

TERMINATION

- A **terminated contract** is a pre-existing agreement which has been brought to an end, releasing the parties from performing further obligations under the agreement

BENEFITS TO THE TERMINATING PARTY

- May increase the other party's incentive to comply with the terms of the contract, lest they lose their expected benefits under the agreement
- May be used as a bargaining chip for the terminating party to renegotiate the terms of a contract
- May afford the terminating party the power to end a failed contractual relationship

TYPES OF TERMINATION

- **Termination by agreement**
- **Termination for breach of a condition**
- **Termination for sufficiently serious breach of an Intermediate term**
- **Termination for Repudiation**
- **Termination for Delay**

TERMINATION BY AGREEMENT

TERMINATION UNDER THE ORIGINAL CONTRACT

EXPRESS POWERS TO TERMINATE

- Parties can include an express term providing for when or how their contract may be brought to an end. Common in long-term commercial contracts.
- A number of different models may be used:
 - Provide that the contract is to last for a fixed period of time and after that time expires, the contract will automatically come to an end
 - Parties might agree that one or both of them will have the right to terminate the contract
 - One of the parties might be given a broad discretionary right to terminate at any time – termination at will
 - A party may be given the right to terminate after a specified period of notice
 - A party to be given the right to terminate which is triggered by certain specified events, such as breach of contract by the other party or the non-fulfilment of a contingent condition.

IMPLIED RIGHT TO TERMINATE A CONTRACT OF OTHERWISE INDEFINITE DURATION

- **Crawford v Sydney**
 - An indefinite commercial contract, on which is silent as to its duration, can be implied to terminate on **reasonable notice**

- An implied right to terminate depends on construction – the meaning of the words, the subject matter, provisions of the agreement and when the contract was made
- The right will be based on the inference that the parties would not have intended the contract to continue indefinitely
- The period of time required for reasonable notice will depend on the circumstances of the particular case – considered in **Crawford v Sydney** in relation to a distributorship contract
 - A period of six months' notice prior to terminating the contract under an implied term was sufficient
- By a procedure of termination previously specified in the contract. Strict compliance is not always required.

TERMINATION BY SUBSEQUENT AGREEMENT

- **Express agreements** - Making a subsequent agreement under which each agrees to release the other from the original contract
 - Must comply with the ordinary rules of contract formation including consideration – in cases of partly performed contracts:
 - The **performing party** gives good consideration by releasing the non-performing party from their obligations
 - The **non-performing party** cannot give good consideration by doing the same, as they have remaining obligations under the contract and would be relieved of their outstanding performance without giving up anything. Thus, the non-performing party can provide good consideration by either a) entering to a deed or b) providing fresh consideration for the subsequent agreement
- Writing is not required for an agreement to terminate an existing contract
- **Termination inferred by subsequent agreement** - An intention to terminate the original contract will be inferred where, because the obligations in the subsequent agreement are inconsistent with those in the original contract, the two agreement cannot be supposed to have intended to co-exist.
- **Termination by abandonment** – inferred agreement to discharge the contract.
 - If an 'inordinate' length of time has passed with neither party trying to perform
 - Abandonment less likely to be ruled if contract is partly performed

TERMINATION FOR BREACH OF A CONDITION/ SUFFICIENTLY SERIOUS BREACH OF AN INTERMEDIATE TERM

WHAT CONSTITUTES A BREACH OF CONTRACT?

- Occurs whenever one of the parties to the agreement did not perform their obligations as required under the contract
- Every breach give rise to the right to damages
- Not every breach gives rise to the right to terminate

WHEN IS THERE A RIGHT TO TERMINATE FOR BREACH AT COMMON LAW?

- Where the breached term is a **condition**, there will be a common law right to terminate in respect of any breach of that term, irrespective of the gravity of the breach – **Arcos v Ronaasen**
- Where the term is an **intermediate** term, the aggrieved party may be entitled to terminate, depending on the gravity of the breach and its consequences
- Where the term is a **warranty**, a breach of the term will not of itself give rise to a right to terminate the contract, and the aggrieved party will be entitled to damages only

TERMINATION FOR BREACH OF A CONDITION

- A **condition** is an essential term that goes to the root of the contract, for which any breach entitled termination of the contract, regardless of its gravity
- A breach of conditions stipulated by statute affords the aggrieved party the right to terminate the contract, irrespective of the gravity of the breach – **Arcos**
- **Goods Act ss18-19** – Does a statute characterise it?
- Have the parties satisfactorily characterised it for themselves?
 - A term classified as a ‘condition’ in a contract is not conclusive – parties may not always have intended to use the word in its technical legal sense – **Schuler**
 - Thus, the parties need to demonstrate their intention that any breach of a particular term, regardless of severity, will amount to breach of a condition. One way of indicating such is to state that “any breach will give rise to a right to terminate”.
- If neither, work it out purely as a matter of construction
 - **Tramways** essentiality test – assessing whether or not a term should be classified as a condition. **Courts will consider whether the promisee only entered into the contract on the understanding that there would be strict compliance with the term and this ought to have been apparent to the promisor**
 - Parties’ probable intentions as to the significance of particular terms are determined objectively
 - Where the language used in the term is clear, precise and promissory in nature, the courts are likely to consider it a condition of the contract – “we guarantee”.
 - This was affirmed in **Newspaper**
 - **Schuler** - Where a condition is not stipulated by statute, and the parties’ intentions are unclear as to whether the term is a condition in the legal sense, the courts will determine the meaning of the word “condition” in light of their context i.e. as part of the terms and subject matter of the contract.
 - Where a particular construction leads to a very unreasonable result, it is unlikely the courts will construe the word “condition” in its legal sense.
 - The courts prefer a construction that encourages the continued performance, rather than avoidance, of a contract.

TERMINATION FOR BREACH OF AN INTERMEDIATE TERM

- **Hong-Kong** – recognised the existence of intermediate terms. Breach of an intermediate term will justify termination if the consequences are significant in their repercussions. An Aggrieved party will be entitled to terminate a contract on the breach of an intermediate term if:
 - The breach deprives the aggrieved party of substantially the whole benefit which it was going to gain from the contract = therefore is a sufficiently serious breach
- **Ankar** – affirmed the English principle of intermediate terms (HongKong) into Australian law albeit an obiter approval

- If damages would not adequately compensate the aggrieved party for breach of a particular term, courts are more inclined to treat the term as a condition.
- **Koompahtoo** - High Court affirmed and incorporated the doctrine of intermediate terms from HongKong into Australian law
 - To construe whether a term is intermediate, the courts will look at many factors, – the nature of the contract, the relationship the contract created etc. - but most importantly, the *consequences* of the breach for the other party – *has the breach deprived the innocent party of substantially the whole benefit of the contract?*
- **Goods Act s85**

OVERVIEW

- 1) Identify the **nature** of the breach – what has occurred to wrong the aggrieved party?
- 2) **Classify** the breach – condition? Warranty? Intermediate term?
- 3) Identify the **consequences** of the breach – right to terminate? Right to damages only?
Depends on severity - deprive party of substantially the whole benefit of the contract?

TERMINATION FOR REPUDIATION

REPUDIATION

- Repudiation of a contract occurs when a party manifests an unwillingness or inability to perform his or her obligations under the contract. The other party may then have the right to terminate.
 - Demonstrated by the party's words, conduct (**Carr**) or factual inability to perform
- To amount to repudiation, the party's inability or unwillingness to perform must:
 - 1) Relate to the whole contract; or
 - 2) Relate to a condition of the contract; or
 - 3) Be "fundamental" to the contract
 - Fundamental in the sense it would deprive the aggrieved party of substantially the whole of the benefit of the obligations remaining to be performed under the contract

OBJECTIVITY

- Unwillingness or inability to perform amounting to repudiation will be established **objectively** on the basis of the repudiating party's words or conduct. Repudiation may also be shown by factual inability to perform.
 - Would a reasonable person believe that the defendant did not intend, or was unable, to perform obligations under the contract that related to the whole, were conditions or were otherwise fundamental to the contract? - **Koompahtoo**

ANTICIPATORY BREACH

- Occurs when one party repudiates his or her obligations under the contract prior to the time set for performance of those obligations
- The aggrieved party will be entitled to terminate even before the actual breach, and claim damages

- If an aggrieved party elects not to terminate the contract (affirms the contract) upon an anticipatory breach, the party will only be entitled to terminate the contract and claim damages unless and until an actual breach occurs.

CONDUCT AMOUNTING TO REPUDIATION

EXPRESS STATEMENTS

- Party makes an express statement to the effect that he or she is unwilling or unable to perform the contract

REPUDIATION BASED ON WORDS OR CONDUCT

- Courts are generally not concerned with the subjective intentions of the party
- **TEST** – whether or not the words or conduct of the party would lead a reasonable person to conclude that the party did not intend or was unable to perform the contract.

CONDUCT SHOWING AN INABILITY OR UNWILLINGNESS TO PERFORM

- **Carr v J A Berriman** – it was held that a building owner repudiated the contract by announcing that he had engaged another contractor to carry out a large part of the work comprised in the contract
- It should not be assumed that continued breach of contractual obligations automatically constitutes repudiation - **Carr**
 - Where one party has not formally complied with the terms of the contract, but the other party has been happy to continue on with the contract despite the breach, such conduct is unlikely to sustain an inference of repudiation

REPUDIATION INFERRED FROM A COMBINATION OF EVENTS

- **Progressive Mailing House** - A series of breaches that are individually too inconsequential to amount to repudiation can combine to do so

INSTALMENT CONTRACTS

- One or both of the parties' obligations may be divided into a number of instalments
 - In a contract for the sale of goods, the seller may undertake to deliver the goods in a number of instalments to the buyer and the buyer to pay for each instalment as delivered
- Breach of one or more instalments of such a contract may indicate that the party in breach is unwilling or unable to perform the remainder of his or her obligations under the contract, and is thus repudiating the contract
- Legislation provides the test of whether breach of instalments constitutes a repudiation of the contract, namely, the **Sales of Goods Act s 38(2)** – requires a court to have regard to the terms of the contract and the circumstances of the case in deciding whether or not a breach amounts to a repudiation of an instalment contract
- **TEST FOR INSTALMENT CONTRACT- Maple Flock** – There is a two part test in assessing whether breach of an instalment amounts to a repudiation of the entire instalment contract:
 - 1) Whether the quantitative ratio of the breach instalment bears a large portion of the overall contract
 - 2) The probability or improbability that such a breach will be repeated
 - If the breach is a relatively small quantitative ratio, and the likelihood of reoccurrence is small, it does not amount to a breach.

- **Shevill v Builders Licensing Board** – an unwillingness or inability to perform contractual obligations will not be made out in instalment contracts merely because instalment obligations are fulfilled partially past their due time.

ERRONEOUS INTERPRETATION OF THE CONTRACT

- A party who refuses to perform his or her obligations under a contract, or will not accept performance from another party except according to an incorrect interpretation of those obligations, may be found to have repudiated that contract
- A party who attempts to terminate a contract where no such right exists may have repudiated
- There are two principles that reduce the likelihood of repudiation in these circumstances:
 - 1) Where an aggrieved party has relied on a ground for terminating that proves invalid, that party will generally be able to justify the termination by reference to any other grounds, even though those grounds were not, at the time of termination, raised by or even known to the aggrieved party and thus did not factor into his or her decision to terminate the contract
 - 2) **A bona fide interpretation** - a party who asserts an erroneous interpretation of a contract, believing it to be correct, may not be rejecting the contract at all; their interpretation may simply be incorrect. It is possible that, were this error explained, the party would be prepared to perform their correct contractual obligations.
- **DTR v Mona Homes** – is the defendant persisting in the incorrect interpretation ‘willy nilly’ in the face of a clear enunciation of the true agreement?
 - Party will not be repudiating if the erroneous party would be willing to perform the contract according to the actual interpretation once he is notified that he has misinterpreted the contract.
 - In order to for a party to be repudiating when erroneously interpreting the contract, it need to manifest an unwillingness to act in accordance with the contract even after its error is pointed out to it.
- **Wimpey Constructions** – the fact that a party to a contract mistakenly believes that he has the right to refuse to perform it cannot avail him
 - The courts prefer a construction which furthers contractual performance, and will only find repudiation in cases of clear refusal to perform.
- **Eminence Property Developments** – Legal test for repudiation: Where it appears, after looking at all circumstances objectively (i.e. from the perspective of a reasonable person in the position of the innocent party) that the contract breaker shows an intention to abandon and refuse to perform the contract, that shall amount to repudiation; otherwise, if a simple mistake is made, that will not amount to repudiation.

TERMINATION FOR DELAY

- **Delay** is failing to perform contractual obligations by the time expressly specified for performance or where no express time is given, failing to perform within a “reasonable time” in all the circumstances
 - What is a reasonable time will depend on the circumstances of the case, including the subject matter of the contract and the context in which it was made

WHEN TO TERMINATE A CONTRACT BECAUSE OF DELAY

WHERE TIME IS OF THE ESSENCE

- Where a time clause is a condition
- In deciding whether or not a time stipulation should be construed as essential, the considerations discussed in relation to the classification of terms as conditions will apply
- Courts are most likely to construe time as being of the essence in commercial contracts for the sale of goods

WHERE TIME IS NOT OF THE ESSENCE

- In the lack of an express statement providing that time is of the essence, courts will be more reluctant to rule that it is
- Breach of a time stipulation will not, of itself, give the aggrieved party a right to terminate
- Termination will be justified where:
 - It is a sufficiently serious breach of an intermediate term; or
 - Where the delay amounts to a repudiation (delay must be gross or protracted)
 - When the delay is so long or is in circumstances where it demonstrates an unwillingness or inability to perform under the contract; or
 - Where the breaching party is given notice to perform within a reasonable time but fails to do so
- **Goods Act 1958 s 15** – if time is stipulated to be of the essence, then it becomes a condition
- **Property Law Act (Vic) s 41**

NOTICE

- Where time is not of the essence and the delay in breach of contract does not amount to a serious breach of an intermediate term or a repudiation of the contract, an aggrieved party may nonetheless gain a right to terminate through the procedure of providing notice
 - If a specific time was expressly stipulated performance then notice can be given as soon as any delay occurs
 - If a specific time was not expressly stipulated then notice cannot be given until after an unreasonable delay has occurred
 - The requirements for a valid notice - **Laurinda v Capalaba**
 - The notice must specify a time for performance
 - The time allowed must be reasonable in all circumstances; and
 - The notice must clearly convey either that the time fixed for performance is of the essence or that the party giving notice will regard himself or herself as being entitled to terminate should the notice not be complied with
 - **Louinder v Leis** – to be effective, notice must be given in relation to the time stipulation that has been breached or after a reasonable time has been allowed for performance. The notice procedure cannot be used to require the performance of some other obligation, the time for performance of which has not yet arisen.
 - Is there a breach?
 - Condition? Time of the essence? Don't have strong language to tell us what parties think
 - Intermediate term – substantially the whole benefit of the contract? 1 week out of 10 so far is not substantial
 - Repudiation? No
 - Notice – express time stipulation (Monday), no need to wait for an unreasonable delay, only when no time is stipulated
 - Notice requirements
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CONSEQUENCES OF AFFIRMATION OR TERMINATION

RIGHT TO ELECT

- A party cannot, by breaching or repudiating a contract, bring the contract to an end or compel the other party (aggrieved party) to bring the contract to an end – the aggrieved party has a **choice**
- DOCTRINE OF ELECTION – when presented with a breach giving rise to the right to terminate, the aggrieved party must elect to either terminate or affirm the contract
- In order for a party to be deemed as having elected to affirm a contract, the party must have:
 - Known about the factual situation which entitled it to terminate.
 - Acted in a way which unequivocally constituted an intent to affirm.

AFFIRMATION

- **The affirmation is irrevocable** – right to subsequently terminate is lost. However, a *new right* to make an election arises upon further breaches. Thus, breaches fall into two categories:
 - *Once and for all breach*: Most breaches fall into this category i.e. occurring as a once off. The standard rule applies here – once the aggrieved party affirms the contract, the right to terminate **is lost**.
 - *Continuing breach*: Every day that such a breach is not rectified, a new right to elect arises. Thus, an earlier election to affirm will not prevent the aggrieved party from changing their mind later on – EG: Where an obligation to pay rent goes unfulfilled.
- **Damages** – aggrieved party retains a right to claim damages for loss caused by the breach, subject to one qualification - anticipatory breach
 - Damages will be available for a repudiation occurring before the time set for performance that is accepted by the aggrieved party terminating the contract
 - If the repudiation is not accepted, the contract will continue on foot and there will be no right to damages or right to terminate unless and until there is an actual breach
- **Earning the contract price** - the aggrieved party may be able to completely perform his or her obligations under contract, thus earning a right to payment of the contract price.
- **An obligation to perform** – an aggrieved party remains liable to perform his or her own contractual obligations, however this is subject to estoppel.
 - An aggrieved party may be absolved of the consequences of non-performance on the basis of the doctrine of estoppel – usual elements of estoppel must be shown
 - An aggrieved party may be absolved from performance where the terminating party intimates that performance is futile. The aggrieved party may assume such unless and until the terminating party signals a readiness to perform. In such cases, the terminating party may be estopped from insisting on the aggrieved party's performance.
- **Reliance on subsequent events** - The fact that an affirmed contract remains on foot also means that a party who has breached or repudiated a contract may himself or herself become entitled to terminate the contract on the ground of subsequent breaches by the aggrieved party
- **Bowes**
- **Bowes v Chaleyer** –
 - High Court held that delivery terms were conditions of the contract, any breach of which entitled the buyer to terminate

- Since the seller had elected not to accept the repudiation by the buyer, the seller remained liable to perform his part of the contract
- The buyer was accordingly entitled to take advantage of any subsequent default by the seller

TERMINATION

- **The election is irrevocable** – if the aggrieved party chooses to terminate, the contract is over for good
- **Parties are relieved from further performance** – future obligations are no longer on foot, but past (accrued) obligations are
 - All rights and obligations that accrued before that moment are binding and enforceable – **McDonald**
 - Rights already unconditionally acquired or accrued are not discharged – e.g. right to recover payment for any part of the contract which has been performed
- **Restitution** - may also make available to the aggrieved party remedies in respect of money paid or goods or services provided
- **Waiver** – available in situations involving a property interest

RESTRICTIONS ON THE RIGHT TO TERMINATE

- Where an aggrieved party has the right to terminate a contract, the breaching party may claim this right to terminate is restricted when –
 - The terminating party **elected to affirm** the contract
 - The terminating party was **not ready and willing** to perform the contract
 - The terminating party is **estopped** from terminating the contract
 - There is a **relief against forfeiture**
 - The right to terminate has been **waived**
- Whilst these restrictions prevent the aggrieved party from terminating, they do not generally **preclude their right to damages** for any breaches of contract.

ELECTION

- When a contract is affirmed, it excludes the subsequent right to terminate for the same breach (the right to terminate can still arise from further or continuing breaches)

REQUIREMENTS OF ELECTION

- Two requirements - **Immer**
 - **Knowledge** of the facts giving rise to the right to terminate; and
 - **Unequivocal conduct** consistent with a choice to continue the contract
 - It is not necessary to show that the aggrieved party formed an actual, subjective intention to elect
 - What type of conduct will amount to an unequivocal election to affirm will depend on the circumstances
 - **Accepting or encouraging performance** – an aggrieved party may be found to have affirmed a contract where, following the event giving rise to a right to

terminate, the aggrieved party accepts or insists on performance from the other party to the contract

- **Acts contemplated under the contract** – an aggrieved party may be found to have affirmed a contract where he or she continues to perform acts contemplated by the contract
- **Claim for specific performance** – where the aggrieved party responds to the breaching party's purported termination by seeking an order of specific performance, the aggrieved party is likely to be viewed as having elected to affirm the contract
- **Failure to perform** – an aggrieved party may be found to have elected to terminate a contract where following an event giving the aggrieved party the right to terminate, the aggrieved party fails to perform his or her own obligations under the contract

TIMING

- **Tropical Traders v Goonan** - an aggrieved party confronted with the choice of terminating or affirming a contract is not required to elect immediately. They are entitled to a reasonable time to consider their position, provided they do not otherwise affirm the contract in that time.
- An aggrieved party may be taken to have affirmed the contract if the choice is not made within a reasonable time. What amounts to a reasonable time depends on the circumstances of the case and the acts done during the period of delay
- A mere extension of time is unlikely to amount to affirmation of the contract

READINESS AND WILLINGNESS

- Under Common Law, in order for an aggrieved party to be entitled to terminate a contract, they must show that they themselves were ready, willing & able to perform their own obligations under contract; otherwise, if they were not ready, willing or able to perform their obligations, they too were at fault - **Foran v Wight**
 - The aggrieved party should not be able to take advantage of another party's breach simply because it happened first.

PRINCIPLES - Foran v Wight

- Actual Breach – the aggrieved party **must show** that they were ready, willing and able to perform their obligations at the time of the breach.
- Anticipatory Breach (accepted) – the aggrieved party must show that at the time of repudiation, they were **not substantially disabled from performing**.
- Anticipatory Breach (rejected) – the aggrieved party **needs to perform** – unless such repudiation makes it futile or pointless for the aggrieved party to perform their obligations.

ESTOPPEL

- Estoppel may arise to restrict the right to terminate where the aggrieved party has made the breaching party assume that the right to terminate would not be exercised, and the breaching party relied on that assumption.
- A party may also be estopped from terminating the contract on the basis of non-fulfilment of a contingent condition if he or she leads the other party to believe that he or she will not terminate the contract on this basis and the other party relies on that assumption to its detriment
- The elements of equitable estoppel would need to be satisfied

ELEMENTS - Legion v Hateley

- **Assumption:** The breaching party must have adopted an assumption made by the aggrieved party;
- **Inducement:** This assumption must have been induced by the aggrieved party;
- **Detrimental Reliance:** The breaching party must have acted on the assumption in such a way that they will suffer a detriment if the aggrieved party does not adhere to the assumption;
- **Reasonableness:** The breaching party must have acted reasonably in adopting and acting upon the assumption;
- **Unconscionability:** It would be unjust for the aggrieved party to depart from the assumption under the circumstances; and
- **Departure:** The aggrieved party departs, or threatens to depart, from the assumption adopted by the breaching party.

RELIEF AGAINST FORFEITURE

- A relief against forfeiture may arise in cases concerning property where an aggrieved party exercises its right to terminate unconscientiously - **Union Eagle v Golden Achievement**
- Only available in:
 - Situations involving a property interest – in land or other property. A contractual interest is insufficient; and where
 - Relief against forfeiture is concerned will protect against the unconscientious exercise of legal rights.
- **Tanwar Enterprises**
 - Relief against forfeiture will not be granted whenever there is some general element of unfairness or hardship. One party must make real unconscientious use of its rights.
 - Unconscientious conduct requires one of the four special heads – fraud, accident, mistake or surprise. If none are prevalent, relief against forfeiture may not be granted.
 - Neither relief against forfeiture nor equity will be granted for breach of an essential condition, no matter how slight the breach.
 - Paid a day late, time was of the essence, contract was terminated.

WAIVER

- **Gardiner** – there is no actual principle of waiver
- When an aggrieved party elects to terminate or affirm a contract, they are said to have “waived” their alternative right to affirm or terminate. Likewise, if an aggrieved party has promised not to enforce a right, they have “waived” their right to do so via estoppel.