**Week 1**

Termination for Breach

Breach occurs when one party fails to perform at the time or to standard required by contract.

Breach often allows for damages, but only certain terms allow for contract termination.

What type of term has been breached?

* **Condition** (or essential) – If breached, contract terminated. Strict performance required.
* **Warranty** (or non-essential) – If breached, contract remains (damages as remedy)
* **Intermediate/inordinate** – If breached, may terminate if effect of breach deprives the innocent party of the substantial benefits from the contract.

Condition breach – guide

1. What is a condition?
   * If the term requires strict performance then a condition.
   * Any breach, however slight, allows for termination (*Arcos v Ronaansen; Tramways v Luna Park*).
   * ‘a substantial failure in the performance would enable the defendant to treat the contract as at an end’ (*Associated Newspapers Ltd v Bancks*).
2. How do you check if a term is a condition?
   * Test of essentiality – is promise so important that promisee would not have entered into the contract unless the term was strictly performed? (*Tramways v Luna Park*).
3. What factors help determine that a term is a condition?
   * The character of a term – e.g. ‘seaworthy’ is very general and party could fail term by one missing nail up to the sinking of the ship (*Hongkong Fir v Kawasaki*).
   * Have previous decisions classified term as a condition?
   * Need for certainty – if a court calls a general term a condition, does it cast doubt into all similar contracts?
   * Is the language promissory (*Tramways v Luna Park*)?
   * Is this particular term emphasised over others? e.g. One term says ‘we guarantee…’, the others don’t.
4. Does labelling a term a ‘condition’ mean it is a condition?

* Not necessarily, as word often used in a non-legal manner.
* Essentially, if the nature of a term means that it is likely to be breached then strict compliance unlikely to be required (*Schuler v Wickman Machine Tool Sales*).

Intermediate term breach – guide

1. What is an intermediate term?
   * A term that allows for termination, but only if the breach deprives the innocent party of a substantial benefit. Otherwise the term is a warranty (*Hongkong Fir v Kawasaki*).
2. How do you know if a breach justifies termination?

* Must deprive innocent party of ‘a substantial part of the benefit for which it contracted’ (*Koompahtoo v Sanpine* – Aus HCA standard).
* Has to be ‘grave’ or ‘serious’ to justify termination (*Ankar Pty Ltd v National Westminster Finance*).

**Week 2**

Termination for Repudiation

Also known as renunciation (*Koopmpahtoo*), revocation, rescission, termination.

1. What is repudiation?

* Basically, if one party indicates an unwillingness or inability to perform their contractual obligations, then they are effectively repudiating their obligations.
* This gives the innocent party the right to terminate.
* Applies to leases as well as general contracts (*Progressive Mailing House v Tabali*).

1. How do you know if a party has repudiated?

* Expressly says so (i.e. ‘I’m not building the house by next week despite my contractual obligations’).
* Conduct showing inability/unwillingness to perform:
* ‘Time of the essence’ may be a condition, so failure to perform on time warrants termination. If not, conduct of party is the area to regard (*Carr v J A Berriman*).
* ‘A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him. The intention must be judged from acts.’ (*Carr v J A Berriman*).
* Repudiation inferred from combination of events:
* Though a breach of one term may not result in a termination, a number of breaches like this justify a termination (*Progressive Mailing House*).
* Instalment contracts
* Repudiation only possible if quantative ratio of breach-to-contract is high, and the degree of probability it could be repeated (*Maple Flock v Universal Furniture*).
* Erroneous interpretation of contract
* Party may have repudiated if they interpret the contract incorrectly, as their conduct indicates that they won’t perform their obligations.
* However, honesty of belief that interpretation correct may mean that contract not being repudiated. Possible that party purported to have repudiated may actually comply with terms if error explained (*DTR Nominees v Mona Homes*).
  + NOTE: Exception to general principles that conduct of repudiating party judged objectively.
  + Heavily criticised decision, as impossible to distinguish between an honest mistake and any other conduct (*Woodar Investment v Wimpey Constructions*).

Repudiation and anticipatory breach

Anticipatory breach is when one party repudiates before the performance period. If aggrieved party accepts this they can terminate contract and claim damages (*Progressive Mailing House*).

* Reason this occurs is because it is unfair that aggrieved party must waste time and money performing their obligations when they are aware that the other party won’t perform their half of the bargain.
* However, if aggrieved party does not accept repudiation, contract will continue and no right to damages will occur until breach happens. [See election]

Termination for Delay

Generally contracts specify times to complete obligations by. Otherwise the law implies an obligation to perform within a reasonable time.

Time of the essence

Timeframe stipulated for condition is essential and termination justified if breach occurs.

1. How do you know time is of the essence?

* Statement specifically saying that ‘time is to be of the essence’.
* No time of essence in land sales unless expressly stated (*Property Law Act (Vic)* 1958, s 41).

Time not of the essence

If time is not of the essence, proof needed to demonstrate repudiation by delaying party – ‘making time of the essence’.

1. How do you make time of the essence?

* Demonstrate that the delay has been excessively long, and possibly that an intermediate term has been substantially breached as a result (*Laurinda v Capalaba Park Shopping Centre*).
* Notice must be given with the following requirements (*Louinder v Leis*):
* Specific time for performance;
* Time given must be reasonable; and
* Notice must clearly state that time is of the essence, or that notice-giving party has right to terminate if performance not completed by time limit.
* Notice in itself doesn’t make time limits a contractual obligation. It actually acts as proof that one party is unwilling/unable to perform, and thus repudiating contract.

1. How specific does the notice need to be?

* It must be given in relation to the term breached, not some other obligation for performance not yet arisen (*Louinder v Leis* – notice requested contract completion, not statement of title completion).

1. What is a reasonable period of time?

* Depends on the case, but factors include subject matter, what remains to be done, whether aggrieved party pressured previously for performance, and unnecessary delays which occurred previously.
* Sometimes unreasonable period of time still allows for termination, so long as ‘the correspondence from [the delaying party] demonstrates an attitude which was cavalier and recalcitrant’ (*Laurinda v Capalaba Park Shopping Centre*).

**Week 3**

Election

Affirmation or Termination

If breach occurs, innocent party can either terminate contract, or elect to continue contract (i.e. affirm).

* However, if elected to affirm, innocent party loses right to terminate until another breach occurs.
* Until new breach, innocent party must uphold its contractual obligations or risk repudiating as well – contract kept alive for both parties (*Bowes v Chaleyer*).

Restrictions on the right to terminate

Election

Affirmation/termination is considered final.

1. Innocent party who elected to affirm contract will generally still be allowed to terminate if a further event occurs giving rise to termination

* e.g. Just because innocent party accepts a late payment or two doesn’t mean they can’t argue that time is of the essence for future payments (*Tropical Traders Ltd v Goonan*).

Estoppel

If innocent party grants an extension to breaching party, then rescinds on this variation, breaching party can argue estoppel in order to prevent innocent party exercising its original contractual rights (*Legione v Hately* – see Contract A notes for this area).

Relief from forfeiture

Relived of obligation to forfeit interest in the land – e.g. you build a house on land but fail to complete purchase deal. RFF prevents you making a loss because of the decision to build, perhaps allowing damages to be paid in alternative.

1. When is it possible to claim RFF?

* ‘it is only in exceptional circumstances that specific performance will be granted at the instance of a purchaser who is in breach of an essential condition.’ (*Legione v Hately*).
* Questions to consider: Did vendor’s conduct contribute to the purchaser’s breach? Was the breach trivial/slight/accidental? What damage did the vendor suffer? What is the magnitude of the purchaser’s loss/vendor’s gain if interest forfeited? Is specific performance adequate for the vendor?

1. What has more recent cases done for RFF?

* Made it harder to claim RFF.
* Cannot simply grant relief because of general element of unfairness/hardship – ‘unconscientious conduct’ must be shown, or why innocent party should not be allowed to exercise contractual rights (*Tanwar v Cauchi*).
* Fraud, mistake, accident or surprise only real basis for RFF.
* Essentially, the vendor must have done something substantial to warrant not having termination allowed.

**Week 4**

The Measure of Damages

Compensation Principle

‘Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed’ (*Robinson v Harman*).

Expectation Damages

If contract entitles something be done, in general the guilty party’s contractual obligations should be performed regardless of the cost (*Bellgrove v Eldridge; Tabcorp v Bowen*).

* Essentially, a party can’t buy the right to breach by paying a difference between what they did and what they were *supposed* to do. Must deliver what was promised.
* However, cost of deterioration could be argued in some cases to get a discount (*Tabcorp* – original foyer would be worth less after 15 years, so $1.38m brand new price should be reduced).

Reliance Damages

Available if impossible to assess what expectation damages would be. As a result compensation is whatever it takes to put the innocent party back to where it was *before* the contract was formed (*Commonwealth v Amann; McRae v Commonwealth*).

If high chance of a contract being renewed and court can’t establish where innocent party would be financially in future, reliance damages can be given.

* *Cth v Amann* – Contract loss tiny compared to expenditure on equipment, but Cth unable to prove that they *wouldn’t* renew Amann’s contract in future (thus allowing it to make a profit).

Loss of chance

If expectation damages can’t be ascertained (because it was uncertain future earnings), *and* reliance damages can’t be applied (no significant upfront cost by innocent party) then on balance of probabilities loss of a chance may be given (*Howe v Tefey*).

Damages might be discounted based on probability plaintiff *wouldn’t* have lost any chance

* *Cth v Amann* – Minority judges held that because 80 per cent chance of contract renewal, damages should be reduced by 20 per cent. However, onus on guilty party to prove because reliance damages – unsuccessful.

Limitations on award of damages

Causation

Must prove that there is a connection between the breach and damages claimed – no *novus actus interveniens*.

* If external events caused losses – e.g. flood, credit crisis, interest rate rises – breach will be held to have not caused the loss (*Alexander v Cambridge Credit*).

Remoteness

Damages cannot be too far removed from the breach; otherwise pretty much anyone anywhere can get damages off others.

* If damages out of the ordinary, must be made clear to breaching party *at the time contract entered into* that there will be consequences if a breach occurs (*Hadley v Baxendale* – ‘Sorry chap, but unlike your usual miller, I don’t have a spare mill shaft. So please don’t delay on this repair or I’ll lose money’).
* If guilty party knows of general losses but doesn’t realise *additional* losses at time of contract, defendant can’t claim extra damages as a result (*Victoria Laundry v Newman*).

Mitigation of Damage

A plaintiff can recover losses incurred when taking reasonable steps to mitigate the loss, even if the mitigation results in greater losses than if steps weren’t taken (*Simonious Vischer v Holt & Thompson*).

Non-pecuniary losses

Not usually given, unless purpose of contract was to provide relaxation, enjoyment, or freedom from distress (*Baltic Shipping Co v Dillon*).

Loss of bargain damage and termination under a term

Although lessor has a right to terminate for breach of contractually defined circumstances, if this right isn’t applicable under common law then will not receive full damages for loss of bargain (*Shelvill v Builders Licensing Board*).

**Week 5**

Liquidated Damages and Penalties

Rule against penalties

If contract specifies damages to be given if breach occurs, the damages cannot be out of proportion to the damages sustained (*AMEV v UDC Finance*).

Distinguishing between the two

* Must be genuine pre-estimate, if penal damages extravagant compared to greatest possible loss then unenforceable (*Dunlop v New Garage*).
* Words of contract doesn’t determine if penalty/damages (*Dunlop v New Garage*).
* Lease examples:
  + If take back equipment and demand future instalments to be paid, then penalty (*AMEV v UDC Finance*).
  + If resale value of equipment discounted from future instalments, or discount for early payment, then not penalty (*Esanda v Plessing*).
* ‘Goodwill’ value not relevant unless plaintiff can show that it results in penalty all out of proportion to real damages (*Ringrow v BP Australia*).
* Allowed to request damages and exercise option to reacquire property, so long as neither damages or resale value amounts to a penalty (*Ringrow*).

Equitable remedies

Discretionary, usually damages adequate.

Specific Performance

Can arise if land disputes as this property considered unique. However, specific performance won’t be used if courts must supervise contract to completion – generally relevant to ‘buy-sell’ contracts.

* Used if property can be considered unique and unable to attain elsewhere (*Dougan v Ley*).
* Mutuality required to use remedy – if seller can’t get remedy buy buyer can, cannot use specific performance (*JC Williamson v Mulholland*).

Injunction

Usually granted to prevent breach of a negative stipulation in contract – e.g. ‘don’t perform work for 60 Minutes’ (*Curro v Beyond Productions*).

* Useful here as SP would require court supervision, but injunction means parties can go separate ways while Curro restricted from 60 Minutes work.
* Time a factor – only short period left on contract so injunction appropriate.

Supreme Court Act s 38

* Court can replace injunction/SP with damages, or add to them.
* Used if equitable remedies not possible, but common law damages unavailable
* e.g. *Waltons Stores v Maher* – SP would be ineffective as landlord/tenancy relationship would be strained, but under Statute of Frauds no written contract = no remedies. s 38 allows damages to be given as *alternative* to equity.
* If equitable remedies aren’t available, s 38 cannot be used (*JC Williamson*).
  + In above case, SP cannot be adequately supervised as repeat duties by D, and injunction could not be used against any specific part of the contract.

**Week 6**

Actions for Debt

General

Separate from damages – generally alternative for innocent party to damages, but breaching party can also claim for things like substantial performance or completion of certain obligations.

* If breaching party is claiming, essentially that debt is deducted from whatever damages it owes to the innocent party.

Right to action for debt occurs when:

* Contract must impose obligation to pay a certain/ascertainable amount of money; and
* Right to payment of sum must have accrued.

Entire/divisible obligations

* Entire contract – Complete performance of obligation is the condition to get payment.
  + e.g. Complete building for a lump sum of money.
* Divisible – When parties intend to perform (and thus pay) in instalments.
  + e.g. Pay for each shipment of goods, pay for each floor of apartment built.
  + Generally, if instalment contract and party has completed some instalments, it should be paid for the completed obligations, as it would be unconscionable for the other party to benefit from what was actually completed (*Steele v Tardiani*).
* [Legislative alternative – review later]

Substantial Performance

* If performance is quite substantial, contract price can be recovered even though contract is not completely fulfilled (*Hoenig v Isaacs*).
  + Payment will be the contract price, minus any costs to rectify remaining problems.
* However, depends on costs of defects to defendant, proportion between cost of defects and contract price, and the nature of the defect (*Bolton v Mahdeva*).
* Generally won’t apply to ‘entire contracts’ since aim of this contract is complete, proper performance.

Payment independent of performance

* Sum to be paid is independent of the performance of the contract.
* Generally applies to sale of property, where buyer pays instalments to vendor.
* Principle is as follows (*McDonald v Denny Lascelles*):
  + Any instalment to be paid will be owed as a debt to vendor.
  + BUT, right of vendor to retain payment conditional on vendor completing the contract.
  + If vendor does not complete its contractual obligations, then purchaser has right to make restitution claim.

Deposits

* *Bot v Ristevski*
* If vendor cancels, purchaser has right to recover the deposit.
* If purchaser defaults on a contract, then the vendor keeps the deposit.
  + Unlike *McDonald* independent payments, vendor doesn’t have to complete contract to retain the deposit (so can discharge contract and keep money, no problems!).

Mitigation and the action for debt

* To sue for debt the payment must be earned.
* On occasions plaintiff may refuse to accept repudiation, complete its contractual obligations and claim the contract fee, despite having no co-operation from the defendant (*White and Carter (Councils) Ltd v McGregor*).
  + However, if no legitimate interest (financial or otherwise) in performing contract rather than claiming damages then will not receive full contract fee. (Ibid).
  + Question is where plaintiff’s actions become totally unreasonable – issue then becomes less about P’s unfettered right to reject repudiation, and more about refusing to allow P to enforce full contractual rights in the name of equity (*Clea Shipping Corp v Bulk Oil International*).
    - In America, innocent party *always* obliged to mitigate damages.

**Week 7**

Frustration

General

When external circumstances outside control of parties make contract performance radically different than what was originally intended, then frustration can be held to have occurred.

* *Codelfa v State Rail Authority NSW*

Circumstances allowing frustration

* Destruction of subject matter - e.g. location one party has hired
* *Taylor v Caldwell*
* Disappearance of contract basis
* *Krell v Henry* - large, widely-known event
* *Brisbane CC v Group Projects* - Third party caused purpose of contract to be moot, despite performance still being possible.
* Death of one party.

Consequences of frustration

Parties can agree what to do if frustration occurs - RARE, but possible to bypass above.

Common Law

* Contract ends when frustrating act originally occurs.
* Unconditionally accrued rights retained, future obligations cancelled:
* *Fibrosa v Fairbairn*
* However, perverse consequences possible as one party must receive all past performance even if unfair to other party.

Fair Trading Act 1999 (Vic)

* s 32ZG - All amounts paid recoverable.
* s 32ZH - If amount paid/payable, if other party incurs performance expenses then can recover all/part of money up to full amount of expenses
* Polish case - Manufacturer could keep monies paid prior to frustration due to their performance.
* s 32ZI - If one party obtained benefit from time of frustrating act, court may offer payment up to value of benefit obtained.
* s 32ZM - If part of contract wholly performed, court must treat this as separate contract not affected by frustration.
* Can do this with instalment, divisible contracts.

Contracts not covered by doctrine of frustration

* Charter party (ship hire).
* Carriage of goods by sea.
* Contracts of insurance.

**Week 8**

Vitiating Factors - Abuse of Power

General

Equitable remedy for unfair/unjust behaviour on behalf of dominant party.

Two types - undue influence; unconscionable dealing.

Undue Influence

One party overly influences another to enter into contract. Three elements:

* Is there a presumed relationship of influence between parties?
* Examples: Solicitor-Client; Teacher-Student; Doctor-Patient; Religious Teacher-Disciple; Parent-Child; Guardian-Ward.
* Otherwise must show how long influence has occurred, then as a matter of FACT that influence exists.
* Was the transaction between parties product of exercise of influence?
* Rebuttable presumption
* Can dominant party prove transaction not related to influence?
* (i) Transaction entirely reasonable; and (ii) Independent advice - must explain specific transaction details to WP, and explain implications of entering contract.
* If cannot prove this then presumption upheld (*Johnson v Buttress*)
* Independent advice not essential if WP has expertise and DP can prove honest/fair dealing (*Westmelton v Archer*).

Unconscionable Dealing

1. Does the plaintiff have a special disability? Relief in equity if yes.

* Three main areas:
* Drunkenness and mental disorder (*Blomley v Ryan*).
* Must be utterly incapable of forming a rational judgement, not *mere* drunkenness.
* Lack of knowledge or education (*CBA v Amadio*).
* Old age, limited English, no business experience, unaware of true financial situation all elements of above.
* Emotional dependence.
* Unrequited love, particularly if an ‘atmosphere of crisis’ is present (*Louth v Diprose*).
* Strong emotional attachment/dependence, even if disadvantaged party is fully aware of their position (*Bridgewater v Leahy*).
* Additional special disabilities?
* Impossible to define all UD situations (*CBA v Amadio*).
* Can include poverty/need of any kind, sickness, age, sex, infirmity of body/mind, drunkenness, lack of education, lack of assistance/explanation if necessary (*Blomley v Ryan*).
* Poor consideration can suggest existence of disadvantage/exploitation.

1. Did defendant have knowledge of special disability?

* If disability sufficiently evident to defendant *prima facie* unconscionable (*CBA v Amadio*).
  + Wilful ignorance sufficient as well.
* Poor consideration can indicate existence/exploitation of special disability (*Blomley v Ryan; Bridgewater v Leahy*).

1. Can this presumption be rebutted?

* Independent advice received by disadvantaged party; or
* Transaction can be shown to be fair.

Unconscionable Dealing – Statute

1. Has unconscionable conduct occurred?

* Corporations must not, in trade/commerce, engage in unconscionable conduct (*TPA* s 51AA).
  + As per case law. Statutory remedies available if this occurs – see W12.
* Inequality of bargaining power not sufficient to demonstrate UD (*ACCC v Berbatis*).

**Week 9**

Vitiating Factors Remedies - Rescission

1. Is rescission a possible remedy?

* Return parties to pre-contract position. Must be 100 per cent restitution.
* Available for undue influence/unconscionable dealing.

1. What is required to apply this remedy?

* In law, restitution must be exact.
  + If not possible to return to exact positions cannot use rescission.
* In remedy, substantial restitution adequate (*Alati v Kruger*).
  + Business purchase – restitution possible if:
    - Loss of rent/stock can be compensated financially, deterioration of business not fault of purchaser, reasonable notice given by purchaser to vendor to resume occupation.
    - cf. If purchasers continue to run business possible to claim they affirm contract, and therefore cannot rescind.
  + Partial restitution also possible (*Vadasz v Pionerr Concrete*).
    - Guarantee for past as well as future debt, HCA held future debt still payable.
  + If land sold to third party, rescission in equity means payment of land value (*Hartigan v Krishna*).

**Week 10**

Misleading and Deceptive Conduct

1. What is misleading/deceptive conduct?

* When a corporation in trade/commerce engages in conduct likely to mislead/deceive (*TPA* s 52).
* Not ‘in the course of trade/commerce’.
  + e.g. builder on construction site given wrong information by foreman (*Concrete Constructions v Nelson*).

1. Who can be misled/deceived?

* An ordinary/reasonable member of class of people (*Campomar v Nike*).
  + Must identify that class (e.g. TV viewers, old people, housewives, etc.).
* Must look at the nature of the parties, character of transaction, contents of item itself (*Butcher v London*).
  + Disclaimers might defeat claim (*Butcher*), but not if they are small or if product one of high value (*Campomar*).