

CASE NAME > FACTS > ISSUE > HELD/OUTCOME

Topic 1 Termination by agreement			
<i>Termination under the original contract</i>			
<p>Shevill v Builders Licensing Board (1982) 149 CLR 620</p> <p>EXPRESS TERMINATION CLAUSE AND COMMON LAW RIGHTS TO TERMINATE</p>	<p>Shevill leased premises to a tenant under a lease agreement that included a forfeiture clause allowing termination for breaches. The tenant failed to make rent payments, and Shevill sought to terminate the lease.</p>		<p>The common law right to terminate co-exists with an express right to terminate</p> <p>Failure to comply with a specified procedure under an express termination clause, does not preclude reliance on the common law right to terminate (Common law rights are preferred to express clause)</p>

Topic 2 Termination for Breach			
<i>TERMINATION FOR BREACH OF A CONDITION</i>			
<p>Arcos v Ronaasen [1933] AC 470</p>	<p>Contracted for sale of wood to make barrels with specified thickness of wood to be half an inch</p> <p>Some wood was fractionally different thickness which made no difference to the use of the wood</p> <p>Buyers terminated</p>	<p>Could the buyer terminate for breach?</p>	<p>Held that yes they had the right</p> <p>Correspondence with description was a condition under UK sales of Goods legislation and here the goods didn't match their description (even though merchantable)</p> <p>Even though breach was minor and trivial there was right to terminate for every breach</p>
<p>L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235</p>	<p>A clause existed for Wickman to visit six largest UK manufacturers at least once every week and hence about 1400 visits over contract term - Wickman did not make all these visits</p>	<p>Could Schuler terminate the contract?</p> <p>Was the term a condition?</p>	<p>Held not to be a condition</p> <p>The word CONDITION was used however it was not clear what sense of the word was meant and considering that constructing the term to lead to breach is a very unreasonable result (where the nature of the term is such that breach</p>

<p>Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903</p>	<p>Subaru had a clear express right to terminate on 32 days notice - need not be even a breach</p> <p>Subaru wanted to implement lot of changes with Roger disputed to implement - Subaru gave 13 months notice of its intention to terminate the relationship</p>	<p>Had Subaru breached the duty of good faith in exercising its termination right</p>	<p>Held: implied term of good faith in law which both parties accepted</p> <p>Test was that must not act capricious but does not restrict acts to promote legitimate interests</p> <p>On the facts Subaru had good reason and acted reasonably</p> <ul style="list-style-type: none"> - Good reason for issue of 6 point program and was not onerous expectation - which Garry disputed - 13 month notice was very reasonable and gave Garry lots of time to accommodate
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<p>Topic 8 Damages (Common law damages)</p>			
<p>THE MEASURE OF DAMAGES</p>			
<p><u>EXPECTATION DAMAGES</u></p>			
<p>Robinson v Harman (1848) 1 Ex 850, 855; 154 ER 363, 365</p>			<p>Compensation principle</p>
<p><u>BREACH OF AN OBLIGATION TO BUILD OR REPAIR</u></p>			
<p>Bellgrove v Eldridge (1954) 90 CLR 613</p>	<p>Contract to build house</p> <p>Bellgrove was the builder and breached the building specifications</p> <ul style="list-style-type: none"> - Re: concrete composition in foundations and mortar in brick walls, resulting in grave instability of house 	<p>Issue: assessment of damages - Cost of decreased value of defective house, or cost to rebuild</p> <p>Builder argued that the value was resale value - minus if contract was fulfilled</p> <p>Owner argued - cost should be to demolish the house and rebuild it based on the contract</p>	<p>Held; plaintiff entitled to have a house built for what they contracted for and gave a qualifications</p> <ul style="list-style-type: none"> - To grant damages on cost of cure basis it must be Necessary to induce conformity with the contract, must also be a reasonable course to adopt
<p>Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272</p>	<p>Office building was owned by Bowen and rented by Tabcorp</p> <p>Landlord visited the</p>	<p>Issue: How should damages be assessed</p> <p>Tenant argued that should be different in</p>	<p>Held: Cost of cure damages were available</p> <p>Putting the plaintiff in same position as if</p>

			<p>oral contract, and was not prevented by the legislation</p> <p>If contract was enforceable would not be claim under restitution and instead an action for debt</p>
Codelfa constructions	<p>A contract to construct an underground railway was frustrated by the grant of the injunction</p> <p>Contract frustrated by injunction due to noise</p>		<p>Codelfa received from State Rail Authority an amount on the basis of restitution in relation to services provided after the frustration of their contract (which was more than the contract price due to the change in working methods resulting from the injunction)</p>

Topic 13 Frustration			
<i>WHEN IS A CONTRACT FRUSTRATED?</i>			
The test for frustration			
Davis Contractors Ltd v Fareham Urban DC [1956] AC 696			
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337			
Illustrations			
Destruction of subject matter			
Taylor v Caldwell (1863) 3 B & S 826	<p>Contract to hire music hall and Gardens for grand concerts</p> <p>Hall destroyed by accidental fire</p> <p>Plenty of argue defend him was in breach for not providing the hall and sought recovery of advertising expenditure</p> <p>Defendant argued:</p>	Was the P loss to fall on the defendant? Was the contract frustrated	<p>Held</p> <p>Contract was frustrated Parties contracted on the basis of the continued existence of the music hall</p> <p>The music hall ceased to exist</p> <p>Both parties were excused from performance of their</p>

Topic 14 Common Law Vitiating Factors - Impropriety by Third Parties (Cont.)

DURESS

BASIC ELEMENTS OF DURESS

<p>Universe Tankships of Monrovia v International Transport Workers Federation [1983] 1 AC 366</p>	<p>Universe tankship “blackened” by the union (ITWFP - meant it could not be serviced by tugboats and could not get out of port)</p> <p>ITWFP demanded \$6480 contribution to its welfare fund to lift the “blackening” (which Universe Paid)</p>	<p>Was this duress</p>	<p>Legal test was outlined here</p> <p>The ship owner acted under compulsion; there was no protest they did whatever was necessary to get it back due to the urgency and commercial necessity</p>
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ECONOMIC DURESS

<p>Crescendo Management Pty Ltd v Westpac Banking Corp (1988) 19 NSWLR 40, 45</p>	<p>Company alleged that Westpac were not released funds from sale of directors house until the company executed mortgage over another property owned by the company to secure company debts (This was unlawful because westpac was not entitled to keep that money)</p> <p>Company then sought to set aside the mortgage on the basis of economic duress</p>		<p>There was no causal link (It was entered into to keep the company afloat and the directors were happy to sign the mortgage to keep the company trading and the threat was no cause - company signed mortgage before bank made the threat)</p> <p>Although the bank applied illegitimate pressure and withholding the funds, the pressure did not cause the company to execute the mortgage. It played no part in the execution of the mortgage, which was executed for commercial reasons to allow the company to continue trading (and before the relevant pressure was applied)</p>
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LAWFUL ACT DURESS

<p>Thorne v Kennedy (2017) 263 CLR 85</p>	<p>Kenedy (18-24M net worth) brings fiance Throne to Australia with plans to marry</p> <p>Days before wedding he says she must sign a</p>	<p>Can the agreement be set aside on the basis of duress, undue influence, or unconscionable conduct</p>	<p>Ms Thorne claims that the contract should be rescinded (under the pre-nup she would receive \$50k whereas without the pre-nup she would receive 1.1M)</p>
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OUTLINE LAW AND ONLY DISCUSS CONTENTIOUS ISSUES

Termination

- Contracts can be terminated by agreement or;
- Breach (Condition, serious intermediate term, Repudiation (Delay))

Topic 1 Termination by agreement

1 TERMINATION UNDER ORIGINAL CONTRACT

Contracts that have a fixed term and expire or terminate at the end of that period (Case example – **Shevill**)

2 TERMINATION UNDER SUBSEQUENT CONTRACT (new contract ends the old one)

TERMINATION BY EXPRESS AGREEMENT

The contract to end a contract must fulfil the **ordinary principles of contract formation**, and particularly sufficient consideration on parties will depend on whether the contract is **partly or wholly executed**.

- If contract is executory (ie both parties still have obligations to perform): each party agreeing the release the other and promise not to sue is sufficient consideration
- Fully executed by one party and not the other: A deed is necessary because it does not require consideration **otherwise** fresh consideration is needed e.g I promise to pay you \$1

TERMINATION 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 (look to intention of the parties)

ABANDONMENT

- 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

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

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

<p>Factors to consider from (Koomphatoo) Regarding seriousness</p>	<ul style="list-style-type: none"> ● The nature of the contract and the relationship it creates. ● The nature of the term ● The kind and degree of breach ● The consequences of the breach to the other party ● The adequacy of damages
<p>Say more or less likely that is was intended to be condition and perhaps was instead intended to be an IT COURTS DONT PREFER TERMINATION - script writing</p>	

<p>Topic 3 Repudiation</p>
<p>Where a party is unable or unwilling to perform their contractual obligations and allows for termination</p> <ul style="list-style-type: none"> ● Its an objective test and may be demonstrated by words or conduct or factual inability to perform (Wholly and finally disabled from performing the contract) ● May also be anticipatory (e.g I will not pay) ● “A serious matter and is not to be lightly found or inferred” (Shevill v Builders) <p>Test for repudiation “A contract may be repudiated if one party renounces his liabilities under it - if he evinces is an intention no longer to be Bound by the contract...Or shows that he intends to fulfill the contract only in a manner substantially inconsistent with his obligations and not in any other way” - Gibbs CJ in shevill</p>
<p>SPECIAL CIRCUMSTANCES</p>
<p>INSTALMENT CONTRACT Contract where obligations are divided into a number of installments.</p> <p>TEST FOR REPUDIATION – (MAPLE FLOCK) <u>Relevant Factors</u></p> <ol style="list-style-type: none"> 1. The quantitative ration the breach bears to the contract as a whole and (e.g 3 installments of 100) 2. The degree of probability or improbability that such a breach would be repeated (e.g will probably happen next time) <p>ERRONEOUS INTERPRETATION (A party is mistaken about their obligations) Is the party persisting in its interpretation <i>willy nilly</i> in the face of a clear enunciation of the correct interpretation (<i>DTR v Mona Homes</i>)?</p> <ul style="list-style-type: none"> ● Did they have a chance to discuss, persuade, or correct their mistake? ● Was it plainly clear to begin with?
<p>For exam script If a party is erroneously interpreting and other party wants to terminate:</p> <ul style="list-style-type: none"> - Take steps to try to enunciate correct interpretation of contract to other party - If correct interpretation is unclear, get a court determination of the correct interpretation of contract

<p>Topic 4 Termination for Delay</p>
<p>Delay is not a separate reason for termination but treated as separate analysis because of specific terminology and special rules</p> <p>When can you terminate for delay</p> <ul style="list-style-type: none"> ● If time is of the essence and “hence a condition” of the contract they can terminate at any time after the due date ● If time is not of the essence may be an IT and serious breach can lead to termination ● Delay could amount to repudiation

- (h) Requirements of any other code that P reasonably believed D would follow.
- (i) D's failure to disclose certain risks that might affect their interest.
- (j) Formation: opportunity for negotiation, nature of terms, pre-contractual conduct, post contractual conduct.
- (k) D's contractual rights to vary contract unilaterally.
- (l) Extent to which parties acted in good faith.

Guidance from Cases about what is unconscionable

- To be given its ordinary meaning - something not done in good conscience – **ACCC v Lux**
- The definition of unconscionable conduct per s21 there does not need to be vulnerability or disadvantage which was exploited (**ASIC v Quantum**)
- The court is to evaluate the facts by reference to a “normative standard of conscience ... permeated with accepted and acceptable community values” – **ACCC v Lux**
- “Conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience”- **ASIC v Kobelt**
- Can include dishonesty, trickery or sharp practices, unfair dealing with customers, and taking advantage of vulnerability - **Paciocco v ANZ; ASIC v Kobelt**
- Consider also the judicial pronouncements in **ASIC v Kobelt**.

Topic 18 Remedies Under Statute

WHEN WILL STATUTORY REMEDIES BE AVAILABLE

1. There has been a contravention of s18, 20 or 21 (Misleading or deceptive conduct or statutory UC); and
2. Some “loss or damage” (for s236) has been (or is likely to be) suffered; and
3. There is a causal connection between the “loss or damage” and the breach

P must prove that she has suffered loss or is likely to suffer loss. An appropriate test for assessing if there is any loss or likely loss is to ask if P is/is likely to be “worse off” because of the conduct (**Gates; Marks**)

S 236 DAMAGES

Available as of right on application by an injured person, to compensate actual loss or damage suffered (Can't be loss likely to be suffered must have been actual loss) because of a contravention of (s18, 20, 21) and can recover the amount of the loss or damage (**s236(1)ACL**)

LIMITATION

Claims for damages must be brought within 6 years of breach (**s 236 (2)**).

IDENTIFY THE LOSS

- S 236 damages are not limited to compensation for Economic loss and can compensate for Non-pecuniary losses

OTHER ORDERS

INTRODUCTION

The court has discretion to make any other orders it deems appropriate to compensate loss suffered; or prevent/reduce loss suffered or likely to be suffered (**ACL s 237**).

- Action must be brought within 6 years of breach (**s 237(3)**).
- P does not need to have suffered actual loss (**s 237(2)(b)**).

OTHER ORDERS LISTED IN S 243