CONTRACT LAW B

NOTES

TRIMESTER 3, 2025

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TERMINOLOGY
Discharge = following due performance
Termination = one party or both parties choose to end the contract by agreement or for breach
Repudiation = a party 'repudiates' when they are unwilling to perform the contract – the aggrieved party may elect to terminate or affirm the contract
Rescission = remedy which can be sought by an aggrieved party where a vitiating factor exists (usually where there was impropriety, e.g., winding back odometer before selling a car)
Frustration = applies automatically (by operation of law) when frustrating circumstances exist and ends the contract prospectively (e.g. covid)

TERMINATION I

INTRODUCTION

It must be determined if **[party]** has a right to terminate the contract with **[party]** and thus extinguish both parties' rights and obligations under the contract.

TERMINATION BY AGREEMENT

Parties may terminate a contract by agreement. **[Party]** may seek to argue that they can terminate the contract as **[pick from below]**.

TERMINATION UNDER ORIGINAL AGREEMENT

IF FIXED TERM:

As the contract between **[parties]** is a fixed term contract, evident through **[how – term in contract]**, the contract will expire/terminate at the end of this term.

IF EXPRESS TERMINATION CLAUSE:

As the contract between **[parties]** contains an express termination clause, evident in clause **[insert clause]**, **[party]** can terminate the contract validly by **[how – refer to clause]** ***(Shevill v Builder's Licensing Board)***.

*Clause in ***Shevill***: 'if the rent is unpaid for 14 days the lessor can terminate the lease'

TERMINATION BY SUBSEQUENT AGREEMENT

IF CONTRACT IS WHOLLY EXECUTORY (NOT COMPLETED BY BOTH PARTIES):

[Parties] have entered into a subsequent agreement in order to terminate their original contract. As the contract is wholly executory as both parties still have obligations to perform, consideration can be provided by both **[parties]** by agreeing to release the other party from their obligations. Thus, the subsequent contract complies with the requirements of contract formation and **[parties]** can terminate their original contract through this subsequent agreement.

IF CONTRACT IS PARTLY EXECUTORY (COMPLETED FULLY BY ONLY ONE PARTY):

[Parties] have entered into a subsequent agreement in order to terminate their original contract. However, as **[party]** has completed all their obligations under the original contract and **[party]** has not, it is necessary to have a deed, or to ensure there is consideration provided by **[party being relieved of performance]**. This is known as an accord and satisfaction.

TERMINATION INFERRED FROM ABANDONMENT

ABANDONMENT INFERRED FROM SUBSEQUENT AGREEMENT:

As **[parties]** have made a subsequent contract covering similar ground of **[contents]**, the court may be able to infer that they intended to terminate their original contract and replace it with their subsequent agreement.

ABANDONMENT INFERRED FROM INACTIVITY AND OTHER CONDUCT:

[Parties] have shown a long period of inactivity in relation to the performance of their contract, evident through **[how]**. This may indicate that the parties no longer desire their contract to be on foot, and the court may determine that the parties have mutually abandoned the contract ***(DTR Nominees v Mona Homes)***.

TERMINATION FOR BREACH

Any breach of a term of the contract between **[parties]** will entitle the aggrieved party to damages, however classification of the term is required to analyse if **[aggrieved party]** has a right to terminate. ~~If the defendant, **[party]**, is found to have breached a term that is a condition of the~~

~~contract *(Luna Park v Tramways)* or is found to have committed a serious breach of an intermediate term of the contract *(Hong Kong Fir, Koomphatoo v Sanpine)*, then the aggrieved party, **[party]**, will be entitled to terminate the contract for breach of that term. If the breach is found to be of a term that is a warranty of the contract, **[aggrieved party]** will only be entitled to damages. The right to terminate is a rare occurrence and the courts encourage performance and keeping contracts afoot as opposed to avoidance of performance.~~

STEP ONE: IDENTIFY THE BREACH

In order to determine if **[aggrieved party]** has a right to terminate the contract with **[party]**, they must show that **[defendant party]** failed to perform one of their obligations at the time performance was required, or to the standard required by the contract, thus constituting a breach. On the facts, **[defendant party]** breached their obligation to **[do what – enter relevant term/clause if applicable]** by **[how did they breach]**.

TYPES OF BREACHES

ACTUAL BREACH:

[Party] has committed an actual breach of a term of the contract as this breach has occurred after the time for performance has expired. Performance was due to occur by **[when]**, and on the facts, this has not occurred.

Types of actual breach:

→ Non-performance

→ Defective performance (including delayed performance)

ANTICIPATORY BREACH:

[Aggrieved party] can reach a well-founded conclusion based on **[what reasons]** that **[party]** will not perform **[what task]** when this performance is due, and **[party]** has thus committed an anticipatory breach.

STEP TWO: CLASSIFY THE TERM THAT HAS BEEN BREACHED

[Aggrieved party] may argue that the breach amounts to a breach of a term that is a condition, giving them a right to terminate *(Luna Park v Tramways)*. The term will need to be classified according to the tripartite classification system of contract terms.

WHEN WILL A BREACH OF A TERM GIVE RISE TO A RIGHT TO TERMINATE?

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, however trivial it may be, 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, no breach allows for termination; the aggrieved party will be entitled to damages only.

WARRANTY

[Breaching party] may argue that **[term]** is a warranty as it is an inconsequential term, and their breach of this term had no chance of depriving **[aggrieved party]** of substantially the whole benefit of the contract ***(Hong Kong Fir)***. On the facts, this is likely/not likely to be the conclusion of the courts as **[why – deprives benefit of contract OR does not deprive benefit of contract]**. A breach of a warranty will still give rise to a right to damages to the aggrieved party.

*__NOTE__: Be cautious in classifying as a warranty. Preferable to classify 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.

CLASSIFYING TERMS AS A CONDITION

[Aggrieved party] may argue that **[term]** is a condition and they therefore have a right to terminate the contract with **[breaching party]** ***(Luna Park v Tramways)***. The court must establish that the term can be classified as a condition.

1. STATUTORY CLASSIFICATION

Some statutes provide that certain terms are conditions ***(Arcos)***. On the facts, **[substance of breach]** is covered by statute in the **[relevant Act and section]**, and **[aggrieved party]** can thus contend that the breach is of a term that is a condition.

****Arcos*** dealt with the sale of timber that did not correspond with its description – this was covered by the *Sale of Goods Act* 1958 (Vic), which specified that correspondence with description was a condition. Despite the breach being minor (the timber was only fractionally shorter which made no difference for its use), the term was still a condition that gave rise to a right to terminate.

2. EXPRESS CLASSIFICATION IN CONTRACT

Parties can classify terms as a condition within the contract. However, it is important to note that the terminology used by parties is not decisive.

IF NOT DECISIVE:

Although **[party]** has used the term 'condition' within **[clause …/term]**, this is not conclusive evidence that the term can be classified as such in the technical legal sense ***(L Schuler AG)***. As it is unclear whether **[term]** is a condition, the court will consider the

intention of the parties having regard to the terms and subject matter of the contract, as well as to the consequences of a strict interpretation of the term. **GO TO INTENTION OF PARTIES.**

IF UNREASONABLE RESULT:

On the facts, it is unlikely the court would consider the term of **[what]** as a condition as a strict interpretation of the term, so as not to allow a single breach of **[what]**, would lead to unreasonable results, and it is not likely the parties intended this.

IF REASONABLE RESULT:

On the facts, it is likely the court would consider the term of **[what]** as a condition as a strict interpretation of the term would not lead to an unreasonable result, and it is likely the parties intended that the term be abided by.

**L Schuler AG*: Clause stated it is a 'condition' of this agreement that Wickman shall send its representatives to visit the UK at least once in every week, totalling 1400 visits over the contract. Held as not a condition as it would be unreasonable to allow termination for missing 1/1400 visits.

3. INTENTION OF THE PARTIES – ESSENTIALITY TEST

As there is no statutory classification or express classification of whether **[clause/term]** is a condition, the intentions of **[parties]**, as deduced through the essentiality test (per Jordan CJ in ***Tramways***; affirmed in ***Associated Newspapers***) is decisive.

[Aggrieved party] would/would not have entered into the contract unless they had been assured of a strict performance of **[breaching party's]** obligations to **[do what]**, and this was/was not apparent to **[breaching party]** when entering the contract.

CONSIDER:

→ Language used in the term (promissory, certain language; 'we guarantee')

→ Prior court decisions

→ Other terms of the contract – have the parties included a clause/assumed the risk of the term being breached? Is there a liquidated damages clause for the term in question?

→ Likely consequences of the breach

→ Whether damages would provide adequate remedy

→ Whether the breach was likely to occur

→ Fairness if the breach gives a right to terminate

It is likely the court would determine that the term is/is not a condition as **[why]**.

**Tramways v Luna Park*: Clause stated 'we guarantee that these boards will be on the tracks at least eight hours per day throughout your season' – Tramways argued it was sufficient for the

boards to be on the tracks for an average of eight hours per day throughout the season, Luna Park said that is not sufficient. HCA held with Luna Park, the term went so directly to the root of the contract and was so essential to its very nature that non-performance can be considered as failure to perform the contract. Additionally, the promissory language of 'we guarantee' was considered. Note also: repudiation of the contract by Tramways – refused to have the trams on the track for 8 hours every day.

*_Associated Newspapers v Bancks_: Bancks had a 10-year contract with Associated Newspapers to publish his cartoon on the front page of the comic section. On several occasions, AN published the cartoons not on the first page. Bancks terminated the contract. HCA held it was a condition; Bancks' obligation was to deliver a one page cartoon every week and this was a condition. The newspaper had to publish this on the front page – would be strange is Bancks' obligation was a condition but the AN's was not. The importance to Bancks of continuity, the cartoon's integrity, and being on the most conspicuous page. Affirmed Jordan CJ's essentiality test.

SERIOUS BREACH OF AN INTERMEDIATE TERM

BACKGROUND OF TRIPARTITE CLASSIFICATION OF TERMS

Prior to ***Hong Kong Fir***, terms were only classified as a condition or warranty. This provided an inflexible regime that did not consider the seriousness of a breach of a contract term. Following this case, the concept of an intermediate term was introduced into contract law, allowing for termination to be permitted if a breach is considered serious. In Australian contract law, adoption of the tripartite classification of terms was first given obiter approval in ***Ankar Pty Ltd v National Westminster Finance*** and was subsequently adopted by the HCA in ***Koompahtoo v Sanpine***, though it is important to Justice Kirby's opposition. In ***Koompahtoo v Sanpine***, the HCA noted the practical utility of intermediate terms, namely giving greater flexibility to the law of contract, and promoting the interests of justice by limiting the right to terminate to serious and substantial breaches, and not merely trivial or technical breaches.

CLASSIFYING AN INTERMEDIATE TERM

Although the term of **[term]** is not a condition in the contract between **[parties]**, it could be classified as an intermediate term which can be breached in many ways, ranging from trivial to serious ***(Hong Kong Fir, Koompahtoo v Sanpine)***. In order to determine if **[term]** is an intermediate term, the court will apply the test from ***Hong Kong Fir*** as postulated by Lord Diplock; in doing so, it will ask if the occurrence of **[breaching event]** deprives **[aggrieved party]** of substantially the whole benefit of the contract which it was the intention of **[parties]** that **[aggrieved party]** should obtain as the consideration for performing their obligations.

On the facts, it is likely the court would/would not find this an intermediate term as **[reason – went to root of contract/didn't go to root of contract/still receive benefit?]**.

→ Then, has it been seriously breached?

*_Hong Kong Fir_: Hong Kong Fir owned a ship and Kawasaki chartered the ship. They entered into a contract for the 24-month charter of the ship. A seaworthiness clause stated, 'She being in every way fitted for ordinary cargo service'. The ship was out of action for 20 weeks, and Kawasaki terminated the contract as a result. The clause was not considered a condition but instead an intermediate term as it did not deprive Kawasaki of substantially the whole benefit of the contract –

ship was only unavailable 20 weeks out of 2 years. Also relevant was the fact that it could easily be breached by trivial defects – a screw slightly loose on the deck.
*_Koompahtoo v Sanpine_: Koompahtoo (under administration) and Sanpine entered into a joint venture agreement whereby K contributed land, and S contributed management and financial expertise. Sanpine breached their obligations in their dealing with joint venture funds and keeping proper books of account and financial records. K terminated the contract. HCA found termination was valid as Sanpine's breaches were sufficiently serious – went to the root of the contract and deprived K of substantial benefit.

CONCLUDE

Ultimately, it is likely the court would consider the term of **[what term]** in the contract between **[parties]** as a condition/intermediate term/warranty, thus allowing/not allowing **[aggrieved party]** to terminate the contract due to **[breaching party's]** breach of the term.

CONSIDER IF THERE IS REPUDIATION?

GO BELOW

TERMINATION II

TERMINATION BY REPUDIATION

INTRODUCTION

If **[aggrieved party]** cannot terminate their contract with **[party]** on the grounds of a breach of a condition/serious breach of an intermediate term, they may be able to terminate for repudiation. **[Aggrieved party]** will need to establish that **[party]** evinced an unwillingness or inability to perform their obligations under the contract ***(Carr v Berriman, Shevill v Builders Licensing Board)***. The doctrine of repudiation serves to ensure that no party is bound by a contract that the other party is unwilling or unable to perform.

***NOTE**: A breach of a condition/intermediate term/warranty can also amount to repudiation.
***NOTE**: An express contractual right to terminate does not exclude the common law right to terminate.

SERIOUSNESS OF REPUDIATION

Repudiation of a contract is a 'serious matter and is not to be lightly found or inferred' (***Shevill v Builders Licensing Board***). As such, the court will apply a high threshold in determining if **[party]** has repudiated the contract. **[Aggrieved party]** must show that **[party's]** unwillingness or inability to perform relates to the whole of the contract, to a condition of the contract, or is otherwise fundamental to the contract (deprive the aggrieved party of substantially the whole benefit of the contract).

TEST FOR REPUDIATION

To establish if **[aggrieved party]** can terminate on the grounds of repudiation, the court will examine whether, viewed objectively, the conduct of **[repudiating party]** has been such as to convey to a reasonable person in the position of **[aggrieved party]**, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it ***(per Deane and Dawson JJ in Laurinda v Capalaba)***. Applying this objective test, it is likely the court would determine **[repudiation did/did not occur]** as **[why]**.

CLASSIFICATION OF TERMS AND REPUDIATION – IF RELEVANT

While **[relevant breached term]** has been classified as a condition/intermediate term/warranty, this classification does not alter **[aggrieved party]** from having a right to terminate on the grounds of repudiation.

→ Breach of condition and repudiation: ***Luna Park v Tramways, Association Newspapers v Bancks***

→ A sufficiently serious breach of an intermediate term can also constitute a repudiation of the contract

→ A series of breaches of warranties could be a repudiation: ***Laurinda v Capalaba***

INTENTION OF PARTIES/HOW HAS REPUDIATION HAPPENED

PARTY'S EXPRESS WORDS:

On the facts, **[repudiating party]** has demonstrated through their express words that they intend to repudiate the contract, evident through the statement of **[insert statement]**.

INFERRED FROM PARTY'S CONDUCT:

On the facts, **[repudiating party]** has demonstrated through their conduct that they intend to repudiate the contract, evident through **[insert conduct]**.

INFERRED FROM FACTUAL INABILITY TO PERFORM:

On the facts, there is a factual inability preventing **[repudiating party]** from performing their obligations under the contract, evident through **[insert factual inability]**.

ANALOGISE/DISTINGUISH FROM CASES (IF RELEVANT)

[Party] has **[insert relevant repudiation]**, similar to **[relevant case]** in which the court determined repudiation had/had not occurred.

CARR v BERRIMAN:

REPUDIATION BASED ONLY ON PARTY'S TERMS

→ **Repudiation**: Contract to build factory, Carr breached by failing to clear land and failing to supply steel. Berriman terminated.

- 'He is prepared to carry out his part of the contract only if and when it suits him'.

- Also series of breaches amounting to repudiation

SHEVILL v BUILDERS LICENSING BOARD:

MUST EVIDENCE AN UNWILLINGNESS/INABILITY TO PERFORM

→ **No repudiation**: Lease agreement where the tenant was repeatedly late with rent due to financial difficulties but was trying their best. Clause 9a stated if the rent is unpaid for 14 days the lessor can terminate the lease. Lessor terminated.

- 'The evidence reveals serious and consistent effort on the part of the lessee to meet its obligations'.
- No evidence that lessee evinced unwillingness or inability to perform contract (tried to meet obligations). Constant late rent payments, without anything else, not enough to show repudiation.

PROGRESSIVE MAILING HOUSE v TABALI:

SERIES OF BREACHES COMBINED CAN AMOUNT TO REPUDIATION

→ **Repudiation**: 5-year lease agreement. Tenant refused to pay rent for 6 months, damaged property, sub-let without consent and misused premises. Lessor terminated based on express termination clause stating termination permitted in rent unpaid for 14 days.

- While the breaches in isolation weren't repudiation, when combined they were.

ANTICIPATORY BREACH?

Although it appears **[repudiating party's]** breach is anticipatory because they are repudiating **[what obligation]** prior to when performance was due, evident through **[statement? Factual inability?]**, this can still amount to repudiation and give rise to a right for **[aggrieved party]** to terminate.

COME TO REASONABLE CONCLUSION

Ultimately, it is likely/not likely that the court would consider, from the objective standpoint of a reasonable person, that **[party]** has repudiated the contract with **[aggrieved party]** as **[why]**. As such, **[aggrieved party]** has/does not have a right to terminate for repudiation.

**CLASSIFYING TERMS AND CASE AUTHORITIES FOR REPUDIATION OF CONDITION, INTERMEDIATE, WARRANTY.

INSTALMENT CONTRACTS

*This ***Maple Flock*** test is mostly used for when there is potentially repudiation, but could also be used to support an argument that there has been a serious breach of an intermediate term – in terms of arguing it has deprived the party of substantially the whole benefit of the contract ***(Hong Kong Fir)***

INTRODUCTION

The contract between **[parties]** can be classified as an instalment contract as the obligations of **[what]** are divided into a number of instalments. As such, pursuant to ***Maple Flock***, the court will