CONTRACT LAW B EXAM NOTES
LAW5005
Semester 1, 2025

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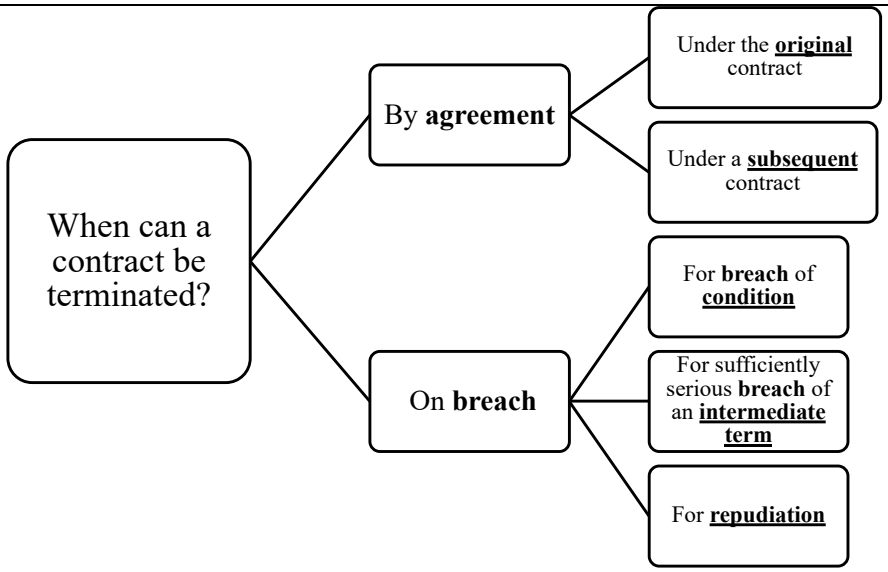
WEEK 1- TERMINATION (AGREEMENT/BREACH)

Performance and breach	**BREACH** A breach of contract occurs when a party does not fulfil their obligations in accordance with the terms of the contract. Contractual liability is strict. If a breach is established the aggrieved party will have the right to claim damages to compensate for losses sustained, specific performance or termination. **PERFORMANCE** Whether there has been performance in accordance with the terms of a contract, important issues will be the standard of performance required and the time at which performance is required. Standard of performance will be found in express terms, as a matter of construction or implied terms. If no time is specified, the courts will imply a term requiring performance within a reasonable time. The order in which the parties must perform their obligations may be specified or a matter of construction. Obligations may be constructive- the parties performed their respective obligations at different times. Obligations may be concurrent- the parties must be ready and willing to perform at the same time.
Termination	**TERMINATION** Termination releases the parties from any obligation to perform the contract any further. While it discharges the parties from contractual obligations arising in the future any rights accrued prior to termination continue unaffected and may be enforced by the relevant party. A right to terminate may give the terminating party's self-help response to breaches of the contract. The right of response may increase the other party's incentive to comply with the terms. Under the common law a right to terminate may arise from: the agreement of the parties, non-fulfilment of a contingent condition, breach of a condition, breach of an intermediate term which is sufficiently serious, fundamental breach or repudiation/renunciation. There are various ways by which a contract may come to an end: ▪ **Discharge—**following due performance, no issues contract end ▪ **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. ▪ **Frustration** – applies automatically (by ***operation of law***) when frustrating circumstances exist and ends the contract prospectively (e.g. boarders closed covid).



TERMINATION BY AGREEMENT

The law of contract concerns consensual obligations allowing parties to make agreement about terminating their contract.

The original contract may include an express term providing for termination, the parties may make a subsequent agreement expressly terminating their original contract, or the courts may find an implied agreement by the parties to terminate in either an existing or subsequent contract.

Termination by agreement original agreement

TERMINATION UNDER THE ORIGINAL CONTRACT/ AGREEMENT

- Many contracts have a fixed term. Those contracts will expire or terminate at the end of the term.
  - Eg. 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.
  - Examples: The Customer may terminate this contract at any time by giving 30 days written notice: see ***Shevill v Builder's Licensing Board***.
- If silent on duration courts may imply a right for the parties to terminate the contract based on the inference that they would not have intended the contract to continue indefinitely, requiring reasonable notice.
- Broad discretionary right to terminate: termination at will.
- May require precise compliance with the termination procedure but see ***Pan Foods v ANZ Bank*** requirements should not be construed in overly technical or restrictive manor.

Shevill v Builders Licensing Board **(1982) 149 CLR 620**

Facts: A lease clause provided that if rent was unpaid for 14 days, the lessor might terminate contract. The lessor re-entered and claimed as damages for breach of contract.

Held:

- The lessee had not evinced an intention no longer to be bound by the lease; and the lessee's failure to pay rent did not go to the root of the contract and make further commercial performance of it impossible.
- The covenant to pay rent was not a fundamental or essential term having the effect that any failure to make payment would entitle the lessor, having terminated the lease, to sue for damages.
- The words in the default clause "or for damages as a result of any such event" did not entitle the lessor to recover damages for non-payment of rent.
- "Would be quite unjust, that whenever a lessor could exercise the right given by the clause to re-enter, he could also recover damages for the loss resulting from the failure

	of the lessee to carry out all the covenants of the lease — covenants which, in some cases, the lessee might have been both willing and able to perform had it not been for the re-entry"- Gibbs CJ.
Termination by agreement subsequent agreement	**TERMINATION BY SUBSEQUENT AGREEMENT** ▪ A "**contract to end a contract**" ▪ Parties may terminate a contract by making a subsequent agreement under which each agrees to release the other from the original contract. ▪ The subsequent (terminating) contract must itself comply with ordinary principles of contract formation, including ***good consideration***. ▪ What will be sufficient consideration depends on whether the 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 other party from obligations – If the contract is fully executed 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**") ▪ An original contract required to be in writing may be terminated by subsequent oral contract writing will be required where the subsequent contract seeks to vary rather than terminate the original contract. ▪ Needs determining whether the parties have intended the subsequent agreement to replace and thus terminate the original contract or intended to merely vary or supplement. Whether the terms are inconsistence and thus not intended to co-exist, termination unlikely intended if subsequent cannot stand alone as new and independent contract, or parties cannot be presumed to have intended to abandon their rights under the original contract. ▪ Difference between termination and variation: ***Concut v Worrell*** held it is unlikely the parties adopted the original agreement with the purpose of depriving the employer of any accrued rights under the original contract.
Termination by agreement abandonment	**TERMINATION INFERRED FROM ABANDONMENT (week 2)** Abandonment inferred from subsequent agreement ▪ Where parties make a subsequent contract covering similar ground, it can sometimes be inferred that they intended to terminate the initial contract. Abandonment inferred from inactivity and other conduct ▪ 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. ▪ Case examples of abandonment (in later topics): – ***DTR Nominees v Mona*** *Homes* (*see* Repudiation—Week 2) ▪ A contract will be terminated by abandonment where the parties conduct themselves in a way to manifest a mutual intention that the contract shall not be further performed, a matter of fact to be inferred from an objective assessment of the conduct of the parties, both acts and omissions viewed objectively must manifests an intention to discharge the contract. Operates on the principles of waiver, been discharged by agreement. Where contract partly performed courts less likely to infer abandonment where length of time of inactivity has elapsed.
TERMINATION FOR BREACH **What is a Breach of Contract?**	

"A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively"
Identifying a breach: The contractual obligation and the nature of the non-performance or defective performance need to be identified.

Actual Breach: occurs **after** time for performance has expired

Types of Actual Breach:

a. Non-performance (breach and repudiation)

b. Defective performance (including delayed performance)

Anticipatory Breach: occurs **before** performance is due

A party reaches **a well founded conclusion/ grounds** that the other party will not perform when performance becomes due.

Not every breach gives rise to the right to terminate (but ***every breach gives rise to the right to damages***)
For the purpose of the right to terminate, the common law classifies contract terms into three types:

- **Condition** (or essential term): any breach gives rise to a right to terminate.
- **Intermediate** (or innominate term): only a serious breach allows termination.
- **Warranty** (or non-essential term): breach does not entitle termination, only damages for the breach e.g. wrong paint colour vs foundations in building contract.

Rights conferred by the common law
The common law rules and termination are most significant where the contract does not expressly granted party the right to terminate the contract in response to breaches and where the aggrieved parties claiming loss of bargain damages.
Whether is an express right to terminate the common law may be excluded, however the mere presence of an express power to terminate will not generally be regarded as excluding the rights conferred by the common law.

When is there a right to terminate for breach at common law?
Whether there is a common law right to terminate for breach of contract depends on the tripartite classification of terms:

- 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.
- 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.
- If the breached term is a **warranty**, *no* breach allows termination; the aggrieved party will be entitled only to damages

Focused on the nature of the terms not the nature of the breach.

Termination for breach of condition	**TERMINATION FOR BREACH OF A CONDITION** Condition and essential terms are often interchangeable. An essential term goes to the root of the contract. A term may be classified as a condition by statute, by the parties express words, or by the courts on the basis of the construction of the contract. Three ways of classifying the term as a condition: ▪ Statutory classification ▪ Express classification in the contract ▪ Intention of the parties **STATUTORY CLASSIFICATION** Statute provides that certain terms are Conditions Where terms classified as a condition any breach of the term will give the aggrieved party a right to terminate the contract, regardless of the gravity of the breach. If question says "illegal without…" may imply a statue. E.g. ***Goods Act 1958*** (Vic) Implied conditions under s 18:

s 18: Sale by description

"When there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description." (Note: section 18 is not on your Reading Guide)

Arcos v Ronaasen **[1933] AC 470**

Facts: Timber delivered by sellers was only fractionally different from its contract specifications and was still suitable for its intended purpose, buyer could buy cheaper if terminated.

Held: The buyers had the right to terminate the contract.

Correspondence with description was a condition under Sale of Goods Act– here the goods didn't match their description (even though they were merchantable and the commercial equivalent).

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.

Does not matter commercial / economic motivation for terminating here.

EXPRESS CLASSIFICATION IN CONTRACT

Parties can classify terms in the contract.

However, the terminology used by parties is NOT decisive:

- ***Goods Act 1958*** **(Vic) s 16(2) -** a stipulation may be a condition though called a warranty in a contract for the sale of goods.

  "Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract."

The parties use of the word condition is not conclusive, must show intended to use in legal sense (e.g. terms and conditions statement doesn't mean conditions).

The fact the contract has expressly confer the right to terminate for breach of a term will not necessarily make it a condition so as to confer a right to terminate for breach under the common law.

While an express right to terminate for breach of a particular term may support a conclusion the term is essential the other circumstances of the case will remain relevant.

However, where there is an express right to terminate for breach the classification of a term is of less important, they will still have a clear right, it may however affect the amount of damages available to the aggrieved party.

Schuler AG v Wickman Machine Tool Sales Ltd **[1974] AC 235**

Facts: The issue in the case was whether the fact that a term of the contract was called a "condition" was conclusive, and whether it could be anything else upon a full reading and interpretation of the contract.

Issue: Could Schuler terminate the contract if Wickman failed to make one single visit out of the 1400?:

- If the term was a condition in the technical legal sense (an essential term going to the root of the contract which the parties intended that any breach would give a right to terminate) YES
- If the term was a condition only in the popular, layman's sense (and not in the technical legal sense) NO