

TERMINATION FOR REPUDIATION

- where a party, by words or conduct, shows unwillingness or inability to perform the contract
- **test:** would a *reasonable person* see the conduct as renunciation of the contract / primary obligation? – *Koompahtoo*
- the court is strict with the application of this rule and can only be used in clear cases of repudiation

Examples of Repudiation:

- clear unequivocal words – e.g., “*I will not keep this contract*”
- conduct that manifests an unequivocal intention to no longer be bound – *Luna Park v Tramways*
- in rare cases, a manifestation of an inability to perform – *Foran v Wight*
- incorrect interpretation of the contract – will only amount to repudiation if the party has had the chance to correct their wrong actions and is acting in clear renunciation of the agreement, and the innocent party is acting on true construction of the contract – *DTR nominees v Mona Holmes; Progressive Mailing House Pty Ltd v Tabali Pty Ltd*

Repudiation in Instalment Contracts

- the court will consider the significance of the breach to the contract as a whole, and the probability that this breach will be repeated for later instalments
- see e.g., *Maple Flock Co v Universal Furniture; Hammer & Barrow v Coca Cola; Sale of Goods Act*

Delay Amounting to Repudiation

- it is rare that delay can amount to repudiation - *Laurinda v Capalaba*
- a party may be taken to repudiate for delay if a **notice** is issued and the party still fails to comply
 - such a notice must: (i) relate to the unperformed obligation, (ii) allow and state a reasonable time for compliance, and (iii) clearly state consequences (i.e., termination)
 - the notice can be issued where a stipulated time for completion has passed, or if there is no stipulated time, where the delay is unreasonable (determined objectively)

Election on Repudiation

- upon repudiation, the innocent party may elect to either **accept the repudiation** or **affirm the contract** – once this decision is communicated, the choice is made and cannot be taken back

Acceptance

- termination occurs and the contract is discharged
- the repudiating party is liable for damages for anticipatory breach of contract

Affirmed Contract

- the repudiating party may either:
 - withdraw the repudiation (i.e., make good on their obligation)
 - continue to repudiate – ongoing failure amounts to a fresh repudiation
- the contract remains on foot; the repudiating party can still take advantage of entitlements arising from future breaches by the formerly innocent party
- if the innocent party affirms the contract but fails to perform their obligations, they are excused from non-performance if the obligations are mutual and co-dependent – *Foran v Wight*

Reasonableness of Election

- there is no overarching reasonableness requirement limiting the innocent party's election to affirm
- however, if cooperation between the parties is required and it would be unreasonable to continue given the lack of relationship between the parties, the court may deem that the contract is to be automatically discharged - *White & Carter v McGregor*

Case summaries

Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985)

- the tenant ceased paying rent and abandoned the premises, arguing that the landlord had repudiated the lease.
 - **HELD:** leases are subject to the same contract principles as other contracts, and the landlord was entitled to terminate for the tenant's repudiation.

DTR Nominees v Mona Homes (1978)

- a purchaser insisted on completing a land sale on terms inconsistent with the contract.
 - **HELD:** insisting on an incorrect interpretation was repudiation, giving the vendor a right to terminate.

Starlight Enterprises Ltd v Lapco Enterprises Ltd [1979]

- a supplier unilaterally increased the price of bags under a contract.
 - **HELD:** this was a mistaken interpretation of the contract, not a refusal to perform, so it did not amount to repudiation.

Oxborough v North Harbour Builders Ltd [2002]

- purchasers of a house sought to treat defects as repudiation by the builder.
 - **HELD:** defective performance alone is not repudiation unless it shows an intention not to be bound by the contract.

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938)

- tramways failed to display advertisements as required under a contract.
 - **HELD:** the failure amounted to conduct manifesting an unequivocal intention to no longer be bound

Associated Newspapers v Banks (1951)

- a cartoonist's work was repeatedly published away from the front page despite express promises.
 - **HELD:** this was a breach of an essential term and the cartoonist was entitled to terminate.

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989)

- a landlord delayed registering a lease, and the tenant gave a short notice to complete.
 - **HELD:** although the delay was serious, the notice was unreasonable, so the termination was invalid.

Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd [193]

- a supplier delivered one batch of defective flock under an instalment contract.
 - **HELD:** a single defective instalment is only repudiation if it shows the party will not perform future obligations properly.

Hammer and Barrow v Coca-Cola [1962]

- a buyer refused delivery of promotional yo-yos after only a small portion of goods had been shipped.
 - **HELD:** the buyer's conduct was repudiation, entitling the seller to terminate and claim damages.

Foran v Wight (1989)

- a vendor failed to complete settlement on the due date and indicated an inability to perform.
 - **HELD:** the purchaser was excused from tendering performance where obligations were co-dependent and could terminate for repudiation.