TOPIC 1 – TERMINATION BY AGREEMENT

AGREEMENT

Parties may terminate a contract by agreement. This may be through termination by agreement under the original contract, expressly under a subsequent contract or inferred under a subsequent contract.

TERMINATION BY AGREEMENT UNDER THE ORIGINAL CONTRACT

- Many contracts have a **fixed term**. They will expire or terminate at the end of the term.
    - *e.g. The term of this lease is for a period of 2 years from [commencement date}*
- It is also common for contracts to include an **express** termination clause:
    - *e.g. The Customer may terminate this contract at any time on 30 days written notice* (broad)
    - *e.g. The Customer may terminate the contract immediately on written notice if the* Supplier breaches clause X and fails to remedy the breach within 30 days of a written request from the Customer (more specific)
- Where there is no fixed term or termination clause (an indefinite contract), there may be an **implied** right to terminate on reasonable notice
- Shevill v Builders Licencing Board
    - **Express right to terminate an agreement**
    - Clause 9(a) of the lease provided that if rent is unpaid for 14 days lessor can terminate the lease
    - Lessee was in financial difficulty and constantly late with rent payments.
    - Lessor terminated under the express termination clause

TERMINATION BY AGREEMENT UNDER A SUBSEQUENT CONTRACT – EXPRESS

Termination by express agreement

- Another way of terminating is by a parties agreement under a subsequent contract to terminate the original contract after the original contract has been entered into
- 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 termination contract is partly executed or wholly executory:
    - If the contract is executory (i.e. both parties still have obligations to perform under the contract), each party provides consideration in agreeing to release the other party from obligations i.e. promise not to sue for breach of contract
    - If the contract is fully executed (obligations are performed) by one party (but not the other), it is necessary to have a deed, or ensure there is consideration provided by the party being relieved of performance. (These agreements are often called "accord and satisfaction")
        - Party A who has fully performed obligations promises to release other party from its contractual obligations (i.e. not to sue for breach of contract) and Party B who still has obligations to perform provides fresh consideration, like money (or a deed is required)

TERMINATION BY SUBSEQUENT AGREEMENT - INFERRED

- **Termination inferred from subsequent agreement**
    - Where parties make a subsequent contract covering similar ground but doesn't expressly terminate the original contract, it can sometimes be inferred that they intended to terminate the initial contract in contrast to just varying it
- **Abandonment – another way that a contract can come to an end (effectively by agreement between parties)**
    - 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
    - A contract may be mutually abandoned when neither party takes steps to perform or have the other party perform - a court may infer abandonment by parties conduct
    - DTR Nominees v Mona Homes (see repudiation)

TOPIC 2 – TERMINATION FOR BREACH

BREACH

WHAT IS A CONTRACT?
An agreement or set of promises that the law will enforce (i.e. for breach of which the law will remedy)

COMMON LAW RIGHT TO TERMINATE
The common law right to terminate co-exists with an express right to terminate (e.g. Shevill v Builders Licensing Board - Termination By Agreement)

- unless common law right to terminate is expressly excluded, or the express terms are clearly intended to be comprehensive (e.g. Cth v Amann - Damages)
- *e.g. failure to comply with a specified procedure under an express termination clause, doesn't preclude reliance on the common law right to terminate*

WHAT IS A BREACH?

- A breach of contract occurs whenever one of the parties to the agreement did not perform its obligations as required under the contract
  - This is irrespective of any fault or motivation they must simply not do what they promised to do under the contract.
- **Identify the breach:** first identify the contractual obligation and then the nature of the non-performance need to be identified OTF

RIGHT TO TERMINATE - ONLY FOR SOME BREACHES

- Not every breach allows termination of the whole contract (though every breach gives rise to damages)
- *party effected by the other parties breach is an innocent or aggrieved party
- Breaches that give rise to a right to terminate (and also damages) are:
  - Breach of a **condition**
  - Serious breach of an **intermediate term**
  - **Repudiation**
- Note: there may be more than one ground for termination in any particular fact scenario

Once you have identified the breach you may then need to determine if the party has the right to terminate the contract for that breach and this will require you to classify the breached term to work out if it is a condition or a serious breach of an intermediate term.

RIGHT TO TERMINATE - CLASSIFICATION OF TERMS

CONDITION = YES, RIGHT TO TERMINATE

- **Condition**: an essential clause that is of such importance to the party that they would not have entered into the contract unless assured strict performance of it
- Conditions are an essential term going to the root of the contract which the parties intended that nay breach would give a right to terminate
- If a party has breach a contracted and the breached term is a condition, the aggrieved party will be entitled to terminate the contract for any breach of the term, even if it was of little gravity or consequence; EVERY breach allows for termination
- A clause may be classified as a condition by statute (*e.g., under sale of goods legislation*)
  - Arcos v Ronaasen; L Schuler AG v Wickman Machine Tool Sales Ltd; Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd; Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd
- Otherwise, whether a clause is a condition or not is determined as a matter of construction of the contract, having regard to the probable intention of the parties (did the parties intend the clause to be essential)
  - This will be determined by application of the Tramways' essentiality test
  - This may be evidenced by express (intended) designation of the parties:
    - Gumland v Duffy Bros Fruit Market (damages)
    - However, the use of the word "condition" is not conclusive --- L Schuler v Wickman
- Consider the following when determining whether a clause is a condition:
  - General nature and subject matter of the contract – what is the contract about
  - Particular term or language used (e.g., "condition", "we guarantee") – clearly and precisely worded means it is more likely to be a condition as this indicates the importance of the term to the parties/generally wording less likely (Luna Park) (L Schuler)
  - Other terms of the contract can help you work out the importance of the clause your analysing (e.g., clause giving right to terminate for material un-remedies breaches; interrelation

between parties' obligations) – e.g. only some clauses are called conditions (Associated Newspapers v Bancks) (L Schuler)
    - Whether the breach is likely- if a breach is likely then it is less likely the parties placed such importance on strict compliance with that term and intended it be a condition (L Schuler v Wickman)
    - Likely consequences of breach- if any breach of the clause would be serious then it would be more likely to be held to be a condition/if it could be breached in various ways including those with non-serious consequences then it is less likely that the clause was intended to be a condition (Hong Kong Fir)
    - Damages adequate remedy? – if damages would be an adequate remedy then this points against the clause being intended to be a condition because the party is protected without needing the right to terminate/if damages would be difficult to prove, assess, or wouldn't adequately compensate for the breach then the court will be more likely to allow for its termination upon breach to protect the parties interests (Ankar v National Westminster Finance)
    - Prior court decisions

INTERMEDIATE TERM = MAY BE A RIGHT TO TERMINATE

- Here you need to classify the term as intermediate first and then as serious
- An intermediate term is less than a condition but more than a warranty and can be breached in a variety of ways ranging from the trivial to the serious
- 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.
- A serious breach which deprives the innocent party of the substantial benefit that they contracted for allows for termination. Look to the gravity of the consequences of the breach:
    - *"Can terminate for a breach that deprives the innocent party of substantially the whole benefit of the contract"*
    - Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd; Ankar Pty Ltd v National Westminster Finance (Aust) Ltd; Koompahtoo Local Aboriginal Land Council v Sanpine

WARRANTY = NO RIGHT TO TERMINATE

- If the breached term is a warranty, no breach allows termination; the aggrieved party will be entitled only to damages to compensate for loss suffered of that particular breach of warranty
- Be cautious in characterising a term as a warranty. It is preferable to classify a term as an intermediate term (if it can be breached in more than one way with varying degrees of seriousness) as it gives courts more flexibility in dealing with the breach
- Classification as a warranty is rare now that we have intermediate terms - a term will only be a warranty if no possible breach could give rise to an event which would deprive the aggrieved party of substantially the whole of the benefit of the contract (unless clearly/intentionally expressed otherwise or prescribed by legislation)

DAMAGES - AVAILABLE FOR ALL BREACHES

- Whenever there is a breach of contract there is the right to damages (this is the usual remedy for breach)
- All breaches give rise to damages for breach of the particular term
- Damages are compensation for loss that is suffered because of a breach of contract (when one party doesn't do what they promised the other party is entitles to money to compensate them)
- Damages are monetary compensation to put the party in the position they would have been in had the contract been performed
- Available irrespective of if the party has they right to end the whole contract as a result of the breach or not – even if there is no right to terminate the contract there is still the right to damages

EFFECT OF RIGHT TO TERMINATE - ELECTION

- When an aggrieved party has a right to terminate, they can elect to take one of two courses:
    1. **Terminate** the contract and sue for damages; or
    2. **Affirm (keep the contract on foot)** the contract and lose the right to terminate (can't get damages for loss or bargain but can get damages for the particular breach)

CONSEQUENCES OF TERMINATION (IF A CONTEACTED IS ENDED)

- Rights and obligations that accrued before termination remain binding and enforceable
- Future rights and obligations cease

RESTRICTIONS ON THE RIGHT TO TERMINATE

SAMPLE OF CASES

TERMINATION FOR BREACH CASES

ARCOS V RONAASEN – TERMINATION FOR BREACH OF A CONDITION

FACTS	• Contract for the sale of wood to make barrels (specified the thickness to be half an inch). • Some of the wood was a slightly different thickness (made no difference to its use). • The buyer terminated the contract (so they could buy cheaper timber)
ISSUE	Any breach gives RTT. Gravity irrelevant. Legislation specifying terms as a condition. Motivation irrelevant.
DECISION	• 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). **"half an inch doesn't mean about half an inch."** • 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. • If there is a legal right to terminate then the buyer's commercial/economic motivation for terminating is irrelevant

L SCHULER AG V WICKMAN MACHINE TOOL SALES – TERMINATION FOR BREACH OF A CONDITION (EXPRESS CLASSIFICATION)

FACTS	• Schuler (car parts manufacturer) appointed Wickman as a sole distributor in the UK • In their distribution contract there included clause 7(b): o *It is a condition of this agreement that Wickman visit the six largest UK car manufacturers weekly for the purpose of soliciting orders for panel process* • This required W make 1400 visits over the contract term. Wickman did not make all these visits. W Breached clause 7b, S terminated the contract.
ISSUE	Express classification. If the clause was a condition in the technical legal sense, then Schuler could terminate if Wickman failed to make just one of the visits. If it was a condition only in the popular, layman's sense S could not terminate.
DECISION	• **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. • Use of the word condition is an indication (even a strong indication) of an intention that it be a condition in the legal sense, but just because it is called a condition isn't conclusive. If unclear the court will decide what was the intention of the parties having regard to the terms and subject matter of the contract. **"what did the parties mean to say"** • Relevant consideration: where a particular construction leads to a very unreasonable result (where the nature of the term is such that breach is likely), it is unlikely that strict compliance is required • Classifying this term as a condition would have led to an unreasonable result as it is highly likely that it would be breached. The court states that the more unreasonable the result the more unlikely it is that the parties can't have intended it and if they do intend it the more necessary it is that they shall make that intention abundantly clear. • Should have stated: this obligation is a condition, an essential and fundamental term of the contract and any breach will give a right to terminate and to loss of bargain damages.

LUNA PARK V TRAMWAYS ADVERTISING– TERMINATION FOR BREACH OF A CONDITION

FACTS	• Contract between Luna Park and Tramways to display 53 advertising boards on trams • The advertising was to be over a period of the warmer months (Oct-March) • Disputed clause was included in a letter that formed part of the contract: o *We **guarantee** that these boards will be on the tracks at least 8 hours per day throughout the season* • Tramways position: sufficient if boards on tracks for an average of 8 hours per day - kept advertising and sued for debt --- SCNSW agreed that Tramways wasn't in breach • Luna Park's position: every board must be displayed for at least 8 hours every day (not for an average period of 8 hours) - purported to terminate --- HCA agreed that Tramways

	was in breach **Tramways' essentiality test for a condition:** • The question whether a term in a contract is a condition or a warranty, that is, an essential or a non-essential promise, depends upon the **intention of the parties** as appearing in or from the contract • **The test of essentiality is whether it appears from the general nature of the contract, 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 contract unless he had been assured of a strict [or a substantial] performance of the promise, [as the case may be], and this ought to have been apparent to the promisor** • If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight
ISSUE	To work out if there is a breach/right to terminate the correct interpretation and whether it is a condition must be worked out first. Must apply to the facts.

DECISION	• Clause **was a condition** - Luna Park had the right to terminate.
	• Relevant factors – indicating that the clause was so important to Luna Park that they would not have entered the contract at all unless assured of strict performance:
	  • Importance/essentiality derived from the words "we guarantee".
	  • Payment specified not to commence until 53 boards were all displayed (parties regarded the completeness of the advertising display)
	  • Preliminary correspondence demonstrated importance of continuity of display.
	• There was also a **repudiation** of the contract by Tramways - not only did they not have the boards on the tracks for 8 hours every day but they insisted that they would continue to not do so - they clearly indicated an intention not to perform/unwillingness to be bound by the contract according to its terms
	• Outcome: 1 shilling was awarded to Luna Park as nominal damages

ASSOCIATED NEWSPAPERS V BANCKS – TERMINATION FOR BREACH OF A CONDITION

FACTS	• 1949 Bancks (cartoonist) was negotiating a renewal contract with Associated Newspaper • New contract: Every week he would make a front page for the Associated Newspaper • 3 times his cartoon was not printed on the front page, B terminated his contract with AN
ISSUE	Is the front-page promise of such importance to B that he wouldn't have entered into the contract unless ensures of a strict or substantial performance and that ought to have been apparent to AN? = this is a condition? = B's termination is valid?

DECISION	• **It was a condition - Bancks could terminate contract**
	• Relevant factors (why the term was a condition):
	  • The importance to Bancks of continuity, the cartoon's integrity (published as a whole), and being on the most conspicuous page. Compared this to actors.
	  • Bancks' obligation was a condition. It would be strange if Bancks' obligation was a condition but the newspaper's corresponding obligation was only a warranty- The interrelation between the parties respective obligations is a relevant factor in determining of AN's obligation was a condition or not
	• Affirmed legal test stated by Jordan CJ in *Tramways v Luna Park*
	• Newspaper's conduct was also a repudiation of the contract