



Law of Contract II

JDOC1002

Termination – Pt 1

Breach of contract

- Breach of contract: failure or refusal to perform contractual obligation (without lawful excuse)
- Types of breaches:
 - Actual breach: failure to perform when time for performance expired
 - Anticipatory breach: repudiation of contract before time for performance

Actual breach – types

- ▶ Non-compliance with contractual representation/warranty
- ▶ Non-performance of obligation
- ▶ Late performance of obligation
- ▶ Defective/unsatisfactory performance



Standards of contractual duty

- Strict liability
- Absolute liability
- Reasonable care



Strict liability

- Liability regardless of fault or intent
- Eg *Grant v Australian Knitting Mills Ltd* [1936] AC 85
- Strict liability usually applies for contractual obligations



Absolute liability

- Technically distinguished from strict liability
- Eg where buyer's obligation to pay under sale of goods contract is contingent on transfer of title to goods:
 - Buyer's liability to pay is strict liability but not absolute liability
- Absolute liability:
 - Any failure to perform constitutes breach
- Strict liability:
 - Obligation to perform may depend on a contingency



Reasonable care

- Breach only if failure to exercise reasonable care
- Egs: contracts of personal service or professional services



Remedies for breach of contract

- Damages: available for any breach of contract
- Termination: available only if innocent party has right to terminate for other party's breach of contract



Discharge of contracts

- ➡ Discharge of contract: contract comes to an end
- ➡ Discharge by frustration
- ➡ Discharge by performance
- ➡ Discharge by agreement
- ➡ Discharge by termination



Termination

- ▶ Termination distinguished from rescission:
 - ▶ Rescission of voidable contract: parties put in original position as if contract never made
 - ▶ Termination: parties discharged from obligations for further performance
- ▶ Right to terminate may arise:
 - ▶ Pursuant to contractual provision (eg contractual right to terminate upon notice; or contractual right to terminate for breach of contract)
 - ▶ Pursuant to common law for breach of contract

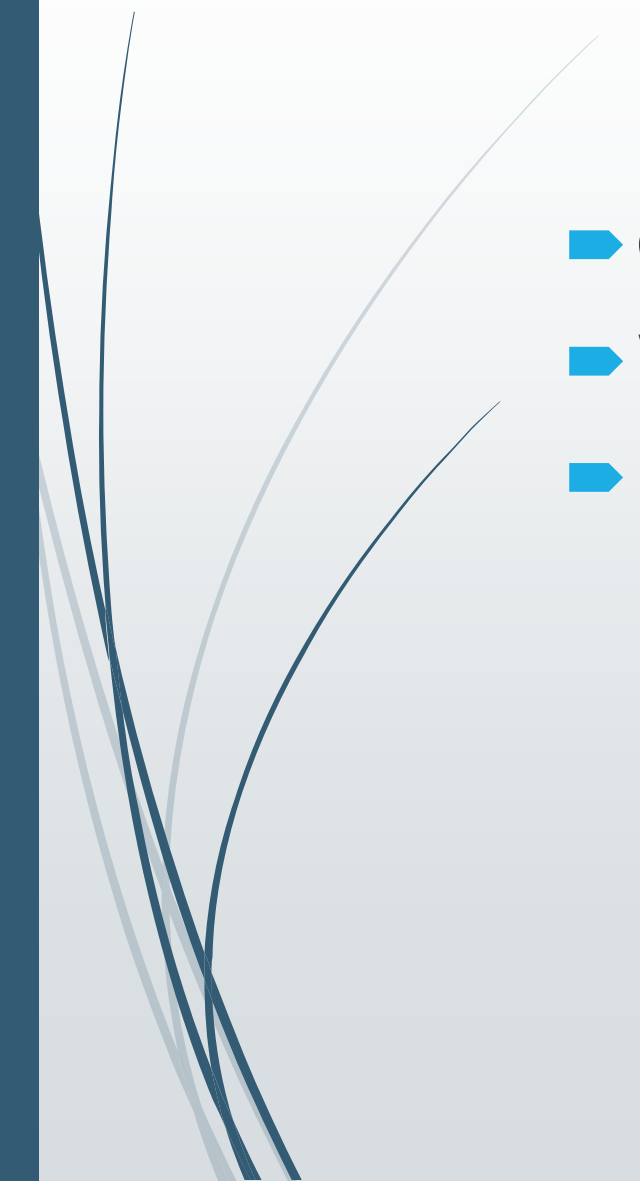


Termination for breach of contract

- ▶ Right to terminate under common law for:
 - ▶ Breach of condition; or
 - ▶ Serious breach of intermediate term
- ▶ No right to terminate for:
 - ▶ Breach of warranty; or
 - ▶ Non-serious breach of intermediate term



Classification of contractual terms

- Conditions
 - Warranties
 - Intermediate terms
- 



Terminology



- Condition/warranty distinction based on consequences of breach
- Note other usages/meanings of “condition” and “warranty” in other contexts:
 - “Terms and conditions” of contract
 - Condition precedent: contract or obligation to perform is contingent on fulfillment of condition
 - Condition subsequent: occurrence of contingency ends contractual obligation
 - “Warranties and representations” in contract
 - Manufacturer’s warranty

Conditions and warranties

- ▶ *Bettini v Gye* (1876) 1 QBD 183
- ▶ Facts:
 - ▶ Contract: opera singer (pl) to be available for rehearsals 6 days before commencement of engagement (for 3 months)
 - ▶ Pl arrived 2 days before commencement due to illness
- ▶ Issue: can def terminate services?

Conditions and warranties

► Held:

- Does term go to root of contract?
- Performance rendered a thing different in substance from that stipulated for?
- Or contract only partially affected which may be adequately compensated by damages?
- Breach of warranty only in present case

Conditions and warranties

- ▶ Importance of term: would promisee have entered into contract if no assurance of strict or substantial performance of promise?
 - ▶ *Bannerman v White* (1861) 142 ER 685
- ▶ Court looks at likely effect of a breach (as opposed to effects of actual breach)
 - ▶ *Bensen v Taylor Sons & CO (No 2)* [1893] 2 QB 274
- ▶ If term is a condition, right to terminate does not depend on gravity of breach that occurred
 - ▶ *Lombard North Central plc v Butterworth* [1987] QB 527 per Mustill LJ

Conditions and warranties

- Contract may expressly designate which terms are conditions or warranties
- But wording adopted by parties (eg “condition”, “warranty”) not necessarily decisive
- *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235

Conditions and warranties

- ▶ *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235
- ▶ Facts:
 - ▶ Distributorship agreement between manufacturer (Schuler) and distributor (Wickman)
 - ▶ Wickman to act as agent for Schuler in procuring sales of panel presses
 - ▶ Clause 7: "It shall be condition of this Agreement" that Wickman's representative visit 6 specified firms at least once each week
 - ▶ Clause 11: right to terminate if other party commits material breach and fails to remedy within 60 days
 - ▶ Extensive failures by Wickman to comply with cl 7
 - ▶ Schuler sought to terminate for breach of condition in cl 7
- ▶ Issue: did Schuler have right to terminate?

Conditions and warranties

- ▶ House of Lords held:
 - ▶ No
 - ▶ Use of word “condition” gives rise to presumption that term intended as condition
 - ▶ But cl 7 not a condition
 - ▶ Very unreasonable result if Schuler has right to terminate for minor breaches of cl 7: court should strive towards an interpretation to avoid unreasonable result if possible (on basis that parties could not have intended unreasonable result)
 - ▶ Possible to avoid interpreting cl 7 as condition because of cl 11

Conditions and warranties

- ▶ Avoid uncertainty by clearer drafting
 - ▶ Eg expressly provide for consequences of breach: express contractual right to terminate for breach of specified terms in contract
- ▶ Use phrase “time of the essence” if time stipulation is intended as condition

Time of the essence

- ▶ *Lombard North Central plc v Butterworth* [1987] QB 527
- ▶ Facts:
 - ▶ Plaintiff finance company leased computers to defendant for 5 year period
 - ▶ Clause 2(a): time of the essence with regard to payment of quarterly rentals
 - ▶ Clause 5: failure to make due and punctual payment entitled pl to terminate
 - ▶ Def fell into arrears
 - ▶ Pl repossessed computers and sued for non-payment
- ▶ Issue:
 - ▶ Was pl entitled to terminate?

Time of the essence

- ▶ Eng CA held:

- ▶ Yes, pl entitled to terminate under common law independently of cl 5
- ▶ Express stipulation that time of the essence for payment by due date (time stipulation a condition)

Time of the essence

- *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514
- Facts:
 - Contract for sale of land: 1 Aug 1991
 - Completion to take place by 5pm, 30 Sep 1991: time of the essence
 - Purchaser tendered payment of balance by cheques at 5:10pm, 30 Sep
 - Vendor refused to accept payment and sought to terminate
- Issues:
 - Was vendor entitled to terminate?
 - Could purchaser still seek specific performance of contract?

Time of the essence

- ▶ Privy Council (Lord Hoffmann) held:
 - ▶ Vendor entitled to terminate
 - ▶ Time stipulation for completion was a condition (time of the essence)
 - ▶ No equitable jurisdiction to intervene to allow specific performance, even if delay is minor

Intermediate terms (innominate terms)

- ▶ Where term is an intermediate term:
 - ▶ Whether innocent party has right to terminate depends on actual effect of breach in question (whether consequences sufficiently serious)
- ▶ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474
- ▶ Facts:
 - ▶ Pl hired def's ship – 24 month charterparty
 - ▶ Term: ship to be “in every way fitted for ordinary cargo service”
 - ▶ Problems: repairs for over 15 weeks needed
 - ▶ Pl sought to terminate after 4 months

Intermediate terms (innominate terms)

- Issue: whether breach of term requiring seaworthiness gave rise to right to terminate
- Held:
 - There is a category of terms where some breaches are serious but not always [intermediate terms]
 - Requirement of seaworthiness is such a term
 - Right to terminate if innocent party deprived of substantially whole benefit of contract
 - No right to terminate in present case

Whether term is condition, warranty or an intermediate term

- ▶ Default classification as intermediate term unless clear that parties intended term as condition or warranty
 - ▶ *Grand China Logistics Holdings (Group) Co Ltd v Spar Shipping AS* [2016] 2 Lloyd's Rep 447 at [92]
- ▶ Recall general tests as to whether term is a condition:
 - ▶ Importance of term to promisee (whether promisee would not have contracted unless there is strict compliance with term)
 - ▶ Whether term goes to root of the contract; whether likely effect of breach would deprive promisee of substantially whole benefit of contract

Whether term is condition, warranty or an intermediate term

- ▶ Other relevant factors:
 - ▶ Whether term previously classified in decided cases (parties presumed to contract on basis of accepted interpretation)
 - ▶ Whether damages for breach would be adequate remedy
 - ▶ Whether construing term as condition would lead to an unreasonable result

Whether term is condition, warranty or an intermediate term

- *Bunge Corporation New York v Tradax Export SA* [1981] 1 WLR 711
- Facts:
 - Sale of goods contract adopting standard terms used in industry
 - Time of shipment at buyer's option
 - Port of shipment at seller's option
 - Buyer required under contract to give 15 days' notice of readiness of vessel which was to receive the goods
 - Shipment in June 1975: buyers did not give sufficient notice
- Issue:
 - Was seller entitled to terminate?

Whether term is condition, warranty or an intermediate term

- ▶ House of Lords:
 - ▶ Yes, term requiring notice was a condition and not intermediate term
- ▶ Relevant factors taken into account by HL:
 - ▶ Need for certainty in commercial contracts where parties are both buyers and sellers in the market
 - ▶ Obligations interdependent
 - ▶ Business practice treated term as condition
 - ▶ Damages not adequate remedy: difficulties in assessment of damages where insufficient notice given

Express termination clauses

- ▶ Prima facie, parties entitled to provide for contractual right of termination for any breach of contract
- ▶ But note risks of termination clause being read down
- ▶ *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2003] TCLR 1
- ▶ Facts:
 - ▶ Two contracts between claimant and def local authority for maintenance of sports grounds, parks, gardens etc
 - ▶ Clause 23.2.1: "if the contractor commits a breach of any of its obligations under the Contract ... the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect"
 - ▶ Def sought to terminate on basis of substandard maintenance of cricket and football pitches and bowling greens, plus other complaints

Express termination clauses

- Issue:
 - Was def entitled to terminate?
- Eng CA held:
 - No
 - If cl 23.2.1 applied to any breaches, this “flies in the face of commercial common sense”
 - Cl 23.2.1 only applies to repudiatory breaches (including cumulative breaches which are sufficiently serious)
 - Trial judge entitled to find that breaches in present case not sufficiently serious

Express termination clauses

- ▶ How should parties draft termination clause to avoid clause being read down?
- ▶ McKendrick: right to terminate for “any breach (whether or not that breach is repudiatory)”
- ▶ Termination clause to cover specified conditions only (considered by party to be important) and not breach of any term of contract:
 - ▶ Can provide for wider right of termination than under common law
 - ▶ Possible to distinguish *Rice* case: see *Secretary for Justice v Yu's Tin Sing Enterprises Co Ltd* (unreported, CFI, HCA 398/2006, 9 Sep 2008)
- ▶ Separate clause giving right to terminate upon giving written notice (with specified period of notice that is reasonable)

Election to terminate or affirm contract

- ▶ Choice of innocent party: election to terminate or to affirm contract
- ▶ Termination: occurs where words or conduct clearly and unequivocally conveys to other party that the innocent party is treating the contract at an end
 - ▶ *Vitol SA v Norelf Ltd* [1996] AC 800, 810
- ▶ Where election is made to affirm the contract, then right to terminate is lost
 - ▶ *Cheung Ching Ping Stephen v Allcom Ltd* [2010] 2 HKLRD 324

Election to terminate or affirm contract

- Affirmation: unequivocal act indicating that the innocent party has elected to proceed with the contract
- Generally, affirmation can only occur if innocent party has knowledge of facts giving rise to breach:
 - *Peyman v Lanjani* [1985] Ch 457
- But there may still be affirmation (even without such knowledge) if a reasonable time has passed:
 - *Kosmar Villa Holidays Inc v Trustees of Syndicate 1243* [2008] EWCA Civ 147
- Merely requesting other party to perform does not necessarily mean there is affirmation:
 - *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604

Election to terminate or affirm contract

- ▶ Where delay in termination, there is no implicit affirmation of contract unless the delay is consistent only with affirmation
- ▶ *Cheung Ching Ping Stephen v Allcom Ltd* [2010] 2 HKLRD 324
 - ▶ Sale of land contract; time of the essence; vendor required to obtain certain government approvals before completion; completion on 19 Aug 2008
 - ▶ Approvals not obtained by 19 Aug
 - ▶ Purchaser enquired about status in letters on 20 Aug and 11 Sep
 - ▶ Vendor replied: still waiting on approvals
 - ▶ Purchaser terminated on 10 Oct
 - ▶ HKCA: purchasers had not affirmed contract and were entitled to terminate