

Topic 2 Termination for Breach

INTRODUCTION

Step 1 Identify what the breach is

Step 2 Classify the term - reasoning

1. Ask first if the term is a condition
2. If not is it an IT → Then ask; is the breach serious enough to terminate
3. If the breach is minor and causes no substantial loss, treated as a warranty

Step 3 Determine if it gives rise to grounds for breach

STEP 1 - IDENTIFY THE BREACH

The contractual obligation and the nature of the non-performance need to be identified

NOT EVERY BREACH ALLOWS FOR TERMINATION BUT ALL GIVE RISE TO DAMAGES;

These breaches give right to terminate;

- Breach of a condition (Even of little gravity) (**Acros**)
- Serious breach of an intermediate term (Depending on gravity and consequence)
- Repudiation

STEP 2 - CLASSIFY THE TERM

RULE

1st is it a Condition: Term is so important that wronged party would not have entered the contract if not assured strict performance of it (**Tramways essentiality test**)

2nd If not then is it an IT: term that can be breached in a number of ways. → **If it is see below for seriousness**

- It is unlikely this term will be a warranty as this term is not “inconsequential” (**Hong Kong**)

3rd if neither than must be Warranty: Will only be a warranty if no possible breach could give rise to an event that would deprive the aggrieved party of substantially the whole of the benefit of the contract

Condition

A clause may be classified as a condition by statute; Otherwise it depends on the intention of the parties

- This is determined using the tramways essentiality test above
- It may be evidenced by express (intended) designation of the parties (However the use of word “condition” alone is not conclusive (**L Schuler v Wickman**))

RELEVANT FACTORS FROM CASES

<u>Factor</u>	<u>Case examples</u>
Look at general nature and subject matter	What is the contract about (Does it go to the root of the contract)
Term is very important to parties (Tramways, Ankar, Bancks).	In Bancks it was important that the cartoon was on the front page

Topic 10 Specific Performance and Injunctions

Specific Performance

STEP 1. INTRODUCTION

→ Specific performance is an equitable doctrine. It is an order from the court directing a party to perform their obligations under the contract

STEP 2. ESSENTIAL REQUIREMENTS

Essential requirements;

1. The contract remains valid and is not rescinded due to vitiating factors.
2. The contract is enforceable as it meets all required formalities.
3. There is valid consideration supporting the contract.
4. There is an actual or threatened breach of contract.
5. Damages are deemed inadequate to address the breach. **(Dougan v Ley)**

WHEN ARE INADEQUATE DAMAGES

- Damages may be inadequate where they are difficult to assess (Difficult to assess is a very high bar with expert accountants and financial experts)
- Damages are adequate where plaintiff can obtain substitute on market (Common goods, listed shares)
- Damages are inadequate where the plaintiff cannot obtain a substitute on market (Land, unique items; articles of unusual beauty, rarity and distinction)

DISCRETIONARY FACTORS

Specific performance may be denied where

- It would require **continued court supervision** **(JC Williamson v Lukey)**
- The contract involves **personal services** (Particularly when there's been a breakdown in relations)
- There is an unreasonable **delay** (causing prejudice to the defendant)
- The plaintiff has also breached the contract i.e. (not **ready and willing**)
- It would be **futile, impossible or illegal** to perform
- The contract is affected by plaintiff's **unfair conduct**
- It would cause **hardship** to the defendant or third party
- There is no **mutuality** (neither party could get specific performance) **JC Williamson**

Injunctions

STEP 1. INTRODUCTION

Like specific performance, injunctions are an equitable doctrine. They prevent a party from doing something. The court generally will not grant an injunction unless damages are inadequate. It is also discretionary - is it **just and appropriate** to grant injunction and confine the plaintiff to damages.

STEP 2. ESSENTIAL REQUIREMENTS

Not granted where the contract is:

- Rescinded due to vitiating factors
- Unenforceable due to lack of formalities
- No valid consideration
- Actual or threatened breach of contract

Topic 13 Frustration

STEP 1: Introduction

Suggested Process

1. Identifying the supervening event
2. Apply general test from **Davis Contractors**
3. Compare; the situation that arose; with the situation contemplated by the contract
4. Consider the various categories and cases (as an aid to applying to the general test)
5. If any of the limitations aren't relevant

Performance of a contract will sometimes be **disrupted** by events outside the control of the parties

Test for frustration

Without default of either party a contractual obligation to become incapable of being performed because in circumstances in which performance is called for would render it fundamentally/**radically different** from the situation contemplated by the contract upon creation... **It was not this I promised to do** (**Davis; Codelfa**)

E.g Ship transporting goods is delayed in hurricane or gov prohibits goods subject of contract

- Thus doctrine of frustration provides a **lawful excuse** for non performance
- Test is strict and not easy to make out
- **Did performance become impossible or merely more difficult**

Structure

1. Identify the supervening event
2. Apply general test from Davis
3. Compare the situation that arose to the situation contemplated by the contract (Ask is it radically or fundamentally different)
4. Consider various illustrative categories (In aid of the general test)
5. Consider if any of limitations are relevant

STEP 2: ILLUSTRATIVE CATEGORIES OF WHEN A CATEGORY MAY BE FRUSTRATED

*Serves illustrative examples but whether a particular contract is frustrated depends on the circumstances of the case and should be determined using test above from **Davis Contractors***

DESTRUCTION OF SUBJECT MATTER

A contract is likely to be frustrated where the subject matter (particular thing to be supplied) of the contract is destroyed. This is because its destruction makes performance impossible.

E.g **Taylor v Caldwell** - Destruction of property to be hired - "In contracts which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse performance"

GOODS ACT 1958 – S 12

Goods perished after agreement to sell before risk passes to the buyer (to no fault of the seller or buyer) the agreement is thereby avoided

DEATH OR INCAPACITY (PERSONAL SERVICES)

Death or incapacity of person to provide personal services

CONTRACT B EXAM SCRIPT

Topic 1: Termination by Agreement:

Factor	Exam Script
INTRODUCTION	
	<p>It is likely that P wants to terminate the contract with D and hence P must establish that P has the right to terminate (RTT) the contract with D. D will likely argue that D does not want the contract to be terminated/ P has wrongfully terminated the contract if P has made an effort to do so. To ensure that P does not risk being sued for repudiating by wrongfully terminating the contract, it is advised that P should ultimately seek a court order on this RTT. There are various ways in which the RTT will be valid.</p>
STEP 1 TERMINATION UNDER ORIGINAL CONTRACT	
Express Agreement	<p>P will argue that [insert clause] of the contract is a termination clause which expressly allows the contract to end, therefore, enabling P to validly exercise the RTT. Analogising to Shevill v Builders Licensing Board, P may argue that there was an express right to terminate the contract because [insert facts]. This was similar as in Shevill, there was an express right to terminate the lease agreement if the rent was unpaid for 14 days.</p> <p>As D must still perform their part of the contract, P will argue that an ‘accord and satisfaction’ agreement was validly executed by P and D, which produced a contract to the end the original contract of [insert contract]. In this situation it is necessary to have a deed, or ensure there is consideration provided by D. Here, fresh consideration is required and P will argue that the fresh consideration is [insert]</p> <p>Counterarguments: D may argue that the contract did not comply with ordinary principles of contract formation because [insert reason].</p> <p>D may argue that insufficient consideration was made because [insert reason]. Executory: However, P may argue that consideration is sufficient because the contract is executory, meaning that both parties still have obligations to perform under the contract, specifically, P must [insert what P has to do] and D must [insert what D must do]. In this case, P will argue that each party provides consideration in agreeing to release the other party from the obligations.</p> <p>On balance, it is likely/ unlikely that P has the right to terminate the contract via express agreement because [insert reason]. Subsequently, each party’s future rights and obligations under the contract are extinguished, although accrued rights remain.</p>
Implied Agreement.	<p>If the express termination by agreement fails, P may wish to argue that P has the right to terminate which was inferred from the subsequent agreement of [insert agreement]. Here, P will argue that the subsequent contract covers similar ground and</p>

Topic 11: Equitable Remedy: Action for Debt

Factor	Exam Script
<p>STEP 1: Introduction</p>	<p>P may consider seeking the equitable remedy of an action for debt, which is a payment of an amount of money due under a contract. This equitable remedy is an alternative to damages. A party to a contract may be entitled to recover a debt even where that party has breached the contract and where the contract has been terminated in response to the breach.</p>
	<p>STEP 2. HAS THE RIGHT ACCRUED</p>
<p>Requirements for an Action for Debt</p>	<p>In order for P to seek an action for debt, two requirements must be satisfied. First, the contract must impose an obligation to pay a certain or ascertainable sum of money. Here, P will argue that this is satisfied because D had the obligation to pay [insert sum], which is ascertainable. However, D may counterargue and state that the sum of money is not ascertainable because [insert reason]. On balance, this requirement is likely/ unlikely to be satisfied.</p> <p>If unsatisfied: However, in the case that I am wrong and the sum of money is ascertainable, the court will consider the second requirement.</p> <p>Second, the right to payment of the sum must have accrued. Here, P will argue that the [sum of money] has accrued because [insert reason].</p> <ol style="list-style-type: none"> 1. Where performance for that money has been given, i.e. the party claiming the right to sue for a debt has earned the payment by performance; or 2. On the time for payment where the contract clearly specifies that payment is to be independent of performance. <p>On balance, this requirement is likely to be satisfied. Therefore, the requirements for an action for debt are met.</p>
<p>Entire and Divisible Obligations</p>	<p>Next, the court will need to consider whether the obligations are entire or divisible. To determine this, the court will perceive it as a matter of construction and depends on the presumed intentions of the parties and the circumstances of the contract. Subsequently, the court will ask - Did the parties intend that performance and price would be divided into corresponding parts, or did they intend the entire obligation to be performed before any entitlement would arise?</p> <p>Here, P may argue that it is an entire obligation as the [insert performance] must be fully performed for a D to be entitled to payment for the [insert performance]. However, D may argue that it is not an entire obligation because D merely partly performed the entire obligation and therefore P is not entitled to payment of the contract price or any part of the price. Regardless, P will raise that this general principle is subject to the doctrine of substantial performance.</p> <p>Here, P may analogise to Cutter v Powell, where the Court held that it was an entire contract as Cutter was entitled to 30 guineas given that he completed the voyage or alternatively, receive nothing if he did not complete the voyage. This can be analogised to the facts of the present case because [insert facts].</p> <p>Alternatively, P may argue that it is a divisible obligation where the party intended the contract price and performance to be divided into corresponding parts. Here, P may argue that [insert facts] which was likely to be intended to be divided because [insert intention of the parties].</p>

Topic 13: Frustration

Factor	Exam Script
	STEP 1: INTRODUCTION
Introduction	<p>P will argue that the contract has been frustrated and hence P is excused from further performance due to changed circumstances that are outside the scope of the original agreement, specifically due to [insert changed circumstances]. If satisfied, the parties are discharged with the contract and no further performance is required as frustration is an excuse for non-performance.</p> <p>Suggested Process</p> <ol style="list-style-type: none"> 1. Identifying the supervening event 2. Apply general test from Davis Contractors 3. Compare; the situation that arose; with the situation contemplated by the contract 4. Consider the various categories and cases (as an aid to applying to the general test) 5. If any of the limitations aren't relevant <p>Frustration is a strict test and will only be found in exceptional circumstances. The critical issue is whether [the situation] resulting from the [alleged frustrating event] is radically/ fundamentally different from the situation contemplated by the contract without default of either party (Davis Contractors; approved in Codelfa)</p> <p>Here, P will argue that the new circumstance is radically/ fundamentally different because [insert reason] Consider: According to the natural interpretation read in light of the surrounding circumstances and nature of the contract, what circumstance was the contract intended to cover?</p> <p>Consider: Compare the ‘new’ circumstances with the situation contemplated by the contract and ask: is it radically different? – matter of the construction; is the contract wide enough to apply to the new situation However, D may counterargue that the [alleged frustrated event] was contemplated by the contract as [insert reason]. Therefore, it is unlikely to be a frustrating event and the parties are not discharged from the contract. On balance, the courts are likely to find that the test for frustration is/ is not made out because [insert reason].</p>
	STEP 2: ILLUSTRATIVE CATEGORIES OF WHEN A CATEGORY MAY BE FRUSTRATED
Destruction of Subject Matter	<p>To further aid in the application of the general test, P may consider the various illustrative categories of frustration.</p> <p>P may argue that the contract is likely to be frustrated as the subject matter of the contract, namely [insert subject matter], has been destroyed. Therefore, this will make [insert performance] impossible. P may analogise with Taylor v Cadwell, in that similar to the destruction of the music hall due to the fire, the destruction of [insert subject matter] will excuse the performance</p> <p><u>GOODS ACT 1958 – S 12</u></p> <p>Goods perished after agreement to sell before risk passes to the buyer (to no fault of the seller or buyer) the agreement is thereby avoided</p>