

CONSEQUENCES OF AFFIRMATION OR TERMINATION

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Right to Elect

- When a breach or repudiation occurs, the aggrieved party must **choose** whether to:
 - Affirm** the contract (continue it despite the breach) or
 - Terminate** the contract (end future obligations under it).
- The right to elect is fundamental in contract law and rests **solely with the innocent party** > the innocent party controls the fate of the contract after breach.
- Election can be:
 - Express** - clearly stated to the other party; or
 - Implied** - inferred from actions inconsistent with continuation (e.g., suing for damages or treating the contract as ended).
- Once an election to affirm or terminate is made and communicated > it is generally **irrevocable**, especially if the other party relies on that election.
- This choice ensures fairness by letting the innocent party decide how best to respond > balancing their interests in performance or ending the contract.

Where the Contract is Affirmed

When the contract is affirmed:

- The contract remains valid and enforceable.
- The innocent party must continue to perform their obligations.
- The innocent party can sue for damages for any breach but cannot terminate based on repudiation they have accepted.
- Affirmation protects the repudiating party from immediate termination but still preserves rights to damages for breach.
- Affirmation can sometimes result in **estoppel** > preventing the repudiating party from later terminating if they relied on the continuation of performance.

Bowes v Chaleyer (1923) 32 CLR 159

- Facts:** The buyer repudiated a contract involving instalment deliveries. The seller responded by continuing delivery inconsistent with contract terms. The buyer then rejected the goods based on breach.
- Legal Application:** The court held the seller had affirmed the contract by continuing performance despite repudiation, which kept the contract alive. Affirmation meant the buyer could only terminate for subsequent breaches, not the initial repudiation.

Where the Contract is Terminated

- When the contract is terminated:
 - Future performance obligations end immediately.
 - Past breaches or rights survive termination.
 - The innocent party may claim damages for breach occurring before termination.
 - Restitution or recovery of money paid may also be available.
- Termination requires a **valid ground** (e.g., repudiation or breach of a condition).
- A termination may still be upheld if a valid ground existed, even if the party was mistaken about the reason.
- Termination thus acts as a **final remedy** > cutting off ongoing obligations but preserving accrued rights.

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457

- Facts:** The purchaser failed to pay instalments on a land sale contract. The seller terminated the contract and kept the deposit.
- Legal Application:** Termination ended the parties' future obligations but did not undo rights already accrued, including the seller's right to retain the deposit.

RESTRICTIONS ON THE RIGHT TO TERMINATE

RESTRICTIONS ON THE RIGHT TO TERMINATE

Election

- When an aggrieved party becomes entitled to terminate a contract (due to breach, repudiation, etc.), they face a binary choice:
 - Affirm the contract (continue it), or
 - Terminate the contract (end it for the future).
- This decision is governed by the **doctrine of election** > which restricts the right to terminate once a choice has been made.
- Once election is made and communicated (either expressly or through unequivocal conduct) > it is generally final and cannot be reversed.
- The party that affirms loses the right to terminate for that same breach, while the party that terminates cannot insist on further performance.

Further Breaches

- Affirming one breach does **not** prevent termination for a **subsequent breach**.
For **anticipatory breaches** > the innocent party may affirm and later terminate upon actual breach.

Continuing vs Once-and-for-All Breaches

- A **once-and-for-all breach** occurs when a party fails to perform a single, time-specific obligation.
 - If affirmed > the right to terminate for that breach is lost.

- A **continuing breach** arises where an obligation is ongoing.
 - Affirmation does not bar termination if the breach persists.

Tropical Traders Ltd v Goonan (1964) 111 CLR 41

- **Facts:** The buyer failed to make timely payments. The seller continued to accept late payments before eventually suing for the balance.
- **Legal Application:** The High Court held that by accepting late performance, the seller had affirmed the contract and could no longer terminate for that breach but retained a right to damages.

Immer (No 145) v Uniting Church in Australia Property Trust (NSW) (1992) 182 CLR 26

- **Facts:** Immer defaulted under a contract to purchase land. The seller continued to engage with Immer post-breach, later seeking to rescind.
- **Legal Application:** The court held the seller's conduct amounted to affirmation, preventing termination for the initial breach, but allowing future termination for new breaches.

Readiness and Willingness

Common Law Requirement

- At common law > a party seeking to terminate for breach must show **readiness and willingness** to perform their own obligations.
- The requirement applies to termination for:
 - Actual breaches of essential terms,
 - Serious breaches of intermediate terms, and
 - Repudiatory breaches.
- A party cannot take advantage of another's breach if they were themselves unwilling or unable to perform at the time.

Contractual Termination Clauses

- The requirement does **not** automatically apply where termination is under an **express contractual clause**.

Goods Act 1958 (Vic) s 35

- **Outline:** Provides that in a sale of goods contract, a party must be **ready and willing** to perform obligations in order to enforce rights against the other party.
- **Legal Application:** Used to assess whether a party is entitled to terminate or enforce the contract, based on their own performance status. Reinforces the common law principle of mutuality of obligations.

Foran v Wight (1989) 168 CLR 385

- **Facts:** The vendor in a land sale informed the purchaser prior to settlement that they could not complete due to a right-of-way issue. The purchaser delayed termination but later terminated after the actual breach occurred.
- **Legal Application:** The High Court allowed termination based on **anticipatory breach**, noting that readiness and willingness are assessed contextually, and estoppel applied due to the vendor's conduct.

Sharjade Pty Ltd v Commonwealth [2009] NSWCA 373

- **Facts:** Sharjade sought to terminate a contract with the Commonwealth based on the latter's repudiation, despite Sharjade also being in breach.
- **Legal Application:** The court held that termination was still valid as Sharjade's breaches were **independent** and not causally linked to the Commonwealth's repudiation. The readiness and willingness rule did not bar termination.

Estoppel

- Estoppel limits the right to terminate where one party **induced a belief** that the contract would not be terminated + the other party **relied** on that belief to their **detriment**.
- Requires:
 - A clear **representation or assumption**,
 - **Reliance**, and
 - **Detriment** suffered.
- Estoppel may arise even if the contract includes **non-waiver clauses** > although these make it harder to prove reliance.

Estoppel by Convention

- Arises when **both parties** act on an assumption that the contract continues despite a terminating event.
 - One party may then be estopped from denying the assumption if the other suffers detriment.

Legione v Hateley (1983) 152 CLR 406

- **Facts:** Purchasers failed to settle on time. Their solicitor's secretary made a vague comment implying that an extension might be granted. The vendor terminated.
- **Legal Application:** The High Court held there was **no estoppel**, as the statement was too ambiguous and no **detrimental reliance** was shown. However, the judgment left open the possibility of **relief against forfeiture**.

Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

- **Facts:** Maher executed and returned a lease, believing Waltons would sign. Waltons allowed him to begin construction knowing he assumed the deal was final.
- **Legal Application:** The court applied **promissory estoppel**, preventing Waltons from denying the agreement. The estoppel arose from their knowledge of Maher's assumption and his significant reliance.

Waiver

- "Waiver" refers to **voluntarily relinquishing** a known right.
- In practice > waiver often overlaps with election or estoppel.
- To establish waiver:
 - The party must **intend to waive** a right; and

- It would be **unfair** to allow them to later rely on it.
- The **High Court** has expressed scepticism about treating waiver as an **independent doctrine** in contract law.

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570

- Facts:** Gardiner defaulted on loan repayments but argued the indemnity clause was waived by the lender's conduct.
- Legal Application:** The High Court rejected waiver, holding there was **no election** or **estoppel**. Waiver was not recognised as a separate principle; the facts did not meet the threshold for equitable intervention.

Allianz Australia Insurance Ltd v Delor Vue Apartments (2022) 277 CLR 445

- Facts:** Allianz initially accepted an insurance claim but later denied liability based on a policy exclusion. Delor Vue claimed Allianz had waived that exclusion.
- Legal Application:** The court held that **waiver** does not exist as a freestanding doctrine in Australian contract law. No waiver, election, or estoppel was established.

Relief Against Forfeiture

- Equity may grant **relief against forfeiture** to prevent unjust loss of property or value due to minor breaches.
- Applies primarily to **proprietary interests** (e.g., leases, land, deposits).
- Relief is typically granted if:
 - The breach was **inadvertent** or minor, and
 - The forfeiting party suffered **no real prejudice**.
- Equity does **not** relieve against non-fulfilment of **conditions precedent** or mere failure to gain a benefit.

Legione v Hateley (1983) 152 CLR 406

- Facts:** (See above under Estoppel)
- Legal Application:** Although estoppel failed, the court discussed **relief against forfeiture**, acknowledging that unconscionable conduct might justify equitable intervention even where formal rights exist.

Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514

- Facts:** A purchaser of Hong Kong property was 10 minutes late completing settlement; the vendor terminated and kept the deposit.
- Legal Application:** Relief was denied. The court emphasised the importance of **certainty** in commercial transactions and upheld the strict time clause.

Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315

- Facts:** The purchaser under a land contract failed to complete on time due to a bank delay. The vendor terminated the contract.
- Legal Application:** The High Court denied relief. There was no misleading conduct or mistake by the vendor, and the court reinforced a **strict approach** to time clauses in land contracts.

Good Faith

- Courts may imply a duty of **good faith** into contracts, especially relational or standard form agreements. This duty requires:
 - Honesty,
 - Cooperation, and
 - Avoidance of capricious or opportunistic behaviour.
- It may **limit how contractual rights** (like termination) are exercised, particularly where a party has **discretion**.

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

- Facts:** The government terminated a building contract under a clause allowing termination for failure to comply with directions.
- Legal Application:** The court held that **good faith and reasonableness** could be implied. The clause must not be used **arbitrarily**, especially where power imbalances exist.

Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903

- Facts:** Subaru terminated a dealership agreement using a termination clause without cause. Garry Rogers Motors claimed bad faith.
- Legal Application:** The Federal Court held that a duty of good faith could be implied, but Subaru's conduct was **not dishonest or arbitrary**. Termination was valid under the contract.

Contractual Restrictions

- Contracts may include **express limitations** on the right to terminate. Courts will enforce such clauses **according to their terms** > but they require **clear wording** to displace common law rights. A clause restricting termination will be **narrowly construed** unless the intention to override common law is **unambiguous**.