

CONTRACTS B – CASE SUMMARIES - T1 2016

CASE NAME	PAGE
<i>Agricultural and Rural Finance v Gardiner (2008)</i>	25
<i>Alati v Kruger (1955)</i>	60
<i>Alexander v Cambridge Credit Corp Ltd (1987)</i>	31
<i>AMEV-UDC Finance Ltd v Austin (1986)</i>	35
<i>Andrews v ANZ (2012)</i>	35
<i>Ankar Pty Ltd v National Westminster Finance (Aust) Ltd (1987)</i>	8
<i>Arcos LTD v EA Ronaasen and Son (1933)</i>	5
<i>Associated Newspapers Ltd v Banks (1951)</i>	7
<i>Baltic Shipping Co v Dillon (1993)</i>	34
<i>Barton v Armstrong (1976)</i>	52
<i>Bellgrove v Elderidge (1954)</i>	27
<i>Blomley v Ryan (1956)</i>	56
<i>Bolton v Mahadeva (1972)</i>	44
<i>Bot v Ristevski (1981)</i>	45
<i>Bowes v Chaleyer (1923)</i>	19
<i>Bridgewater v Leahy (1998)</i>	58
<i>Brisbane City Council v Group Projects Pty Ltd (1979)</i>	48
<i>Burns v MAN Automotive (Aust) (1986)</i>	33
<i>Butcher v Lachlan Elder Realty (2004)</i>	63
<i>Byers v Dorotea Pty Ltd (1986)</i>	67
<i>Campomar Sociedad Limitada v Nike International (2000)</i>	62
<i>Carr v J A Berriman Pty Ltd (1953)</i>	11
<i>Chaplin v Hicks (1911)</i>	30
<i>Clea Shipping Corp v Bulk Oil International Ltd (The 'Alaskan Trader') (No 2) (1984)</i>	46
<i>Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982)</i>	49
<i>Commercial Bank of Australia v Amadio (1983)</i>	56
<i>Commonwealth v Amann Aviation Pty Ltd (1991)</i>	29
<i>Concrete Constructions (NSW) v Nelson (1990)</i>	62
<i>Crescendo Management v Westpac (1988)</i>	51
<i>Curro v Beyond Productions Pty Ltd (1993)</i>	40
<i>Cutter v Powell (1795)</i>	42

<i>Davis Contractors Ltd v Fareham Urban DC (1956)</i>	47
<i>Demagogue Pty Ltd v Ramensky (1992)</i>	65
<i>Dougan v Ley (1946)</i>	40
<i>DTR Nominees v Mona Homes (1978)</i>	14
<i>Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd (1915)</i>	38
<i>Eminence Property Development Ltd v Heaney (2010)</i>	15
<i>Esanda Finance Corp v Plessnig (1989)</i>	38
<i>Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943)</i>	50
<i>Futuretronics International Pty Ltd v Gadhzis (1992)</i>	66
<i>Foran v Wight (1989)</i>	21
<i>Gates v City Mutual Life Assurance Society Ltd (1986)</i>	68
<i>Hadley v Baxendale (1854)</i>	32
<i>Hartigan v International Society for Krishna Consciousness Inc (2002)</i>	61
<i>Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988)</i>	64
<i>Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988)</i>	69
<i>Henville v Walker (2001)</i>	70
<i>Herne Bay Steamboat Co v Hutton (1903)</i>	48
<i>Hoening v Isaacs (1952)</i>	43
<i>Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (1962)</i>	8
<i>Howe v Teefey (1927)</i>	30
<i>Immer (no 145) v Uniting Church in Australia Property Trust</i>	22
<i>JC Williamson Ltd v Lukey & Mulholland (1931)</i>	41
<i>Johnson v Buttress (1936)</i>	54
<i>Koompahtoo Local Aboriginal Land Council v Sandpine (2007)</i>	9
<i>Kakavas v Crown (2013)</i>	59
<i>Krell v Henry (1903)</i>	48
<i>L Schuler AG v Wickman Machine Tool Sales Ltd (1974)</i>	5
<i>Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1982)</i>	17
<i>Legione v Hateley (1982)</i>	23
<i>Louinder v Leis (1982)</i>	17
<i>Louth v Diprose (1992)</i>	57
<i>Mackintosh v Johnson (2013)</i>	59
<i>Maple Flock Co Ltd v Universal Furniture Products (1934)</i>	13
<i>March v E & MH Stramare Pty Ltd (1991)</i>	32
<i>Marks v GIO (1998)</i>	70

<i>McDermott v Black (1940)</i>	4
<i>McDonald v Denny Lascelles Ltd (1933)</i>	19
<i>McDonald v Denny Lascelles Ltd (1993)</i>	45
<i>McRae v Commonwealth Dispatch Commission (1951)</i>	28
<i>Miller & Associates Insurance Broking v BMW Australia Finance (2010)</i>	65
<i>Murphy v Overton Investments Pty Ltd (2004)</i>	69
<i>Nemeth v Bayswater Road Pty Ltd (1988)</i>	43
<i>Paciocco v ANZ (No.2) (2014)</i>	36
<i>Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985)</i>	12
<i>Ringrow v BP Australia (2005)</i>	38
<i>Ruxley Electronics & Construction v Forsyth (1996)</i>	28
<i>Shevill v Builders Licencing Board (1982)</i>	13
<i>Simonious Vischer & Co v Holt & Thompson (1979)</i>	34
<i>Steele v Tardiani (1946)</i>	42
<i>Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009)</i>	27
<i>Tanwar Enterprises Pty Ltd v Cauchi (2003)</i>	25
<i>TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Ltd (1955)</i>	52
<i>Taylor v Caldwell (1863)</i>	47
<i>Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938)</i>	6
<i>Tropical Traders Ltd v Goonan (1964)</i>	21
<i>Tsakiroglou & Co v Noble Thorl GmbH (1962)</i>	50
<i>Union Eagle Ltd v Golden Achievements Ltd (1997)</i>	24
<i>Universe Tankship of Monrovia v International Transport Workers Federation (1983)</i>	51
<i>Vadasz v Pioneer Concrete (SA) Pty Ltd (1995)</i>	60
<i>Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949)</i>	32
<i>Westmelton (Vic) Pty Ltd v Archer & Schulman (1982)</i>	55
<i>White and Carter (Councils) Ltd v McGregor (1963)</i>	46
<i>Woodar Investments Development v Wimpey Construction (1980)</i>	15

TOPIC 1 – DISCHARGE & TERMINATION:

TOPIC 1A - TERMINATION BY AGREEMENT

ACCORD AND SATISFACTION:

McDermott v Black (1940) – Accord and satisfaction

Facts:

- Black (purchaser) alleged that he was induced by **fraudulent misrepresentation** to enter into a contract for the sale of shares with McDermott, and that he deposited certain bonds with McDermott to secure payment of the deposit.
- Before the date of completion, Black complained of the misrepresentation (in a letter), before later withdrawing all allegations in exchange for McDermott granting him an extension of time to complete the contract.
- McDermott granted him an extension of time, however Black refused to complete on the extended date.
- McDermott rescinded the contract, and Black sued for damages for deceit, relying on the misrepresentation he had withdrawn.

Issues:

- Did Black's agreement to withdraw the allegations operate to extinguish his cause of action in deceit (any cause of action in deceit)?
- And, if not, did it nevertheless disable him from relying on an action of deceit *upon the specific misrepresentations* to which his withdrawal related?

Held; Dixon J

- McDermott must show that the agreement not to sue amounted to an **accord and satisfaction**.
- The essence of accord and satisfaction is the acceptance by the PL of something in place of his cause of action. It may be a promise or contract or it may be the act or thing promised.
- But whatever it is, **until it is provided and accepted, the cause of action remains alive** and unimpaired.
- An *executory promise* given in consideration (accord) of the abandonment of the claim may be accepted in substitution (satisfaction) of the existing liability. In this case, the discharge of liability is immediate.
- Alternatively, a promise may be made to do an act, thing or make a payment, and the other party may agree to accept not the promise, but *the act, thing, or money itself* in satisfaction. Here, there is no discharge unless and until the promise is performed.
- The agreement to withdraw (allegations of fraudulent misrepresentation) in consideration of a grant of time (three weeks further time for payment of the balance of the purchase money) can be regarded as accord and satisfaction.

TOPIC 1B. TERMINATION FOR BREACH OF A CONDITION

Arcos LTD v EA Ronaasen and Son (1933) – Termination for breach of condition (Statute)

Facts:

- Across entered into a contract to purchase timber from Ronaasen, to use in the manufacture of wooden barrels.
- The contract prescribed a specific thickness of the stakes – half an inch each. Some of the stakes were fractionally different in thickness, however this made no difference to the use of the wood.

Issue: Did the miniscule variance in the thickness of the stakes amount to a breach of a condition?

Held;

- The Sale of Goods Act states it is a *condition* – or essential – that the goods correspond with their description.
- In the event of a **breach of a condition**, the aggrieved party will have the **right to terminate** the contract, **even if the breach is of little gravity**.
- The differing thickness of the timber stakes – even if the variance did not affect usage – amounted to a breach of a condition, and Arcos was entitled to terminate.

L Schuler AG v Wickman Machine Tool Sales Ltd (1974) – Termination for breach of condition (parties intentions)

Facts:

- Schuler was a German manufacturer of machine tools used in the construction of cars.
- Schuler appointed Wickman as the sole distributor of these machine tools in the UK for 4½ years.
- Clause 7(b) of the contract provided that “*it shall be a condition of this agreement that Wickman shall send its representatives to visit at least once in every week for the purpose of soliciting orders for panel presses*”.
- This clause required Wickman to make 1,400 visits over the lifetime of the contract.
- Wickman did not manage to make all visits.
- Schuler purported to terminate the contract for breach of a condition. Wickman Contested

Issue: Could Schuler terminate, based on the breach of clause 7(b), which was described as a ‘condition’?

Held;

- For a term to be a **condition in the technical legal sense**, it must go to the root of the contract, and be one which the parties contemplated the breach of would give rise to a right to terminate.
- The mere use of the word ‘condition’ is not conclusive. Many contracts include the word ‘condition’ only in the layman’s sense of the word.
- If it is unclear, the courts must interpret the parties’ intentions, having regard to the terms and subject matter of the contract.
- Here, the meaning of the word ‘condition’ in Cl. 7(b) is unclear, and up to the courts to interpret.
- As a general rule, where a terms particular construction leads to a very unreasonable result, where the *nature of the term is such that a breach is likely* – it is unlikely that the strict compliance to the legal meaning of the word ‘condition’ is required.
- The result of this clause was unreasonable, and therefore not deemed to be a condition of the contract. Schuler had no right to terminate.

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) – Termination for breach of condition (parties intentions)

Facts:

- Tramways entered into a contract with Luna Park for 3 seasons, whereby it would advertise the theme park on 53 boards on tram roofs throughout the city.
- The contract posited that “*we (Tramways) **guarantee** that these boards will be on the tracks at least 8 hours a day per day throughout Luna Parks season*”
- After the 2nd season, Luna Park argued that the contractual agreement was not being followed - i.e. that Tramways was not advertising the theme park for **at least 8 hours a day**, every day).
- Subsequently Luna Park terminated the contract for breach of this condition.
- Tramways admitted that it had not been advertising the theme park for at least 8 hours a day, but challenged the termination, asserting that it was sufficient that the board were advertised for an **average** of 8 hours a day.

Issue: By advertising for an **average** of 8 hours a day, and not **at least 8 hours a day**, did Tramways breach a condition of the contract, affording Luna Park the right to terminate?

Held; Jordan CJ

- Test for whether a term is a condition;
- “*The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is **of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor***”.

Latham CJ, Rich, McTiernan JJ

- The clause was a legal condition of the contract. By the courts construction, the following factors asserted such;
- The words “**we guarantee**” was in **clear, precise and promissory language**, suggesting that this particular term was important and essential to the contract;
- The parties agreed that payment was not to commence until all 53 boards were displayed. Advertising as per the arrangement was essential to the contract, and
- Preliminary discussion demonstrated the importance of continued display if the boards.
- Accordingly, Luna Park was within its rights to terminate the contract for breach of the Condition.

NB: It was found that Tramways also **repudiated** the contract, i.e. not only did they fail to perform their advertising obligation, they also insisted that they would continue to advertise for only an *average* of 8 hours per day (and not the required 8 hours every day). This clearly indicated their intention not to perform in accordance with the terms, and Tramways were made to pay damages for **breach**, as well as for ‘**loss of whole contract**’.

NB: Parol Evidence Rule – extrinsic evidence (e.g. oral statements made during preliminary discussion) will be allowed where it might assist the court in deciding whether a term is a condition or warranty (aid in construction/clarify). This only applies to contracts that are partly written, and partly oral (and cannot contradict written terms)

Associated Newspapers Ltd v Banks (1951) – Termination for breach of condition (parties intentions)

Facts:

- Jimmy Banks was a well-known cartoonist, who entered into a 100-year contract with Associated Newspapers. Banks agreed to supply a weekly full-page drawing of “Us Fellers”, and Associated Newspapers agreed to publish his drawings each week on the **front page** of the comic section in the Sunday Sun and Guardian.
- The contract operated successfully for 2-years, however after this time, Associated Newspapers begun publishing Banks’ cartoon on the **third page** of the comic section.
- Banks terminated the contract, citing breach of condition. Associated Newspaper sought an injunction at the threatened breach.

Issue: Was Banks’ termination valid?

Held; Dixon, Williams, Webb, Fullager and Kitto JJ

- The term that Banks’ cartoon would be published on the front page of the cartoon section was a **condition** on the following grounds;
 - o Banks obligation (to deliver a one-page cartoon every week) was a condition, without which all obligations could not be performed. It would be strange if **Banks’ obligation was a legal condition**, but the newspapers’ obligation was *merely a warranty*, which would only attract damages.
 - o **It was essential for Banks’ entry into the contract** that the cartoon be published continuously, as a whole, and on the most conspicuous page. Without strict performance of this promise, it is unlikely that Banks would have entered into the contract in the first place – making it a condition of the contract.
 - o **** The High Court affirmed the legal test for a condition, as stated by Jordan CJ in *Tramways v Luna Park***
- Accordingly, the failure of the newspaper to publish Banks’ cartoon on the front page of the cartoon section on three separate occasions amounted to a breach of a condition, and Banks had the right to terminate the contract.

NB: Associated Newspapers maintained that it was entitled to print Banks’ cartoon on pages other than the front page of the Cartoon section. **This amounted to repudiation of the contract.**

TOPIC 1C. TERMINATION - SUFFICIENTLY SERIOUS BREACH OF AN INTERMEDIATE TERM

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (1962) – Termination- breach of intermediate term. **Don't cite English law without citing the AUS case that confirmed it**

Facts:

- HK Fir, a shipping company, entered into a contract for 3 years (24 months) to charter a ship to Kawasaki Kisen. Amongst other things, the contract stipulated that the vessel;
“...be delivered and placed at the disposal of the charterers... **she being in every way fitted for ordinary cargo service**” - (clause 1)
- Consequentially, the ship broke down, and took 7 months before it could be seaworthy again.
- Kawasaki claimed the ships inactivity/unseaworthiness was a breach of a condition, and purported to terminate the contract.
- HK Fir disputed the termination, claiming it was unlawful.

Issue: Was Kawasaki's termination unlawful?

Held; Diplock LJ.

- The it becomes apparent when analysing the terms of a contract that 2 categories of terms are inherent (i.e. conditions and warranties)
- There is, however a third more complex category of contractual terms, which cannot be classified as conditions or warranties. Breaches of a certain term will either deprive the innocent party of substantially the whole benefit of the contract, whilst other breaches of the same term will result only in trivial loss.
- Clause 1, relating to the ships unseaworthiness, was one such **complex contractual term**.
- It could be breached either by the presence of **trivial defects** which are rapidly remediable, or by more substantial defects which could result in the loss of the vessel (and thus, the loss of substantially all of the benefit).
- **Test:** “does the occurrence of the event deprive the party of substantially the whole benefit of the contract?”
- The ship was only unseaworthy for 7 out of the 24 months, and therefore, not the majority of the contract. It was thus unlikely to deprive Kawasaki of substantially all benefit – it could still be used for 17 out of 24 months.

Therefore, Kawasaki's termination was unlawful.

Ankar Pty Ltd v National Westminster Finance (Aust) Ltd (1987) – Termination for breach of an intermediate term. Obiter approval of intermediate terms.

Facts:

- Ankar entered into an agreement with National Westminster, who would guarantee the performance of machinery hired from General Energy, a manufacturing company in return for a security deposit of \$125,000.
- National agreed to – amongst other things – the following clauses;
 - o **Clause 8:** National would notify Ankar if General Energy proposed to assign its interest in the machinery to anyone else;
 - o **Clause 9:** National would notify Ankar if General Energy defaulted under the lease agreement, whereupon National and Ankar would meet to discuss a course of action.
- Subsequently, General Energy defaulted, assigning its interest in the machinery to their parent company. National failed to inform Ankar of these events. This amounted to a breach by National, as they were bound to inform Ankar of both occurrences.
- Ankar sought a court declaration that it could terminate the security deposit agreement with National, and be released from their contract of guarantee, thus enabling them to recover their

security deposit of \$125,000.

- The trial judge made the declaration, but National contested.

Issue: Did Ankar have grounds to terminate their contract with National?

Held; Mason ACJ, Wilson, Brennan and Dawson JJ

- Where it is uncertain as to whether a contract can be terminated, a court declaration will either approve or reject the right to terminate, thus saving the terminating party from possible repudiation.
- Ankar argued that it was discharged from its liabilities, as National had breached clauses 8-9 which were essential conditions.
- 4 factors favour the interpretation of clauses 8 & 9 as conditions:
 1. Damages would not adequately compensate the aggrieved party for breach of these particular terms
 2. National was *obliged to give notice* so that Ankar could safeguard its position and interests;
 3. Ankar would be *disadvantaged* if General Energy defaulted. This is because it would be liable, but the machinery on which the liability was owed was *no longer owned by the lessee*.
 4. This was *no ordinary contract*; this was a surety-ship contract, which created a special relationship between surety and creditor, and for which breach by the creditor would ordinarily discharge the surety from their obligations.
- 3 factors do not favour the interpretation of clauses 8 & 9 as conditions:
 1. The clauses are not expressed to be conditions;
 2. No time is fixed within which notice must be given (of default); and
 3. The language is unclear that the clauses were intended to be conditions,

Nonetheless, on the balance of probabilities, it seems likely that the clauses were intended to be conditions, and Ankar had the right to terminate the contract – *Ankar successful*.

Koompahtoo Local Aboriginal Land Council v Sandpine (2007) – termination for breach of an intermediate term. Intermediate terms incorporated into Australian law.

Facts;

- Koompahtoo and Sandpine entered into a *joint venture* agreement to develop commercial land. Koompahtoo agreed to contribute the land, whilst Sandpine would manage the development. Inherent within their obligations to manage development, Sandpine would:
Clause 16.5(a) – “*ensure proper books are kept so as to permit the affairs of the joint venture to be assessed*.”
- Furthermore, Sandpine had to prepare reports showing accurate incurrence of expenditure so as to allow for project funds to be dealt with effectively
- However, no such reports were ever prepared, and no meaningful records were ever kept. Such breaches of clause 16.5(a) were revealed when Koompahtoo went into administration, and Sandpine was unable to inform the administrator of the financial position of the joint venture.
- Koompahtoo’s administrator sought to terminate the joint venture agreement, alleging that Sandpine’s conduct amounted to repudiation. Sandpine commenced proceedings, seeking a declaration that Koompahtoo’s termination was invalid.
- The trial judge held that the repeated breaches of clause 16.5(a) whilst being an ‘intermediate term’, amounted to repudiation. Sandpine appealed, and the NSW Court of Appeal held in their favour. Koompahtoo appealed to the High Court.

Issues: Could Koompahtoo’s administrator terminate the joint venture agreement on the grounds that Sandpine’s numerous breaches amounted to repudiation?

Ruling:

Gleeson CJ, Gummow, Heydon and Crennan JJ:

- Breaches of non-essential terms can vary widely in importance, from the trivial to the serious. However, in order for such a breach to warrant termination by the aggrieved party, it has to be serious to the extent that it (the breach) deprives the aggrieved party of substantially the whole benefit of the contract intended by the parties.
- Before this case, in Australia, parties could either terminate contracts for breach of conditions, or be unable to terminate for breach of warranty. However, Hongkong Fir laid down the concept of intermediate/innominate terms. Such terms offer a practical utility:
 - They afford greater flexibility to the law of contracts; and
 - Promote the interests of justice by limiting the right to terminate only to serious or substantial breaches (not mere trivial breach of conditions, which had been the case).
- In this contract, Sandpine's obligations in dealing with the joint venture funds were of importance and seriousness, but it was an intermediate term nonetheless. However, the nature of Sandpine's breaches deprived Koompahtoo of a **substantial part of the benefit** for which it contracted.
- Thus, **having regard to the consequence of the breach** – *Koompahtoo went into administration as a result of improper fund use*. It appears that clause 16.5(a) amounted to a sufficiently serious breach of an intermediate term, and Koompahtoo's termination was valid – *Koompahtoo successful*.

Kirby J:

- The right to terminate a contract arises in respect of the following scenarios:
 - a) Breach of an essential term
 - b) Breach of a non-essential term causing substantial loss of benefit; and/or
 - c) Repudiation
- This scheme of classification still affords flexibility, but avoids the need to invent so called 'intermediate terms'. It simplifies the determination of the consequence of the breach, whilst removing needless steps from the process of reasoning. In essence, either the term breached is essential or non-essential. It cannot somehow be somewhere in between.
- Regardless, Sandpine's breach of clause 16.5(a) had the effect of depriving Koompahtoo of the substantial benefit of the contract. Therefore, they are allowed to terminate the contract in accordance with the second scenario above – *Koompahtoo successful*.

TOPIC 2 – TERMINATION FOR REPUDIATION AND DELAY

TOPIC 2A - REPUDIATION

ANTICIPATORY BREACH:

Carr v J A Berriman Pty Ltd (1953) – Conduct showing an inability or unwillingness to perform – repudiation.

Facts:

- Carr, a landowner, entered into a contract with Berriman, a building company, for the construction of a factory. The contract provided that
 - o Carr would carry out excavations on the site before 29 May, and provide Berriman with the necessary steel.
 - o Berriman, or a subcontractor of Berriman, would manufacture (“fabricate”) the steel.
- The site was not excavated by the time specified in the contract; rather, it was covered by heavy machinery at this time. Meanwhile, Berriman had retained a subcontractor to fabricate steel.
- Carr was aware of this sub-contract, but nevertheless retained its own sub-contractor for the supply and fabrication of steel work.
- On 31 July (2 months after excavations were meant to be completed), Berriman’s solicitors informed Carr that their failure to excavate, as well as their own retention of a fabricator, amounted to two distinct breaches of contract.
- Berriman purported to cancel the contract and claim damages. Carr refuted this, but failed both at trial and in the Supreme Court. Carr appealed to the High Court.

Issues: Could Berriman terminate the contract for Carr’s breaches - both for its failure to excavate and for its retention of a sub-contractor?

NB: If Berriman could terminate, they (Berriman) could receive damages for loss of bargain. If Berriman couldn’t terminate – and did terminate anyway – it would amount to repudiation, and Carr could get damages for loss of bargain.

Held: Fullagar J:

- It is apparent that two breaches of contract had been committed:
 1. Carr had not excavated or given possession of the building site to Berriman by the required date;
 2. Carr had retained his own subcontractor even though it was agreed only Berriman would retain their own.

Breach 1: Failure to excavate

- Where there is a failure to remedy a breach that continues so long that it evinces an intention to no longer be bound by the contract, such failure will amount to repudiation.
- Carr’s failure to perform within the stipulated time arguably amounted to repudiation. However, Berriman’s decision to leave the contract on foot (continuing) afforded Carr room to remedy the breach by performance. This failing was not remedied.
- Instead, Carr’s conduct in failing to move any of the machinery from the site and failure to provide an adequate explanation for such suggested they did not intend to be bound by the contract.

Breach 2 – Retention of own-subcontractor

- The second breach went to a very substantial part (“root”) of the contract.
- Berriman stood to gain a profit of £450 on the steel fabrication from their sub-contractor. Carr’s breach in retaining their own sub- contractor not only meant Berriman lost that profit, but also became liable for damages to their sub-contractor.

- Thus, it could be argued that this second breach alone amounted to enough of a breach to warrant repudiation. Indeed, it suggested to Berriman that the contract ‘would not be performed according to its true construction’.
- Moreover, Carr retained their sub-contractor without inviting the discretion of Berriman.
- The intention must be judged from the acts.
- When the breaching party evinces an intention that they are not to be bound by the contract, the aggrieved party is entitled to repudiate the contract. Berriman thought such an intention was shown, and acted accordingly. This was justified, and Berriman can sue to recover damages for loss of bargain

* The sequence of accumulative breaches (more than one) when combine would indicate that Berriman no longer intended to complete the contract according to its term (not a specific event or instance, accumulative effect)

Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) – Repudiation inferred from a combination of events

Facts:

- Tabali leased a factory premise to Progressive Mailing House for 5 years. Clause 10.1 of the contract provided for the following:

“If the rent is unpaid for 14 days, Tabali could terminate the contract in respect of breach”

- In addition to paying rent, Progressive was to carry out work on the premises. But not only did Progressive fail to pay rent; they also committed a number of other breaches, including:
 - o Damaging the property;
 - o Failing to rectify said damage; and
 - o Sub-letting the premises to another party without consent.
- Tabali subsequently terminated the contract on grounds of unpaid rent, in accordance with clause 10.1. They also brought an action in the Supreme Court in an effort to recover the outstanding rent and sue for damages. The Supreme Court found in their favour, but Progressive appealed.

Issue: Could Tabali terminate the contract for breach of a number of terms?

Held; Mason, Brennan and Deane JJ

- Alone, Progressive’s failure to pay rent does not amount to breach of contract. However, accumulatively, the range of breaches of the lease amounted to a repudiation of contract, and Tabali is right to terminate and sue for loss of bargain.
- Furthermore, an express right to terminate under contract (i.e. a Clause that states “a breach of this provision gives party ‘A’ the right to terminate”) – such as that found in clause 10.1 – does not exclude (prevent) the Common Law right to terminate (unless expressly stated otherwise within the contract).
- Terminating under contract does not afford loss of bargain damages, whilst terminating under *common Law* does. Thus, damages are smaller for contractual termination than for Common Law termination.

** Just because contract entitles you to terminate does not mean that breach amounts to breach of a fundamental term (recognises two rights – terminate under lease or terminate for repudiation (combination of conduct).

If you terminate under lease, you’re only entitled to the areas (unpaid rent). But for breach of contract (breach of essential term or repudiation), under common law, the landlord can sue for loss of benefit of contract – the future loss of the rent.

INSTALMENT CONTRACTS:

Maple Flock Co Ltd v Universal Furniture Products (1934) – Instalment contracts

Facts:

- Maple Flock entered into a contract with Universal Furniture Products to sell 100 tons of rag flock to Universal at a rate of 3 loads per week of 1.5 tons per load. It was a term of the contract – albeit, a warranty – that delivery would comply with statutory regulations.
- It was realised, after 18 deliveries had been made, that all but the 16th delivery had complied with statutory regulations. Universal accepted two further deliveries, but then purported to terminate the contract based on the defective instalment. Maple opposed this termination.

Issue: Was Universal's termination valid?

Held: Lord Hewart CJ

- There is a two-part test in assessing whether breach of an instalment amounts to repudiation in an instalment contract;
 - o Whether the **quantitative ratio** of the breached instalment bears a large portion of the whole contract; and
 - o The degree of **probability** that such a breach will be **repeated**.
- In this instance, the defective delivery amounted to no more than 1 1/2 tons out of a contract for 100 tons, representing a very minute quantitative ratio.
- Furthermore, the chance of the breach being repeated is practically negligible, considering that the breach was extraordinary and isolated, and the business was carefully conducted.
- Accordingly, Maple Flock's delivery of one defective instalment did not amount to repudiation of the entire contract.

Shevill v Builders Licensing Board (1982) – Instalment contracts – “*evinced an intention not to be bound*”

Facts:

- Shevill Truck Sales had entered into the primary lease agreement with the Builders Licensing Board for three years. Shevill were guarantors on a land lease granted to Shevill Truck Sales and Services.
- The lease had a yearly rent, which had to be paid in advance in equal monthly instalments.
- Clause 9(a) provided: “*should the rent remain unpaid for a period of 14 days, or if there was a breach or default in any of the provisions of the lease, the lessor had the right to terminate the contract and re-enter the premises*”
- Shevill Truck had financial difficulties, and was constantly in arrears with rent. Finally, with 2-months rent outstanding, Builders purported to terminate the lease, serving a statement of claim to Shevill Truck informing of their intention to re-enter the land. At the same time, Builders sought damages for breach of lease.
- The trial judge found for Builders, Shevill appealed.

Issues:

- Was the non-payment of rent a repudiation of the contract?
- Did builders have the right to terminate the contract under both common law and contract clause?

Ruling: Gibbs CJ

- A contract may be repudiated if one party renounces his liabilities (obligations) under it, evincing an intention to no longer be bound by the contract; or, if he shows that he intends to fulfil the contract in a manner substantially inconsistent with his obligations.
- There was no evidence to suggest that Shevill Truck would renege on its rental obligations;

merely that it was probable that they would continue to be late with payments.

- In fact, rent never truly went unpaid – it was only sometimes two months in arrears. Therefore, it is impossible to conclude that Shevill Truck was unwilling to comply with its obligations; it can only be deduced that it was experiencing financial difficulty.
- Builders are not entitled to the damages prescribed by the trial judge – *Shevill successful*.

ERRONEOUS INTERPRETATION OF A CONTRACT:

DTR Nominees v Mona Homes (1978) – Bona fide erroneous interpretation of a contract– ‘willy nilly test’.

Facts:

- DTR entered into a contract with Mona Homes to sell lots 1-9 of a piece of land to Mona, out of a proposed 35 lots. Condition 4 of the contract stated that:

“A plan of sub-division had been lodged to the municipal council, and that DTR would proceed to have the subdivision plan lodged for registration”.

- Mona Homes was not required to complete purchase of the land prior to registration, but paid a deposit on signing the contract, the balance of which was payable within 14 days of registration.
- DTR had not in fact lodged a deposited plan of subdivision as purported in the contract: instead of lodging a plan for subdivision of all 35 lots, they had only lodged a plan for subdivision of lots 1-9! DTR was under the impression that the contract of subdivision was allowed to proceed in two stages: firstly lots 1-9, then the remainder of the lots.
- Meanwhile, the municipal council approved the plan and registered it. DTR then required settlement from Mona within 14 days. Two weeks later, Mona purported to terminate the contract on the grounds that the lodged plan was not that referred to in the contract, and that DTR was unwilling to perform its obligations under contract.
- DTR opposed it, asserting wrongful repudiation, but accepted the repudiation and retained the deposit anyway.

Issue: Was Mona Homes entitled to repudiate the contract on DTR’s erroneous interpretation of their obligations?

Held; Stephen, Mason and Jacobs JJ

- The question to ask is whether the erroneous act evinced an intention on the part of DTR to repudiate the contract.
- Mona asserted that such an intention could be inferred from DTR’s continued adherence to the incorrect interpretation, and that DTR was not willing to perform the contract according to its terms.
- There is no doubt that there are cases in which a party, by insisting on an incorrect interpretation of their obligations, evinces an intention that he will not perform the contract according to its terms.
- However, there are other cases in which a party, although asserting an incorrect interpretation, is doing so because he believes it to be correct and is willing to perform the contract if corrected. In this situation, an intention to repudiate cannot be concluded.
- The question to ask is whether DTR’s erroneous interpretation and consequent action evinced (demonstrated) an intention to repudiate the contract. Mona asserted that such an intention could be inferred from DTR’s continued adherence to the incorrect interpretation, and that DTR was not willing to perform the contract according to its terms.
- In this case, DTR acted upon an erroneous interpretation and no attempt was made by Mona to notify DTR of their error. As such, *there is no basis to infer that DTR was persisting in its wrongful interpretation willy nilly in the face of clear enunciation (proclamation) of the true agreement.*

- Thus, Mona was not entitled to terminate the contract on grounds of repudiation by DTR.
- Additionally, DTR was also not entitled to terminate for wrongful termination because it was itself in error. Mona was simply insisting on a correct interpretation of the contract, and did not evince an intention not to be bound if the contract was correctly interpreted.
- However, there is no doubt that on the day these proceedings commenced, neither party intended for the contract to be further performed. In light of these circumstances, the parties must have regarded the contract as mutually abandoned.
- The contract fails for abandonment – neither party successful.

Woodar Investments Development v Wimpey Construction (1980) – Erroneous interpretation of a contract

Facts:

- Woodar entered into a contract to sell land to Wimpey for development. Inherent within the agreement was a special condition allowing Wimpey to terminate the contract if a compulsory acquisition was commenced. This meant that the contract could only be terminated on the basis of a new compulsory acquisition, not a pre-existing compulsory acquisition.
- Consequently, Wimpey proceeded to terminate on the basis of an existing compulsory acquisition. This was an incorrect interpretation of the contract.
- Woodar contested the termination citing that Wimpey had wrongfully terminated.

Issue: Was Wimpey's wrongful termination a repudiation of the contract?

Held;

- It would be regrettable if a party, relying on an express right to terminate a contract, should be treated as repudiating the contract if he turns out to be mistaken.
- Repudiation is a drastic conclusion that should only be held to arise in clear cases of refusal that go to the root of the contract.
- Wimpey showed no intention to repudiate by relying on the term which allowed him to terminate, and it would be undesirable to extend the doctrine of repudiation into this area.

Eminence Property Development Ltd v Heaney (2010) – Erroneous interpretation of a contract

****UK AUTHORITY** –if it was applied in Australia the test would be as follows. But scrutinise the law. This test is subjective; how do you know whether it was genuine or not?

Facts:

- Kevin Heaney, a property developer, entered into a contract with Eminence to purchase a block of 13 flats. Inherent within this contract were a range of clauses, including the following:
 - o **Condition 1.1(m):** "Working day means any day from Monday to Friday inclusive, which is not Christmas Day, Good Friday or a statutory Bank Holiday".
 - o Condition 6.1.1: "Time is not of the essence of the contract unless a notice to complete has been served".
 - o Condition 6.8: "At any time on or after the completion date, a party who is ready, able and willing to complete may give the other a notice to complete. The parties are to complete the contract within 10 working days of giving a notice to complete. For this purpose, time is of the essence of the contract"
 - NB: when time is deemed to be **of the essence**, it becomes a condition of the contract. Any delay will give rise to a right to terminate.
- On the 5th of December, Eminence served a notice to complete under condition 6.8. The notice read as follows:

"We calculate the final date for completion under the notice is 15th December, 2008"
- This was a mistake. Eminence took into account non-working days. The final date for completion should have been the 19th of December. Subsequently, Eminence terminated the

contract on the 15th of December when Heaney failed to complete by the date. Heaney promptly counter-terminated, claiming that Eminence's **premature termination** amounted to a repudiation of contract.

Issue: Was Eminence's wrongful termination a repudiation of the contract?

Held;

- In order to determine whether Eminence's wrongful termination amounted to repudiation, the following test must be conducted:
 - o If, looking at all the circumstances objectively (i.e. from the perspective of an innocent party), the contract breaker clearly shows an intention to abandon and altogether refuse to perform the contract - that will amount to repudiation.
- In this case, Eminence's termination was not repudiation. Any reasonable person in the position of Heaney would not have reasonably believed an intention to abandon and not perform obligations under contract; rather, they would simply have thought that a mistake in calculation occurred – Eminence successful.