objective basis**. It suffices that, **viewed objectively the conduct of the relevant party has been such as to convey to a reasonable person**, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it. (*Laurinda; Shevill; Citati*)
 - *Would reasonable person in X's shoes think Y (renunciating party) was evincing the intention (word/conduct) they do not intend to perform their obligations or in manner substantially inconsistent with obligations? (Citati; Shevill)*
 - *Have they clearly dictated an inability to perform?*
4. **Factors to consider**
 - **Express statement of unwillingness or ability:** 'I will not or cannot perform'
 - **Repudiation based on words or conduct:**
 - **Conduct showing an inability or unwillingness to perform**
 - If time of essence: Strong inference of repudiation
 - Late payments; only deduced financial difficulty but no evidence Shevill was unwilling to comply with obligations (*Shevill v Builders*)
 - **Repudiation inferred from combination of events**
 - *Laurinda:* Delayed in fulfilling its obligation to procure a registered/registerable lease, and inadequate responses to progress of matter. Also did not satisfy the notice requirements as no reasonable time frame.
 - **Instalment contracts:** Breach or **one or more instalments** may indicate unwillingness/unable to perform the remaining obligations and is thus repudiating the contract.
 - **S34 The Sale of Goods Act** requires a court to have regard to the **contractual terms** and the **circumstances** of the case in deciding whether it amounts to **repudiation of whole contract** or **severable breach only giving right to claim for compensation**.
 - **Erroneous interpretation of the contract:**
 - Party may have repudiated the contract by **acting on or asserting an erroneous interpretation of the contract**
 - Party refusing to perform their obligations/will not accept performance from other except according to an incorrect interpretation of obligations may have repudiated
 - Party who attempts to terminate a contract where no such right exists may have repudiated.
 - **Inability in Fact:** Repudiation may also be established by showing that a party would, as a **matter of fact**, be unable to perform their contractual obligations.
 - factual impossibility as basis for repudiation "**must be proved in fact non supposition**"
 - aggrieved party must show the repudiating party was "**wholly and finally**" disabled from performing. *Citati*

Anticipatory breach

1. **Anticipatory breach** occurs when one party repudiates their obligations under the contract **prior to the time set for performance of those obligations**. (*Cehave (The Hansan Nord)*)
 - 2 forms: Renunciation by words/conduct and factual impossibility (*Citati*)
2. **Effect:** Aggrieved may accept the repudiation, elect to terminate the contract and claim damage before an actual breach has occurred. If they do not accept repudiation, contract continues and no right to damages unless and until an actual breach occurs.
3. **Termination Restrictions:**

- If obligations **dependent/concurrent** (eg sale, land contracts), aggrieved must show they were **ready, willing and able to perform** the contract at time for performance (*Foran v Wight*)
 - Can argue not required to be ready/willing/able because performance is “futile or pointless” following the other party’s repudiation (*Foran v Wright*)
- At time of **anticipatory breach**, terminating party has to show they **weren’t wholly/disabled** from performing contract (*Foran v Wight*)

Termination

1. **Choice:** Agg faced with an event that entitled him/her to terminate the contract has a choice between **terminating or affirming** contract. (*White & Carter*)
 - **Not obliged to accept the breach of contract** and can continue; thus was entitled to full payment for advertising; even though waste of time/money for other party. (*White & Carter*)
2. **Requirements:** Election requires (1) **unequivocal words/conduct evidencing an intention to elect**; must be (2) **communicated to the promisor- words or act**.
3. **Test:** *Election is not a matter of intention, but what a reasonable man would understand from conduct.* (*White & Carter*)
4. **Effect of Affirmation**
 - If Agg affirms, they remain liable to perform their part of contract; loses the right to terminate in respect of the event that gave rise to the right to terminate.
 - Other party can advantage of any supervening circumstance (*Bowes v Chaleyer*)
 - **Extension of time** when time of essence does not amount to affirmation; merely substitutes the new date for that in the contract and does not change the essential nature of time stipulation. (*Tropical Traders*)
5. **Effect of Termination**
 - If Agg elects to terminate, the contract is not rescinded from the beginning; Parties discharged from further performance, rights/obligations already accrued will continue unaffected (ie. Instalments) (*McDonald v Dennys*)

4. Relief

- **Estoppel:** Right to terminate might be restricted by equitable estoppel where aggrieved has induced the other to believe contract wont be terminated, and other relied on assumption (*Legione v Hateley*)
- **Relief against Forfeiture:** *Legione* sets out the factors relevant in deciding whether this might be granted
 - (1) Did Agg conduct contribute to other’s breach?
 - (2) Was the breach (a) trivial/slight and (b) inadvertent and not wilful?
 - (3) Damage/consequences did Agg suffer by the breach?
 - (4) Magnitude of purchaser’s loss/vendor’s gain if forfeiture were to stand?
 - (5) Is specific performance with/without compensation adequate safeguard for vendor