

Contract B: Exam Notes

LAW 2101

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CONTRACT B – Issue spotting checklist

KEY ISSUE: DID/DOES X HAVE A RIGHT TO TERMINATE

Is it a scenario where one of the parties wants to or has attempted to terminate a contract?

Consider – grounds for termination:

- Under express term
- By agreement
- Because of breach:
 - Breach of condition
 - Serious breach of an intermediate term
 - Repudiation
 - Instalment contracts; erroneous interpretation
 - Delay
 - When notice required; requirements of valid notice

Consider: are there any restrictions on the right to terminate?

- Affirmation
- X not ready and willing
 - Test if actual breach
 - Test if anticipatory breach
- Estoppel
- Relief against forfeiture

Conclude – yes or no

What are the consequences?

If there was a right to terminate?

- Right to elect to terminate or affirm
- Consequences of affirmation
- Consequences of termination

If there was no right to terminate?

- Wrongful termination is repudiation
- Other party may elect to affirm or terminate

KEY ISSUE: REMEDIES AVAILABLE FOR BREACH

Where a party has breached a contract (or threatens to breach) consider what remedies are available to the AP.

Damages for breach

- Measure – compensation principle
 - Expectation; Reliance
 - Loss of chance
- Limits:
 - causation,
 - remoteness,
 - mitigation,
 - nonpecuniary loss
 - loss of bargain damages and express termination clause

Specific performance/ injunction

- Limit: inadequacy of damages
- Discretionary factors: mutuality, personal services, clean hands, supervision, hardship, delay
- Equitable damages

KEY ISSUE: FRUSTRATION

Does a party want to avoid the contract because of radically different circumstances?

Test for frustration:

Examples: Destruction of subject matter; Death/incapacity; Disappearance of the basis of the contract (frustration of purpose); Disappearance of state of affairs essential to performance (assumed method of performance impossible); Illegality; delay

Limits:

- Foreseeable
- Allocation of risk: Express Provision in contract; Implied (wedding dress e.g.)
- fault

Consequences of frustration

- Contract automatically terminated
- Common law; Statute: ss 36, 37 and 38

KEY ISSUE: CAN X CLAIM PAYMENT UNDER A CONTRACT/FAILED CONTRACT

Is it a scenario where one of the parties wants to be paid under the contract (or failed contract)?

Action for debt

- Certain sum
- Right to payment has accrued: entire obligation; divisible obligation; periodical payments; substantial performance; payments independent of performance
- Mitigation and action for debt
- Deposits

Restitution: unjust enrichment claim?

Liquidated damages and penalties

- Activation of penalty doctrine
 - Payment on breach
 - Secondary stipulation
- Is it penal? – out of all proportion
- Effect if a penalty – CL and Eq

KEY ISSUE: DOES A VITIATING FACTOR EFFECT THE CONTRACT?

Is it a scenario where one of the parties wants to avoid its obligations under a contract? Can they argue not bound?

Common law vitiating factors:

Duress

- Impaired consent/lack of practical choice
- Caused by illegitimate pressure
 - Duress to person or goods
 - Economic duress (eg threat to breach contract)

Undue influence

- Actual undue influence
- Presumed undue influence
 - Relationship of influence
 - Deemed
 - In fact
 - Rebuttal of presumption if free and informed consent

Unconscionable dealing

- Special disability
 - Categories: drunk or mental disorder; lack of knowledge or education; emotional dependence
- Knowledge of SD such that transaction prima facie unconscionable
- Rebuttal if fair just and reasonable

Third party impropriety

- Notice of undue influence; unconscionable dealing; special wives' equity

Remedies – common law

- Contract voidable: can elect to rescind or affirm
- Rescission
 - Effect; Requirement of restitutio in integrum; Substantial restoration sufficient; Partial rescission
- Restrictions on rescission: Affirmation; Third party rights

Statutory vitiating factors:

Statutory unconscionability – ss20, 21 ACL

Misleading or deceptive conduct

- Identify conduct
- Trade or commerce
- Audience: public; specific group/individual
- Misleading or deceptive
 - General rules
 - Special rules if:
 - Silence: reasonable expectation of disclosure;
 - Future conduct/ opinion/ promise/ statement of law genuinely held; reasonable grounds (s4(2))
- Effect of exclusion clause

Statutory remedies

- S236 – damages; s237 other orders
- “loss or damage” – tort v contract
- Causation

Termination

[X] will argue that the contract is terminated by agreement/breach/repudiation of [Y]

Termination occurs when 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 under original contract

[A] will argue that agreement under the original contract allows termination of the contract.

Fixed term; Many contracts have a fixed term, after which the contract will terminate (e.g. the term of this lease for a period of 2 years from 1 January 2016 to 1 January 2018).

Express termination clause; The original contract may contain a clause specifying the date for cessation of the contract (*Shevill*). E.g. X may terminate on 1 months notice if Y breached clause 2 etc.

Implied right to terminate; If no express clause specifying termination date is included (i.e. indefinite contract), an implied right

to terminate may exist upon reasonable notice. This is based on the inference that the parties would not have intended the K to continue indefinitely. This requires reasonable notice, however, which requires the 'parties to bring an end in an orderly way to their relationship and a reasonable opportunity to enter into alternative arrangements'.

Contingent condition; If a non-party obligation does not occur, the contract may come to an end. E.g. buying a car subject to passing a road worthy test.

Termination by subsequent contract

[X] may argue that the original contract was terminated by effect of the subsequent contract

Express

A contract to end a contract must comply with ordinary principles of contract formation, including good consideration. What will be sufficient consideration depends on whether the contract is partly executive or wholly executory;

Wholly executory

- Both parties still have obligations to perform under the contract and each party provides consideration in agreeing to release the other party from the obligation. The consideration is the promise to not sue party A for breach of contract.

Partly executed

- If the K is fully executed by one party but not the other it is necessary to have a deed or to ensure that there is consideration provided by the party being relieved of performance (known as **accord and satisfaction**). Where uncertain, courts interpret 'A&S' as requiring performance of the promised act, not merely the promise'. This is an absence of consideration.

Implied

Where parties make a subsequent contract covering similar grounds, it can sometimes be inferred that they intended to terminate the initial contract.

In the absence of an express term explaining the relationship between the two agreements, whether a subsequent agreement carries or terminates the original K will depend on the **intentions** of the parties as disclosed by the terms and circumstances of the subsequent agreement. Either;

- The parties intended the subsequent agreement to replace and thus terminate the original K; OR
- They may have intended the subsequent agreement to merely vary or supplement the original K.

Inferred where; Because the obligations in the subsequent agreement are inconsistent with those in the original K, the two agreements cannot be supposed to have intended to co-exist.

Not inferred where; The subsequent agreement cannot stand alone as a new and independent K. Intention to terminate cannot be

presumed to have intended to abandon their rights under the original K.

Abandonment

After a period of inactivity or other conduct that indicates the parties no longer desire their contract to be on foot the courts may treat the parties as having mutually agreed to abandon that contract.

- May be inferred whether the parties indicate that neither considers the K should be performed further.
- Estopped from relying on the provisions of the k where they have induced an assumption that they have abandoned their contractual rights.
- Courts may infer abandonment where an 'inordinate' length of time has been allowed to elapse 'during which neither party has attempted to perform or called on the other to perform'.

- *DTR Nominees v Mona Homes*

Termination for breach

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

Step 1: Identify the breach

Note the contractual provision and what happened OTF. The contractual obligation and the nature of non-performance need to be

identified. A breach of a K occurs whenever one of the parties does not perform their contractual obligations, e.g. inadequate or late performance (fault/moral culpability is irrelevant).

Step 2: Classify the term

- Is it a **condition**? Was the term so important that the promisee would not have entered into the K unless assured of strict performance? (*Tramways*). High threshold (*Ankar*).
- Is it a **warranty**? Where no breach is likely to deprive the innocent party of substantially the whole benefit of the K. (IT is preferred over warranty - warranty is uncommon)
- Is it an **intermediate term**? (most common). Where the term can be breached in a variety of ways, from the trivial to the serious (*Hong Kong*)

Intermediate term vs Condition

Suggests intermediate term	Suggests condition
- Term is very easy/likely to breach (L Schuler AG)	- Term is very important to the parties (<i>Tramways; Ankar; Bancks</i>)
- Term can be breached in many ways from minor to serious (<i>Hong Kong; Koompahtoo</i>)	- Other parties corresponding obligation is a condition (<i>Bancks</i>)
- Other terms are expressly designated as conditions, but not this one.	- Performance has commenced (<i>Bancks</i>)
- K provides an alternate remedy for breach	- Consequences of breach are severe
- Consequences of the breach are trivial (<i>Hong Kong</i>)	- Damages inadequate to compensate for breach/loss is difficult to prove (<i>Ankar</i>)
- Damages would be a sufficient remedy for breach	- Parties pre-contractual correspondence suggests term is a condition (<i>Tramways</i>).
- Unclear language (<i>Ankar</i>)	

Step 3: Identify the consequences of the classification. Can AP terminate?

- Breach of a **condition**? CL right to terminate for any breach of that term.
- Breach of **warranty**? No right to terminate no matter how severe the breach (damages only).
- Breach of an **intermediate term**? Must look at the gravity of the breach and its consequences. Does it deprive the innocent party of substantially the whole benefit of the K? Must be sufficiently serious (*Hong Kong*).
 - If yes, right to terminate
 - If no, no right to terminate (damages only)

NOTE - damages will be available to compensate for any particular breach, but loss of bargain damages are only available where the contract is terminated). Courts encourage performance rather than avoidance.

Right to Terminate - Overview

Whenever there is a breach of K there is a right to damages to compensate the innocent party for the breach if the K had been performed as promised. All breaches give rise to damages for breach of a particular term.

Right to terminate; only available for some breaches. Namely breach

Condition	Yes, right to terminate	If the breached term is a condition , the aggrieved party will be entitled to terminate the contract for any breach of that term, even if it was of little gravity or consequence; EVERY breach allows for termination.
Intermediate term	May be right to terminate	If the breached term is an intermediate term , the aggrieved party may be entitled to terminate, depending on the gravity and consequences of the breach. A serious breach allows for termination.
Warranty	No right to terminate	If the breached term is a warranty , <u>no breach allows termination</u> ; the aggrieved party will be entitled <u>only to damages</u> .

of a condition, serious breach of an intermediate term and repudiation (there may be more than one ground for termination).

Effect of right to terminate; When an aggrieved party has a right to terminate, they can elect to take one of two courses;

1. Terminate the K and sue for damages; or
2. Affirm the K and lose the right to terminate (cant get damages for loss of bargain but can get damages for the particular breach).

Breach of a Condition

A condition is an essential term that goes to the root of a contract. It may be classified as a condition by statute, by the parties or by the courts on the basis of the construction of the contract. A term may be classified as a condition on the basis of the express words used by the parties. The use of the word condition is not conclusive (*L Shuler v Wickman*). Whether a term is a condition depends on the intention of the parties determined by construction of the K.

Test; The *Tramways* essentiality test

Whether it appears from the general nature of the K considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the K unless he had been assured of a strict or substantial performance of the promise... and this ought to have been apparent to the promisor.

The party's probable intentions as to the significance of particular terms are determined objectively, having regard to the terms of the K and the surrounding circumstances. The question of essentiality falls to be considered not at the time of the breach, but at the time when the K was made. If a term was a condition at the time the K was entered into, it does not lose that quality because the term is now of less value of significance to the promisee.

Relevant factors in assessing whether a term is a condition	
General nature of the K	
The particular term	
Subject matter of the K	
Language used	Clear and precise language is more likely to be a condition than one expressed in general or vague terms (<i>Tramways</i>).
Other terms of the K	Inferences about the probably importance to the parties of strict performance of a particular term may sometimes be drawn from the other terms of the K.
Are damages an adequate remedy?	If damages would not adequately compensate the aggrieved party for the breach of a particular term or would be difficult to prove, courts may be more inclined to treat the term as a condition.

Relevant factors in assessing whether a term is a condition

Likely consequence of the breach	If every breach of term is likely to have serious consequences for an aggrieved party - depriving the aggrieved party of substantially the whole benefit which it was intended, he or she should obtain from the K - then the term is likely to be classified as a condition. Conversely, a term which may be breached in a variety of ways, from the trivial to the significant, it is more likely to be an IT than a condition.
Prior court decisions	If a term has been classified in a previous judicial decision, that classification is likely to be followed.

Serious Breach of an Intermediate Term

AP can only terminate if the breach was so serious that it deprived them substantially of the benefit for which they contracted; breach must go to the 'root' of the contract. (*Hongkong Fir, Koompahtoo*).

Relevant factors (*Koompahtoo*); Nature of the K and the parties relationship. Nature and importance of the term. Nature and extent of breach. Consequences of breach for AP. Adequacy of damages in remedying AP's losses.

Look to the gravity and consequences of the breach - can terminate for a breach that; "Deprives the innocent party of substantially the whole benefit of the K" (*Hong Kong Fir*).

Warranties

No breach of warranty gives a right to terminate, only entitled to damages. A clause is only a warranty if no possible breach of that clause would give rise to an event that would give rise to an event that would deprive the innocent party of the substantial benefit of the K or

unless it is clearly intentionally expressed to be a warranty or if legislation has prescribed it to be so (*Hong kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* per Lord Diplock). Be cautious in characterising a term as a warranty. It is preferable to classify a term as an intermediate term