PART VIII – TERMINATION FOR BREACH

I BREACH

A *Circumstances Giving Rise to Termination*

A contract is breached when one party fails to meet the obligations it imposes upon them. This failure may give rise to two types of rights – legal and contractual – to terminate the contract and sue for damages in respect of loss suffered as a result of the contract not being performed.

Termination can only occur after the formation of a valid contract. A right to terminate may be conferred in two ways:

1 *Legal* (conferred by law when the party in default acts in a particular way)
2 *Contractual* (regulated by provisions in the contract, which can define and limit the operation of rights to terminate for breach)

The exercise of a legal right to terminate may give rise to damages for the loss of the contract ('loss of bargain' damages), whereas a contractual right to terminate may not (unless, of course, it provides for them).

In considering the circumstances capable of giving rise to a right to terminate for breach, it is necessary to examine the nature of the breach in light of both legal and contractual rights that may arise as a result of its occurrence.

B *Effect of Termination*

1 *Temporal effect*

Termination is prospective. This means that everything that occurred prior to termination is valid and irrevocable, despite a subsequent termination of the contract according to which performance occurred. This is unlike rescission (eg, for misrepresentation), where termination occurs *ab initio* such as to void the contract retrospectively.

Confusingly, courts don't always distinguish between the language of termination and rescission – terms which are sometimes used interchangeably. It is thus important to identify and distinguish the circumstances in which each may occur.

2 *Performance*

Where one party is in breach, does the other party have to continue performing their obligations under the contract?

In general, rights to performance yet to be rendered can withstand termination, especially where the non-terminating party has already undertaken some task or obligation in performance of their obligations to supply or deliver (*Westralian Farms v Commonwealth Agricultural Service* (1938) HCA, where the buyer, who terminated a contract of supply, was still liable to pay for tractors imported by the supplier but not yet received).

3 *Remedies for breach*

Is it possible to sue for damages for loss of the value of outstanding performance? What about where one party terminates for the breach of the other?

4 *Restitution*

Because termination is prospective, no requirement of restitutio exists (ie, it need not be possible to restore parties to their former states, since no restoration necessarily occurs [though a restitutionary award may, in some circumstances, be permissible – see below Part IX]).

Can one party be returned a deposit or instalment paid under a contract whose termination they have a right to demand?

Deposits are normally regarded as a guarantee of performance. It is therefore forfeited if the contract is terminated for a breach on the part of the buyer (*Foran v Wight*).

However, in the case of instalments, a vendor cannot both retain instalments paid by the buyer *and* avoid their obligation to transfer the property to the buyer (*McDonald v Dennys Lascelles* (1933) HCA), because this could constitute an unjust enrichment (there being a total failure of consideration).

C *Legal Rights to Terminate*

Three kinds of breach entitle the party not in default to terminate the contract.

Breach of an essential term will normally amount to repudiation (and may also cause substantial loss). However, in the case that the term breached is not essential, one of the two other categories of breach giving rise to a legal right to terminate may be used. That is, breach of a non-essential term will only give rise to a legal right to terminate if it is established to cause substantial loss or if it constitutes repudiation of the contract.

Whether the other party has a common law (legal) right to terminate for breach of a contract's term depends on how that term is classified. There are four possibilities:

1 *Condition* (essential term)
2 *Warranty*
3 *Intermediate term*
4 *Fundamental breach*

If the term is a condition (essential term), the other party is entitled to terminate. If the term is a warranty, the other party will not be entitled to terminate, though damages for loss may be available. If the term is an intermediate term, the other party may terminate if the breach is of sufficient gravity and consequential significance.

Fundamental breach, like the category of intermediate terms, also examines the consequences of a party's breach of a term. Breaches that go to the 'root of the contract' may entitle the aggrieved party to terminate.[1]

[1] Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th ed, 1997) [21.8].

1 *Breach of an essential term*

A 'condition' (of performance) is an 'essential term of the contract going to its very root' (*Associated Newspapers*). Breach of such a term gives rise to a common law right in the aggrieved party to rescind the contract at their discretion and sue the other party for damages.

Essential terms regulate obligations foundational to the contract. They may be distinguished from warranties, which only promise the existence of a particular state of facts, because warranties are only the means by which (or circumstances within which) an essential promise is performed.

Where an essential obligation of the contract is broken by a party, a legal right to terminate is conferred upon the other party (*Associated Newspapers*). Importantly, any breach of an essential term – no matter how trivial – will confer a legal right upon the other party to terminate at their discretion (*Tramways Advertising*).

***Associated Newspapers v Bancks* (1951) HCA:**

Facts

- B, a cartoonist, entered into a contract with AN to provide drawings for their comic section for a period of 10 years, which AN agreed it would publish on the front page of that section
- In days following 11 February 1951, a shortage of newsprint caused the comic to be printed on the third page (rather than the first, as agreed)
- B now asserted that AN had breached the contract and gave notice on 26 February that he was no longer bound to perform
- AN, the plaintiff, seeks an injunction against B, the defendant, to restrain his threatened breach of the contract

Issues

- Was AN's undertaking to publish B's drawings on the front page of the comic section 'a condition or essential term of the contract going to its very root', or was it merely a warranty or 'non-essential and subsidiary term'?

Reasoning

- If the contract's stipulation of the location of publication is an essential term, breach will entitle B to terminate the contract and sue for damages at his discretion
- If the term is a warranty, breach may only entitle B to damages
- The distinction between a condition and a warranty lies in a term's 'probable effect or importance as an inducement to enter into the contract'(Morison, *Principles of Recision of Contracts* (1916) 86; affirmed *Luna Park*)
- AN's contract with B comprises 3 related obligations:
    - To present a full-page drawing;
    - To present it weekly; and
    - To present it on the front page of the comic section
- AN only employed B because he drew comics, and B only provided art to AN because he was satisfied they would be published in a particular manner
- It was 'of prime importance' to B that his comics receive prominent public attention
    - The analogy is drawn to an actor employed by a theatre: unless given a part,

even if paid to do nothing, the employer will be in breach (*White v AUNZ Theatres*)

- The *Tramways* test is adopted:
  - Look to the general nature of the contract, and ask:

    Is the term of such importance to the promisee that they would not have entered into the contract without its strict performance?

  - Answering this question involves a counterfactual: what is the hypothetical intention of the party insisting on termination?
  - This is an objective test, and is not determined by the subjective motivations of the actual party

- The undertaking of AN that each comic would be presented on the front page of the comic section is a condition:
  - Failing to perform the condition enables the defendant (B) to treat the contract as ended
  - AN committed three successive breaches of this condition
  - Thereafter, B was entitled to treat the contract as discharged
  - AN's failure went to the root of the contract and gave B a right to treat the contract as at an end (*Luna Park*), which he exercised by giving notice of termination on 26 February

- The circumstances amounted to AN refusing to be bound by the contract, making the change to publication format without consulting B and maintaining that it was entitled to do so (despite B's protests)

Decision
- The term specifying the manner of publication was a condition essential to the contract
- As such, AN's breach of the term entitles B to rescind the contract and sue for damages
- The injunction is denied and the appeal dismissed

Additional factors relevant to the termination of whether a term is essential include:

- The presence of other clauses dealing with the effect of non-compliance (implying that the term is not a condition of performance of the contract);
- The proportion of benefits under the contract for which the clause accounts (where a clause accounts for all the benefits a party not in breach is likely to receive, it is more likely to be essential); and
- The drafting history of the agreement (whether, for example, essentiality clauses were made express in previous versions) (*Burger King v Hungry Jack's*).

***Burger King v Hungry Jack's* (2001) NSWCA:**

Facts
- BK franchised its fast food system globally
- HJ operated several franchises, paying royalties to BK
- In 1973, BK and HJ entered into a series of franchise agreements, allowing HJ to operate restaurants under their name
- In 1990, several disputes were resolved with the formation of a new Development

Agreement, which granted HJ an unrestricted, non-exclusive right to develop restaurants throughout Australia
- HJ was required to open at least four new restaurants per year, and obtain approval for each franchise (cl 2.1)
- Approval was subject to the 'sole discretion' of BK, who granted all franchise applications (cl 4)
- From 1993, BK resolved to enter the Australian market by reducing HJ's market role
- BK used a senior employee in HJ to gain information and recommendations about their business operations
- In 1995, BK imposed a freeze on HJ's applications for third party franchises, preventing them from opening new restaurants per the Development Agreement; it also withdrew financial and operational support from HJ
- On 18 November 1996, BK notified HJ of their termination of the Agreement by reason of HJ's failure to develop the requisite number of new stores, in breach of cl 2.1
- HJ subsequently commenced proceedings against BK seeking the implication of terms of good faith and co-operation

Issue
- Has HJ breached clause 2.1 of the Development Agreement in failing to open four new restaurants, despite being prevented from doing so by BK?
- If so, is BK entitled to terminate the contract for breach by HJ?

Reasoning
- BK breached the terms of the Development Agreement requiring them to:
    - Act in good faith
    - Cooperate with HJ in enjoying the benefits of the Agreement; and
    - Act reasonably

- Promises to do something by a certain time are, prima facie, essential terms
- However, the *Tramways* formula can override this presumption; looking at the contract as a whole (including its other provisions) may reveal it to be inessential
    - Clause 2.1 is not an essential term
    - There are other clauses dealing with the effect of non-compliance with cl 2.1
        - In many respects, the contract is about what will happen if HJ does not comply with the clause
        - This suggests that cl 2.1 is not essential
        - Eg, cl 2.2 (not absolutely essential since extensions are available), cl 3.2 (right to renew dependent on *average* number of restaurants opened, not the absolute figure), cls 7.3 and 8.1 (clauses confer significant benefits on BK: the franchise fee, waiving approval)
        - These clauses show that the contract still applies in the presence of breach of cl 2.1; alternate penalties are set out and these go less than to require termination
    - Further, BK obtains only a relatively minor proportion of their benefits under the contract from cl 2.1 (which requires precisely '4' restaurants to be opened each year)
        - They receive royalties and other payments
        - These are the major benefits, not the fact of precisely 4 openings
    - The drafting history indicates that the term is not essential
        - There were two previous development agreements into which HJ and BK had been previously entered
        - These had essentiality provisions denoting the equivalent clause as a condition

- This provision had been removed from the most recent revision, implying that the parties no longer intended the term to be essential

- Further, BK was itself in breach (per Sheller, Beazley and Stein JJA):
    - Imposing the freeze on third party franchises
        - There was no contractual basis for the freeze, which was merely a policy decision designed to reduce HJ's role in the Australian market
        - In imposing the freeze, HJ was prevented from satisfying the Development Agreement and expanding its presence by opening new stores, despite there being sufficient interest by prospective franchisees
        - In breach of implied terms of reasonableness and good faith
    - Withdrawing financial support
        - The Development Agreement did not allow BK to withdraw financial support until the completion of their annual progress review
        - Failing to grant financial approval even after having assessed HJ as being in compliance with financial ratios was in breach of the implied term of good faith
        - BK's conduct seems directed not at furthering its legitimate rights under the Agreement, but at preventing HJ from performing its obligations
        - Rolfe J (lower court): 'it was in pursuance of a deliberate plan to prevent HJ expanding, and …enable BK to develop the Australian market unhindered'
    - Withdrawing operational support
        - Various failures to deliver reports, forward documents, and visit restaurants indicate that BK was in breach of the implied term of good faith
        - BK's disapproval of new applications was in breach of the implied obligation of co-operation, since the Expansion Policy required performance by both parties to achieve its purpose
        - Because BK failed to do what was necessary to enable HK to be able to comply with the Policy, BK cannot claim that it has sole discretion to operationally disprove HJ

<u>Decision</u>

- Because cl 2.1 is not an essential term, BK is not entitled to terminate the Agreement for non-compliance by HJ
- BK was in breach of its obligations under the contract; its conduct, in particular their use of the HJ employee to use confidential company information to guide their course of action, directly sought to undermine HJ's position
    - BK's conduct is 'commercially reprehensible' (trial judge) and confirms that they are in breach of the implied obligation to act in good faith in their dealings with HJ
- Damages award varied

Failure to perform an essential term on time does not justify termination unless time is of the essence with respect to its performance (*Laurinda v Capalaba*). Typically, time will be made of the essence either by the contract's express specification (eg, of a date for the completion of performance) or the serving of a valid notice. In order to be valid, the notice must satisfy two requirements:

- It must provide for an additional, reasonable time for completion; typically 14 days (*Sindel v Georgiou*)

- It must unequivocally state that the consequence of non-compliance will be termination (*Laurinda v Capalaba*).

2 *Repudiation*

Repudiation is the manifestation of an intention to repudiate (not to perform) the contract. Typically, this is evinced by an actual or anticipated breach by the party. However, repudiation can mean several things:

- Discharging a contract when the other party is in breach of its terms;
- A breach that is of such a nature as to permit the other party to discharge the contract; and
- (More commonly) A refusal by, or inability of, one party to carry out its obligations to the extent that the other, aggrieved party is justified in discharging the contract.

A party terminating for the other's repudiation need not serve a notice prior to doing so. A notice is *only* required to make time of the essence in connection with breach of unspecified deadlines.

The party in default may manifest an intention to repudiate in four ways:

a) Actual breach

The breach must be of such a nature as to indicate that the party no longer intends to perform their obligations under the contract. A failure to perform imports a repudiatory tendency where it is done in such a way as to show no intention to be bound by the contract in the future.

For example, in *Associated Newspapers*, even if the term was not essential, the manner in which the Newspaper breached the terms of the contract showed they no longer intended to be bound. Relevant factors in reaching this conclusion include:

- AN did not inform B
- AN did not listen to B's protestations
- AN moved the comic three times in a row
- AN maintained that they had the right to do so

Combined, these factors evinced an intention to repudiate.

Note that an inessential term can still be the subject of repudiation. In this sense, repudiation as a justification for termination goes well beyond the scope of termination for breach of an essential term.

***Carr v JA Berriman* (1953) HCA:**

Facts

- Carr ('C'), the building owner, and Berriman ('B'), the builder, entered into a contract under which B would construct a factory upon C's land, subject to conditions
- The relevant parts of the contract provided that:
  - C was to excavate the building site to a prescribed level by 29 May 1950
  - B was to supply all steel needed for construction at an agreed price
- The site was not excavated by C by the specified date; instead, it was covered with heavy machinery
- B accepted a tender for fabrication of the steel work for C; C was aware of this sub-

contract
- 19 July: B is informed that steel is to be supplied by Arcos, with whom C enters into an agreement
    - C had itself entered into a separate contract for the supply and fabrication of the structural steelwork with Arcos
- 31 July 1950: B's solicitor contacts C, rescinding the contract due to two breaches by C (failure to excavate and failure to acquire steel from the agreed source)
    - B relies on a contractual right to terminate (*Shepherd v Felt and Textiles*)
- Trial judge: B entitled to rescind; affirmed by the Full Court

Issue
- Has C repudiated the contract (and, thus, can B claim damages for breach)?

Reasoning
- B's letter did not cite any legal right to terminate for breach, but instead cited a contractual right to terminate
    - This right was actually inapplicable to the circumstances
- Important rule:
    - Citing the wrong ground for termination does not invalidate it if there is, in fact, a valid legal ground (*Shepherd v Felt and Textiles*)
- Failure to excavate is not in itself a repudiation
- However, the accumulation of breaches – reallocating the steel supply (which, in itself would be sufficient), and the failure to excavate – is sufficient to comprise repudiation

- Two breaches of the contract were committed by C – failing to excavate the building site on time and not utilising B for steel supply; B was thus entitled to repudiate his obligation to deliver the structural steel and commence construction

- After 29 May, B's conduct (sub-contracting to fabricate steel) is only consistent with the continued existence of the contract
    - Though it seems to be that C does not intend to be bound by the contract (in which event B would be entitled to rescind and sue for damages), there is some factual uncertainty about whether C actually was able to comply
        - Heavy rain prevented C remedying their breach, since the machinery could not be moved during the downpour throughout the whole of June and July
        - This may indicate that C did not necessarily intend to ignore the contract
    - Even if the breach was capable of giving rise to a right to rescind, B lost that right by continuing to act as though the contract was in existence
        - Badgering C for delivery of the construction site
        - Failing to provide notice specifying the date by which excavation must have been completed

- However, the second breach, when coupled with the existing breach, produces a situation from which it is possible to draw the inference that C did not intend to honour the contract
    - The second breach denied B of a substantial part of his profit from the project, and opened his company up to legal liability to the third party supplier with whom they had sub-contracted
    - A reasonable man could hardly draw any other inference than that C does not intend to take the contract seriously, that he is prepared to carry out his part if and only when it suits him

- An intention not to be bound by the contract is evinced by C's failure to remedy his first

breach (by not removing even part of the machinery), coupled with his:
  - Placing of further machinery on the adjoining land
  - Failure to explain the delay or offer assurances to B that all steps would be taken to remove the machinery
  - Failure to obtain goods specified under the contract as being provided by B
  - Actively pursuing another source of said goods without regard for B's liabilities and contracting out a large potion of the work to a third party contractor

Decision
- The sequence of accumulative breaches may, when combined, indicate that Berriman no longer intended to perform the contract
  - This can be inferred from the conduct in combination

b) Anticipatory breach

It is also possible to repudiate a contract before performance is due. However, this can be problematic: indicating unwillingness may be subject to a change of mind; the interval of time between repudiation and performance can cause problems for parties asserting breach [???].

***Bowes v Chaleyer* (1923) HCA:**

Facts
- 8 March 1920: C, the plaintiff, contracts with B, the defendant, to sell 1800 yards of French tie silk
- The contract specified shipping method and delivery in two instalments:
  - 'to be shipped per sailer/steamer. Half as soon as possible. Half two months later.'
- 3 June (before shipment due): B becomes concerned about the cost of the silk, and wrote to C explaining that he was cancelling the order
  - Anticipatory repudiation
- C nevertheless imported the tie silks: 340 yards on 21 October, 800 yards on 17 November, 580 yards on 13 December
  - This was done in three separate instalments
- C tendered each order to B, who rejected them
- B claims that the contract had been cancelled after being made
- C sues B for damages in respect of the difference between the cost of the silks under the contract and the price obtained after auctioning them to a third party, alleging that B illegitimately repudiated the contract

Issue
- Has B validly repudiated the contract by cancelling the sale?
- Can B terminate for C's breach of contract?

Reasoning
- General principles:
  - If a party repudiates in anticipation, the other party has a right to terminate there and then
    - They don't need to wait and see if the first party will not perform
  - However, if the other party elects not to terminate, they place themselves at the first party's mercy; the first party can either cure the contract (perform) or maintain their decision not to perform

    - The repudiating party is able to rely upon any event occurring between the original manifestation of their repudiation and the actual performance of the contract that would excuse them from performance
        - If something happens that would excuse the repudiating party from performance, they may take advantage of that event

- Knox CJ:
    - What is the meaning of the stipulation of the shipment delivery schedule?
        - No ambiguity in the words of the contract
    - Was the stipulation complied with?
        - C did not comply: the first two shipments did not constitute one half of the goods ordered, and the third shipment did not constitute the other half
        - The clause provided for two shipments two months apart, and C did not deliver in this manner
    - If not, did the failure to comply entitle B to reject the goods?
        - General rule: a clause in a contract for sale of goods that specifies shipping time is, prima facie, a condition precedent (*J Aron & Co v Comptoir Wegimont* per McCardie J)
        - Because the clause is a condition precedent, breach justifies B in rejecting the goods when tendered
    - Ancillary arguments:
        - Did B repudiate his obligation under the contract such as to absolve C from showing fulfilment of the condition precedent? (*Braithwaite v Foreign Hardwood*)
        - A breach by anticipation (repudiation) gives the other party the option of treating the contract as at an end or waiting until the time for performance has arrived before making any claim for breach
        - Here, B repudiated the contract, giving C the option to end his own obligations and seek remedy for B's default, or wait
        - C waited until performance, holding himself bound to perform his obligations under the contract
    - This allows B to justify his refusal of the goods by reference to 'any supervening circumstance' that would excuse performance

<u>Decision</u>

- Here, B committed anticipatory breach entitling C to terminate
- However, C chose not to do so, and the contract remained on foot
- C then breached a condition (three shipments instead of two; not half/half), giving B a legal right to terminate for breach of an essential term
- B is thus entitled to take advantage of the breach by C and so avoid performance
- In general, a repudiating party is allowed to excuse himself from performance if the other party affirms the contract and 'any supervening circumstance' confers a right to terminate
- Majority: C's failure to deliver in two shipments as specified in the contract gives B the right to refuse delivery, because C elected to affirm the contract despite B's anticipatory breach

c) Unjustified termination

Unjustified termination may arise in the following circumstances:

- B claims the right to terminate
- A asserts that no such right exists

- B terminates anyway
- It eventuates that B is not actually entitled to terminate
- There has been an 'unjustified termination'

Where there has been an unjustified termination, the innocent party is allowed to terminate for the terminating party's repudiation of the contract. This repudiation is said to be constituted by the claim that they are no longer bound to perform their obligations under the contract.

***DTR Nominees v Mona Homes* (1978) HCA:**

Facts

- DTR Nominees ('DTR'), the vendor, contracted with Mona Homes ('MH'), the purchaser, who was to buy lots 1-9 of a subdivision on land owned by DTR
- MH terminates the contract because he claims that DTR has breached cl 4 of the contract of sale
- Clause 4 warrants that a plan ('the said plan') of the sub-division has been lodged with the relevant council body
    - '4. The Plan of sub-division, a copy of which is annexed hereto, has been lodged with the Fairfield Municipal Council. The Vendor will proceed with all due dispatch to comply with the conditions of approval of the Council and to have the relevant plan of subdivision lodged for registration as a deposited plan [with the Registrar-General] ...

      If the said plan has not been lodged for registration as a deposited plan within a period of 12 months from the date hereof …either the Purchaser or the Vendor may …rescind this contract whereupon all moneys paid to the Vendor hereunder shall be refunded to the Purchaser …'

- The seller makes a separate plan for the 9 lots being bought by MH
    - This is what he lodges with the council
    - The plan for all 35 lots is what was annexed to the contract
    - 7 July 1974: the plan was registered with the council; payment was owing within 14 days

- 6 months after the sale, the buyer (MH) discovers that the wrong plan has been lodged
    - MH terminates because of DTR's breach and claims a refund of his deposit
    - DTR denies that MH is entitled to terminate and refuses to refund the deposit
    - 19 July: MH rescinds the contract on the ground that the lodged plan was not that referred to in the contract

- 25 July: DTR asserts that MH's recision constituted a wrongful repudiation of the contract, accepted the repudiation, rescinded the contract and retained the deposit
- Supreme Court NSW: DTR were in breach of condition 4, but that breach did not justify recision by MH in the circumstances

Issue

- If MH's termination was unjustifiable, has there been a repudiation?
    - If there has, this would entitle DTR to terminate for MH's repudiation and retain the deposit

Reasoning

- It is agreed that DTR was in breach of the clause as correctly interpreted
    - The dispute of interpretation was resolved in MH's favour

- The 'relevant plan' is the annexed plan (for the full 35 lots)

- The term is not essential, however; so the breach cannot entitle MH to terminate
  - This conclusion stems from an application of the *Tramways* test
  - The phrase 'with all due dispatch' implies that the term was not essential

- There is an express right to rescind if the plan is not lodged within 12 months; however, 12 months have yet to elapse (the action was brought after 6 months), and no right to terminate could arise prior to that point
  - Have DTR repudiated the contract? No
  - DTR is acting on what they *think* is the correct interpretation of the contract (though it is in fact wrong)
  - However, they have made a *bona fide* mistake
  - No warning was given by MH, and there was no chance for DTR to meet or respond to MH's objection
  - DTR were not given the opportunity to manifest an intention to repudiate

- Normally, unjustified termination would amount to repudiation
  - Here, however, there is no repudiation by MH because MH is *also* proceeding on the basis of their own *bona fide* interpretation
  - Even if it was, DTR would be restricted from exercising the right to terminate for unjustified repudiation because they were not able and willing to perform their own obligations (under the correct interpretation)
    - Importantly, DTR is not unwilling nor incapable of lodging the relevant plan as required by the (correct interpretation of the) contract
  - Breaches based on a bona fide interpretation of the terms of a contract cannot amount to repudiation
  - Because DTR was not actually repudiating the contract by failing to lodge the correct plan (they were acting under an honest belief in the correctness of their interpretation), and the term was not itself essential, MH cannot terminate the contract on those bases
  - However, MH's wrongful termination does not here amount to repudiation

- However, the contract was ultimately abandoned by both parties since neither proved willing to perform
  - Both parties asserted a right to terminate; the contract thus came to an end by consent
  - Where a contract is abandoned by consent, the buyer gets back their deposit
  - So even though MH is not entitled to their deposit by virtue of breach, they *can* recover their deposit on the basis that the contract was abandoned

<u>Decision</u>

- MH's termination was unjustified; however, it was *not* a repudiation
- MH is not entitled to terminate for DTR's failure to lodge the annexed plan because DTR was itself acting under a bona fide interpretation of the terms of the contract
- Because neither party was willing to perform, the contract came to an end by consent and MH is entitled to their deposit on the basis that the contract was abandoned

d) Failure to perform on time

Every contractual obligation caries with it both temporal and substantive connotations. The temporal element may be express (as where the term specifies a date of completion) or implied (prima facie, 'a reasonable time').

A failure to perform a contractual obligation within time can give rise to a right to terminate in two circumstances:

i) Where time is of the essence

If time is of the essence, the term becomes essential (breach of which will allow termination). The equitable rule is now adopted at common law. Time will be of the essence in circumstances where:

- It is agreed expressly (this will typically require an express provision to that effect); or
- Even if it is not agreed, equity provides that it can be made essential by serving a written notice (which gives a further, reasonable period for performance);
    - Such a notice creates a unilateral right to make time of the essence

Section 41 of the *Property Law Act* provides that equity rules shall prevail over common law in respect of the time within which performance of contracts involving land must be performed.

It is possible to reconcile the equitable approach with the *Tramways* test. Where a term impliedly imports temporal essentiality, it provides a means of applying equitable rules; such a term becomes essential (a condition of performance), breach of which will allow termination.

ii) Where a failure to perform on time constitutes repudiation.

A party may also delay the performance of their obligations to the point where they evince an intention no longer to be bound by the terms of the contract. In such cases, the failure to perform on time is said to constitute repudiation of the contract, and a legal right to terminate for breach may be conferred (*Laurinda v Capalaba*).

***Laurinda v Capalaba* (1989) HCA:**

Facts

- 31 October 1985: Capalaba, the shopping centre owner, and Laurinda, a tenant therein, sign an agreement to complete and execute annexed lease (commencing 1 December 1985
- It is stated that the '[o]bligations of the Lessor and the Lessee are not dependent on execution of the lease and not affected by any delay in execution of the Lease'
    - The lease has blanks and is not an effective legal document
- 28 November 1985: Capalaba's solicitor informs Laurinda's solicitor that a lease has been executed and will be sent shortly
- 3 December 85: Laurinda moves in and begins operating their business
- 14 March 1986: Laurinda requests the lease as soon as possible; Capalaba replies, 'in the not too distant future'
- 21 August 1986: Laurinda's solicitor writes again, 'our clients require you to complete registration within fourteen days ... If the registration is not completed within that time then our clients naturally reserve their rights'
    - L seems to want to sell their business – they need a lease with C to do so
- 3 September 1986: Capalaba's solicitor replies that it has referred the letter to their clients for instructions.
- 5 September 1986: Laurinda terminates the lease agreement for breach by Capalaba of an implied obligation (the implication of which is conceded at trial) to register or deliver a lease
- Laurinda brings an action seeking a declaration and damages for Capalaba's breach

- Later, L claims C's implied repudiation gives it the right to terminate
- Assertion by lessee that C in breach of implied term to deliver lease on time

Issue

- Does Laurinda have the right to terminate for Capalaba's repudiation, if, indeed, their conduct so amounted?

Reasoning

- Was time of the essence to deliver the lease?
  - No, not initially
  - The contract doesn't refer to it
  - In fact, the clause says it is not dependent on the execution of the lease
- What is the effect of the notice?
  - None; the notice is ineffective because it cannot set a period to be of the essence
  - The notice needs to *unequivocally* convey the consequences of non-compliance
    - The consequences must be unequivocally stated to be immediate termination
    - If, after serving an effective notice, the reasonable time period allowed therein is not complied with, the consequence will be termination
  - The period allowed was unreasonable
    - To be reasonable, a period must be 14 days at a minimum
    - Here, the 13 days remaining after receipt were insufficient
  - Because the notice was ineffective, time is not of the essence
- However, C's failure to deliver and register the lease within 9 months constitutes repudiation
  - C's solicitors said on 3 previous occasions that it would be ready
  - It suited C commercially to withhold leases
  - The trial judge described C's conduct as 'procrastination persistently practiced'
  - C was clearly indicating that it would perform its end of the bargain only if and when it felt like it

Decision

- C repudiated the contract by indicating it would grant the lease only at its discretion
- As a result of C's repudiation, L is entitled to terminate the lease agreement

3 *Breach causing substantial loss*

Where the breach is so substantial as to deprive the other party of the substance of the contract, a legal right to terminate may be conferred upon that other.

If a breach is of such a nature that its consequences cause serious loss to the party not in default (including a loss of virtually the entire contract's performance) then that alone should entitle termination by the other, even if it is not an essential term, and even if it is not repudiated.

Thus, in *Carr*, the reallocation of steel to a supplier other than Berriman was in itself sufficient to justify termination of the contract because of the seriousness of the consequences which that decision would cause Berriman to suffer:

- The estimated profit of fabrication was ¼ of the total profit Berriman expected to derive under the construction contract with Carr

    - This constituted some £450
- In addition, Berriman became liable in damages to the sub-contractor from whom he purchased the steel
    - This was at least £450
- Thus, in total, at least ½ of the contract's value was lost as a result of the reallocation

The consequences of a breach is a substantive factor evident in many cases. A 'breach going to the root of the contract' will often have disastrous consequences for the other party. A 'breach depriving the party of the substantial benefit of the contract' is a clear instance of loss-based assessment of a legal right to terminate.

***Ankar v National Westminster* (1987) HCA:**

Facts
- National Westminster ('NW') are the lessors of manufacturing machinery
- Ankar ('A') is the guarantor of the lease, and pays a security to NW in respect of the assets leased to the lessee's
    - Essentially, A guarantees that the lessee will perform their obligations under the lease
- The Security Deposit Agreement ('the Agreement') contains two clauses, which provide that:

> '8. [NW] agrees with the Depositor that it will use its best endeavours to ensure that the machinery …. shall remain in the possession of the Lessee and will … notify the Depositor should the Lessee propose to sell or assign its interest in any of the said machinery.
>
> 9. Upon the Lessee being in default under the Lease Agreement [NW] shall agree to notify the Depositor whereupon [NW] and the Depositor shall consult with a view to determine what course of action will be taken by [NW] ...'

- These clauses are breached by L, the lessee, who fails to notify the Depositor (A) of the reassignment of their interest in the machinery
- A claims entitlement to terminate the Agreement and receive their security deposit back from NW

Issue
- Does a contractual right arising out of cls 8-9 entitled A to terminate the Agreement?

Reasoning
- Clauses 8-9 are essential (applying the *Tramways* test)
- The Court (arguably) recognises the innominate term (though not an essential term, its breach can lead to horrendous consequences)
    - It appears to have been noted that such a term may 'possibly' arise, but it probably does not on these facts
    - The existence of an innominate term is based on the concept that the consequences of a breach are the foundation of the right to terminate

Decision
- Yes, A is entitled to terminate the Agreement and receive their deposit back on the grounds that a contractual right to terminate is created by L's breach of cls 8-9

Where the consequences of the breach of a term are serious, the term may be 'innominate' such as to give rise to a legal right to terminate the contract (*Ankar*).

D *Contractual Rights to Terminate*

Clauses specifying the circumstances or mechanism in which a party may stop performing their obligations under a contract confer a contractual right to terminate it. This method of termination thus refers to clauses included in the contract itself that specifically deal with the effect of breach and any resulting right to terminate. The existence, scope and function of contractual rights to terminate are regulated entirely by the parties themselves.

The role of a Court is twofold: first, to interpret the relevant provisions so as to determine the ambit of the contractual right to terminate; second, to determine whether the conduct of the parties is such as to render the right applicable in the circumstances. Courts have a tendency to conduct the interpretation of such contractual provisions narrowly and *contra proferentem*, though the author is unaware of any specific rule of law to this effect.

In addition to specifying the manner of termination, clauses may impose obligations or restrictions it carries or are imposed upon it.

Note that damages for termination that is based upon a contractual right to terminate cannot recover for 'loss of bargain'. This head of damages is only available where the terminating party relies on a legal right to do so.

The primary issue is normally whether the conduct alleged to justify termination falls within the ambit of the contractual right to terminate. Several illustrations follow.

***Burger King* (2001) NSWCA:**

Facts
- See above Part I C
- Relevant clauses in the Development Schedule:

> 15.1 The occurrence of any of the following events shall constitute good cause for BKC to terminate this Agreement:
>
> (d) HUNGRY JACK'S fails to comply with any terms, provisions or conditions of this Agreement.
>
> 8.1 Any failure to adhere to the Development Schedule shall attract a liability to pay a franchise fee in respect of each restaurant required to be but not opened. Such franchise fees shall be paid at the end of the year following the failure, but not if such failure is made good by that time.

Issue
- Can BK terminate on the basis of a contractual right conferred by the Development Schedule?

Reasoning
- BK contends that because cl 15.1 confers a right to terminate for breach of 'any terms', HJ's breach of cl 2.1 (requiring HJ to open a minimum of 4 new restaurants each year)

must be sufficient to allow invocation of the contractual right to terminate
- HJ responds that breach of cl 2.1 cannot, in itself, give rise to a contractual right to terminate because cl 8.1 requires that cl 15.1 not be interpreted literally
    - Clause 8.1 provides that an additional year in which to 'ma[ke] good' breach exists in relation to 'any failure' under the contract
    - Therefore, cl 15.1 can't apply until 1 year after a breach of cl 2.1
    - Otherwise, HJ would be deprived of the opportunity to make good their breach

- These two arguments may be reconciled by interpreting cl 8.1 as applying only if BK *chooses* not to exercise its right to termination
    - If BK chooses to affirm the contract, then cl 8.1 applies
    - Otherwise, and prima facie, the Schedule can comes to an end if HJ fails to comply with any of the terms of the Schedule

- The Court applies *ABC v APRA*, reasoning that the meaning that is to be accorded to the ambiguity in cl 8.1 should be that favouring HJ
    - The ambiguity is to be resolved against the person relying on the broad termination clause (in this case, BKC)
    - Therefore, HJ's interpretation applies

Decision
- Ambiguities in broad termination clauses are to be resolved *contra proferentem* (ie, against the party seeking to rely on the clause in order to terminate the contract)

Pan Foods may signal a retreat from the traditional approach to the interpretation of contractual provisions regulating the termination of a contract. It adopts a practical, rather than strict or traditional, approach to the requirement that a notice of termination be served.

***Pan Foods v ANZ Banking Group* (2000) HCA:**

Facts
- Pan Foods ('PF') is an importer; they borrow money from ANZ Bank, a loan which is secured by a debenture (mortgage) over assets of the company
- The Bank appoints a receiver (to sell properties) of all mortgaged premises at any time after the moneys secured become payable
- The Bank is told that PF is trading at a loss, so it appoints receivers to sell their assets
- The Bank now seeks to recover the difference between the proceeds derived from the sale of its assets and the amount loaned from PF's directors personally
- The directors seek to forestall the action, arguing that the monies never became payable
- The Bank responds that cl 11 in the loan states that ANZ is entitled to terminate the loan if PF defaults (ie, if there are circumstances which, in the opinion of the Bank, might affect PF's ability to repay their loan)
    - Under the loan agreement, notice must be given by an authorised representative, signed by an officer of the Bank, and presented to PF
- However, the notice that is served is only signed by the Bank's solicitors, and merely demanded payment
- PF argues that the notice is invalid because it does not comply with the requirements set out in cl 15.3
    - The notice was not given by an authorised representative (which the solicitors were not)
    - The notice simply demands payment, but does not state that 'all monies owing

are due and payable'

- Relevant clauses from the contract:

> 11.1 The Bank may, if an Event of Default has occurred, by notice to the Customer
> (d) Terminate its obligations under the Agreement;
> (e) Declare that all moneys owing are due and payable
>
> 15.3 A notice from the Bank to the Customer must be given by an Authorised Representative, in writing.

Issue

- Can the Bank terminate the Agreement, despite failing to comply with the contractual provisions regulating the requirements for an effective notice of termination?

Reasoning

- Kirby J: the strict approach to notice requirements is no longer to be applied
  - Courts must be pragmatic
  - There is no doubt about the authorship or purpose of the document
  - It therefore constitutes effective notice

Decision

- Despite not being strictly compliant with cl 15.3, the notice is effective and the Bank is entitled to terminate the Agreement and demand payment

The Gleeson Court has since indicated that a 'drier' approach may be taken to contractual stipulations regarding notices communicating termination (*Tri Continental*).[2]

This line of case law shows the emergence of both a traditional (*Burger King*) and distinct, contemporary (*Pan Foods*) approach. *Pan Foods* may signal a turning point in the interpretation of contractual rights to terminate. It has effectively eschewed the traditional view (literal meaning) in favour of a more pragmatic application of principle. The ambit of a party's rights to terminate under a contractual provision is clearly wider when following this approach.

II RESTRICTIONS ON THE EXERCISE OF THE RIGHT TO TERMINATE

Neither a legal nor a contractual right to terminate may be exercised absolutely. Both are subject to restrictions, three of which will here be considered.

Two preliminary issues arise. First is the question of whether the parties may exclude the restrictions by express provision in the contract regulating their relationship. Presumably, both common law and equitable restrictions apply to the termination of a contract unless otherwise provided; however, little authority exists in relation to the effect of provisions overriding the default position.

It is conjectured that the result may be similar to that in relation to provisions excluding rescission for misrepresentation, where common law rights to rescind for innocent misrepresentation can be

[2] MP Ellinghaus, Lecture (9 September, 2004), Melbourne, Australia.

excluded but equitable rights for fraudulent misrepresentation cannot. Similarly, additional, self-defined restrictions are enforceable barriers to termination.

Second, it is unclear whether equitable restrictions will affect a legal right to terminate (their applicability was denied by Brennan J in *Stern v McArthur* at 515-16). However, this problem may not arise if the relevant right is both legal and contractual; for example, a term may be specified as essential by the contract.

A *Readiness and Willingness*

To be entitled to terminate a contract for breach or repudiation, an aggrieved party must establish that they are ready (able) and willing to perform their obligations under it.

In the context of a contract for the sale of land, for example, two contemporaneous obligations exist:

- The seller's duty to deliver the title documents; and
- The buyer's duty to pay the balance of the agreed price.

These are performed contemporaneously on the day of settlement. Readiness and willingness prevents termination where one party is unable or unwilling to perform their obligations. Effectively, this means there is no breach by a party unless the other has tendered performance.

However, in cases of anticipatory breach by a party, the other need not go ahead and tender performance, so long as they were – up to the time at which the breach occurred – ready and willing to perform (*Foran v Wight*). All that the terminating party need show is that on that date they were not *already* unable or unwilling to perform their relevant obligation.

***Foran v Wight* (1989) HCA:**

Facts

- A contract is made for the sale of land from the Wights ('the vendors') to the Forans ('the buyers'), which specifies a $7500 deposit on a purchase price of $75 000
    - Settlement is due by 22 June; time is expressly stated to be of the essence, making this an essential term and giving Wight a right to terminate without notice
    - The seller must register a right of way over the land as part of the official title
- 20 June: the sellers' solicitor advises the buyers that they will be unable to register the right of way by 22 June
- At this stage, the buyers have not themselves yet obtained all $75 000 required for payment (they only have $56 000)
- 22 June: neither party tenders performance
- 24 June: the buyers serve a notice of rescission based on the vendors' failure to effect the transfer by 22 June
- The vendor ignores this termination, and registers the right of way 1 month later
- Over 1 year later, the vendor resells the property for $68 000
- The vendors refuse to accept the rescission, so the buyers seek an order that the contract has been validly rescinded and that they are entitled to their deposit
- The vendors argue that, because the buyers would not have been able to raise $75 000 by 22 June, they were not ready to perform the contract, and thus had no right to terminate it:
    - 22 June: buyers did not turn up to complete the sale (indicates that they were unwilling to perform), nor did they have the required funds (indicates that they

were unable to perform)
    - The buyers cannot terminate unless they were ready and willing to perform, which they were not
    - There is also a requirement that, where performance of both the parties is concurrent, each must tender performance; here, the buyers failed to bring their side of the bargain to fruition

- Trial judge:
    - The buyers had not discharged their onus of proving that they were able to pay the purchase price
    - Even if they had continued raising money, they would not have been able to raise the full purchase price in time for settlement
    - However, the vendors repudiated the contract on 20 June, and the buyers are able to terminate

- An appeal to the Court of Appeal is allowed, which finds that the buyers cannot terminate

Issue

- Are the buyers (Forans) able to terminate for non-performance by the vendors (Wights), despite the fact that they were not 'ready and willing' to perform the contract on 22 June?

Reasoning

- Majority:
    - Affirms the requirement of readiness and willingness as a restriction upon the exercise of a right to terminate a contract
    - However, the Wights cannot rely on that requirement here because of their anticipatory repudiation
    - Dawson J, Brennan J:
        - '[I]f an executory contract creates obligations which are mutually dependent and concurrent and, before the time for performance of the obligations arrives, one party, A, gives the other party, B, an intimation that it will be useless for B to tender performance and B abstains from performing his obligation in reliance on A's intimation, B is dispensed from performing his obligation and A's obligation is absolute provided that B had not repudiated the contract and he was ready and willing to perform his obligation up to the time when the intimation was given.'
        - 'If, at the time when the intimation as given, B was substantially incapable of future performance of his obligation or had already definitely resolved or decided not to perform it, B was not ready and willing'
        - On the facts:
            - There was sufficient readiness and willingness here
            - The critical moment is 20 June (the time of repudiation)
            - All the buyers (the terminating party) need show is that on 20 June they were not *already* unable or unwilling
            - This is a comparatively low threshold
            - Here, they were still trying, so they were not unwilling
        - Where a contract is anticipatorily repudiated, readiness and willingness are to be judged as at the date of repudiation and not performance (ie, 20 June not 24 June)
        - Because the Wights were able and willing at 20 June to perform, the requirement is satisfied
    - Deane J:
        - A party seeking termination of a contract need not be ready or willing to perform it

        - An estoppel has also been created such as to prevent the sellers relying on a contractual right to refuse termination by the buyers
        - The sellers induced an assumption in the buyers that there was no need for them to turn up on 22 June and render performance (the telephone call caused this assumption)
        - However, what si the detriment suffered by the buyers?
            - They gave away the chance of raising enough money to complete the sale on 22 June
            - Even so, how can that be a detriment if they would never have raised the money anyway?
            - So no detriment; no estoppel

- Minority:
    - Mason CJ (dissenting):
        - His Honour dissents on the facts (though arrives at a similar legal conclusion to the majority)
        - Where a contract has been anticipatory repudiated, the requirement of readiness and willingness 'extends only up to the time of acceptance [of the repudiation]'
        - However, for cases of actual breach, the requirement 'is more stringent', and continues through to performance
        - As Dixon CJ noted in *Rawson v Hobbs*: 'nothing but a substantial incapacity or definitive resolve or decision against doing in the future what the contract requires is counted as an absence of readiness and willingness'
        - Here, however, the vendors' anticipatory breach was not accepted and the contract remained on foot
        - The case is thus one of termination for actual breach (occasioned on, and not before, the date of settlement
        - The purchasers have not satisfied their onus to prove 'that at that time they would have been so ready and willing', so the appeal must be dismissed

<u>Decision</u>

- Readiness and willingness are prerequisites for termination for breach
- Where a contract is anticipatorily repudiated, readiness and willingness are to be judged as at the date of repudiation and not performance
- Here, the vendors' telephone call on 20 June constituted an anticipatory repudiation of the contract, giving the buyers the right there and then to terminate
- At the time of repudiation, the vendors were still able and willing to perform, so they are not prevented from terminating
- Upon termination of the contract, the buyers' consideration 'failed totally' and they are recovered to restitution of the monies paid under the contract
- Appeal allowed (4:1)

Foran also appears to indicate (particularly in the judgment of Deane J) that a party may be estopped from relying on the requirement of readiness and willingness where the other has been induced to assume that readiness and willingness are no longer required (as where, for example, the party purports to repudiate the contract), and suffered loss as a result. Reliance loss may be difficult to establish; however, where applicable, this may afford an alternative ground on which to overcome the requirement that the terminating party be ready (able) and willing to perform.

If a party terminates as a result of the other's misinterpretation of the contract, this may not necessarily constitute a justifiable repudiation. However, it may indicate to the misinterpreting party that the terminating party is actually repudiating the contract. In these circumstances, it needs to be asked whether the other is ready and willing to perform the contract under the correct interpretation of the contract. If not, they will be unable to terminate for the terminating party's repudiation (*DTR Nominees*). [???]

***DTR Nominees v Mona Homes* (1978) HCA:**

Facts
- [See above Part I C]

Issue
- Can the buyers (MH) terminate for the sellers' failure to lodge the correct plan?

Reasoning
- On the facts, MH's termination was not a repudiation that would justify DTR terminating the contract
- However, even if it was, DTR was not ready and willing to perform the contract on its terms
    - Thus, even if it had been justifiable to terminate because of MH's repudiation, it would not have given rise to a right to terminate because DTR was unwilling (and unready) to perform the contract according to its terms as correctly interpreted

Decision
- No right to terminate has been conferred upon DTR

B *Unjust Forfeiture*

If termination of a contract would result in the unjust forfeiture of a proprietary interest, this gives rise to a potential equitable basis for restricting a right to do so.

The English and Australian approaches diverge in their treatments of the effect that breach of an essential term will have upon the availability of unjust forfeiture as a restriction upon termination:

- In the UK, breach of an essential term (eg, a 'time is of the essence' provision) will mean that the doctrine of unjust forfeiture has no application
    - This is because, where an essential term is breached, there is no longer any right to the performance of the contract
    - Eg, in the case of a transfer of land: no land or title is actually owned after the time for settlement has elapsed, since the contract comes to an end as a result of the essential term's breach

- In Australia, however, unjust forfeiture *can* (and, traditionally, does) restrict a right to terminate even where there has been a breach of an essential term (*Legione v Hateley*)
    - However, the existence of equitable proprietary interests has been called into question by *Tanwar v Cauchi*

***Legione v Hateley* (1983) HCA:**

Facts

- A contract for the sale of land by Legione (vendor) to Hateley (purchaser) is made in July 1978; the deposit is paid by Hateley; completion is due 1 July 1979
    - The contract states that '[t]ime shall be of the essence in all respects', subject to the giving of 14 days notice
- The purchasers (Hateley) take possession and build house on land.
- 14 June 1979: vendor's solicitor sends a reminder that payment is due in 16 days
- 29 June 1979: purchaser's solicitor requests a 3 month extension
- 1 July 1979: time of completion expires
- 12 days later, the vendor's solicitor again writes to Hateley, refusing an extension
- 26 July 1979: vendor's solicitor serves notice requiring payment by 10 August
- 9 August 1979: purchaser's solicitor telephones the vendor's solicitor
    - They say that they will be '[r]eady to settle on 17 August'
    - Williams (the partner's secretary) says, 'I think that'll be all right but I'll have to get instructions'
- On the basis of this representation, the purchasers do not tender money (although the evidence is that they could have)
- However, the vendor's solicitor claims that the contract has been terminated
- The purchaser now tenders a bank cheque, which is rejected
- The purchaser sues for specific performance
- The vendor claims it has validly terminated the contract (probably having since received a better offer)

Issues

- Is the seller estopped from terminating?
- Can the buyers be relieved from unjust forfeiture notwithstanding their breach of an essential term?

Reasoning

- Majority:
    - Unjust forfeiture can be a basis of equitable relief against termination, even where the party in breach is in breach of an essential term
    - Equitable relief will only be granted when termination would amount to unconscionable conduct
    - Mason and Deane JJ:
        - Set out the Australian position
        - Equitable relief is potentially available even if the buyer is in breach of an essential term if termination would amount to unconscionable conduct
        - Add that it must be an 'exceptionable' result
        - This seems to imply that both 'exceptionality' and 'unconscionability' are required
        - Here, if termination was allowed, an unjust forfeiture would occur, so the right to terminate is restricted
    - Gibbs CJ and Murphy J:
        - Termination for breach of an essential term is to be restricted 'if it will prevent injustice'

- How is it to be decided if termination is unconscionable?
    - Mason and Deane JJ pose several 'subsidiary questions' that look to the consequences of allowing termination as well as the procedural factors accounting for the breach:
        - '(1) Did the conduct of the vendor contribute to the purchaser's breach?
        - (2) Was the breach (a) trivial or slight, (b) inadvertent and not wilful?

        - (3) What adverse consequences did the vendor suffer by the breach?
        - (4) What is the purchaser's loss and the vendor's gain if forfeiture is to stand?
        - (5) Is compensation an adequate safeguard for the vendor?'
    - Here it was ostensibly unconscionable for the vendors to terminate:
        - (1) The vendor contributed to the breach (Williams' statement)
        - (2) The breach was slight – payment came only a few days late and the delay was not wilful
            - It was only a slight breach (delayed by 4 days)
        - (3) None; they were still paid
        - (4), (5) The sellers potentially gained a windfall (the constructed house) and the value of the property had increased; these would be forfeited by the purchaser
            - The property's value had increased substantially since the contract was made
    - However, the evidence is not entirely clear, so the case must be remitted to the trial judge for determination

- Brennan J (dissenting):
    - Adopts the UK position
    - The buyer is in breach of an essential term (time being of the essence) and is not entitled to specific performance
    - Therefore, Hateley has no equitable interest in the land and there can consequently be no unjust forfeiture

Decision
- (3:2) The vendor is not estopped from terminating the contract
- (4:1) However, relief against unjust forfeiture is potentially available
- The case is remitted to a lower court for determination

Unjust forfeiture is available if it would be unconscionable to terminate the contract. The equitable concept is not to be examined at large but rather moderated with common law categories. These categories are limited to the following:

- Where the breach is due to the vendor
- Where there is
    - Fraud
    - Accident
    - Mistake; or
    - Surprise.

It may also be possible to draw an analogy with the equity of redemption, in cases where the contract is not commercial and a windfall would be gained by the vendor if they were allowed to terminate (*Stern v McArthur*).

Stern v McArthur (1988) HCA:

Facts
- 1969: a contract is formed between Stern and McArthur, which provides for instalments on a purchase of land to be paid over a period of 13.5 years
- Clause 15 provides that, in the event of 'any default', the vendor 'shall be entitled to

terminate'
- Clause 18 states that the 'Entire balance [is] payable if [a] default of more than 4 weeks [occurs]'
- The buyers build a house on the land and reside there
- However, in 1975, the buyers separate, and the wife (Bates) remains on the land
- In 1977, Bates' ex-husband ceases to pay instalments, without her knowledge
- In 1978, Bates discovers this and immediately resumes payment of instalments
- The seller demands the balance under cl 18
- Bates tenders payment of all arrears; this is refused; the sellers place the property on the market, but it is not sold
- January 1979: the sellers give notice to pay within 21 days (this made time of the essence)
- February 1979: the sellers give notice of termination
- May 1979: Bates pays the balance into the sellers' bank account.
- The sellers terminate contract of sale and sue to recover their land
- The buyer counterclaims for specific performance

Issue
- Can the sellers' right to terminate under cl 15 be restricted on the basis that it would result in an unjust forfeiture of Bates' equitable interest in the property?

Reasoning
- Unjust forfeiture is available if it would be unconscionable to terminate the contract
    - All judgments recognise that *Legione* allows relief against termination to a party in breach of an essential term if termination would be unconscionable
    - A right to terminate may not be exercised because it would be unconscionable to do so (majority)

- The 'exceptionality' requirement (first introduced by Mason and Deane JJ in *Legione*) is acknowledged by Gaudron and Mason JJ, but Deane and Dawson JJ erode the requirement
    - Gaudron and Mason JJ: termination will be restricted in 'exceptional circumstances only'
    - Deane and Dawson JJ: it is not necessary to confine restriction by reference to this requirement

- Would there be unjust forfeiture if termination was allowed?
    - (4.1) Yes

- Dawson and Deane JJ:
    - Dig up the old categories of tort: fraud, mistake, accident, or surprise
    - Relief against unjust forfeiture is not available unless the breach is a result of one of these categories:
        - Where the breach is due to the vendor
        - Where there is
            - Fraud
            - Accident
            - Mistake; or
            - Surprise
    - But this is not always the case – not needed here because an analogy is able to be drawn to a mortgage case
        - Vendor financing purchase by allowing payment in instalments – just like a mortgage

            - Here, an analogy may be drawn to the equity of redemption
                - The contract is not commercial
                - A windfall would be gained by the vendor if they were allowed to terminate
        - The equity of redemption is a well established equitable rule:
            - A mortgagor cannot sell if the buyer, though late, is willing to pay the balance on the mortgage
        - Don't apply unconscionability at large but moderate with common law categories
        - Also emphasise windfall

- Gaudron J:
    - It would be unconscionable to terminate here
        - Vendor would gain a windfall
        - Buyer would lose her home
        - Her breach was not wilful or serious
            - It was her ex-husband who stopped making payments
            - The balance was eventually paid
    - Applies unconscionability requirement as unconscionability *at large*
        - The question is whether it is unconscionable to terminate the contract
        - Equity prevents the unconscionable exercise of a legal right (no mention of forfeiture)

- Brennan J, Masson CJ (dissenting):
    - Relief against unjust forfeiture is available only in the circumstances outlined by Dawson and Deane JJ (vendor contributing to breach, fraud, accident, mistake, surprise)
    - The fact that the vendor would suffer a windfall if termination were allowed is irrelevant
    - Mason CJ:
        - The circumstances are not 'exceptional'
        - The vendor did not contribute to the breach
    - Brennan J:
        - The vendor did not contribute to the breach
        - There is not 'fraud, accident, mistake or surprise'

<u>Decision</u>

- (3:2) The sellers are not entitled to terminate; the buyers are entitled to specific performance
- Termination is denied by the majority on the basis that it would be unconscionable and occasion an unjust forfeiture
    - However, unjust forfeiture is not really not used in reaching this (complicated) conclusion
    - The equity of redemption (Dawson and Deane JJ, Brennan J, Mason CJ), unconscionability at large (Gaudron J), and dissenting judgments make it difficult to disentangle any discernable principle

In light of *Tanwar*, the question might well be asked, 'do we still have a doctrine of unjust forfeiture?' The unanimous judgment is certainly situated in the context of the doctrine of forfeiture, but it appears to have rejected as irrelevant the analogies drawn with trust and mortgage over 100 years ago which form its basis.

The current approach seems to reflect a shift towards that taken in the UK (hesitancy to restrict termination for breach of an essential term). The Court found that there was no proprietary

interest on the facts, and consequently no right to sue for specific performance. Though it is unlikely the Court is denying any equitable interest can arise in a buyer of land, the status of unjust forfeiture as a distinct doctrine remains unclear.

***Tanwar Enterprises v Cauchi* (2003) HCA:**

Facts

- Tanwar makes a total of three contracts to purchase land owned by Cauchi and others
- The total purchase price is $4.5m; a 10% deposit is payable in instalments
- Completion of the transfer is specified as the date when development approvals are obtained by Tanwar
- February 2000: the approvals are obtained, but Tanwar cannot settle an outstanding sale, so they obtain an extension until August 2000
- August 2000: the vendor serves notices of termination, but does not enforce them (ie, they do not exercise their right to termination, affirming the contract)
- Tanwar completes payment of the deposit, plus 10% of balance
- June 2001: parties sign deeds providing for a final extension until 4.00pm on 25 June:
    - 'time of the essence … a final arrangement to complete the sale'
- 25 June: the vendors are informed at the settlement meeting that funds have been delayed by one day
- 26 June: Tanwar receives the funds and forwards them to Cauche, but it is 12 hours too late and the vendors terminate the contract
- Tanwar sues for specific performance, claiming that an unjust forfeiture prevents the seller from terminating the agreement

Issue

- Is Cauchi's right to terminate the contract restricted by unjust forfeiture of Tanwar's equitable interest in the land?

Reasoning

- Status of forfeiture as a basis for relief against termination
    - Tanwar relied on forfeiture, arguing that termination was unconscionable in light of 'subsidiary questions' posed by Mason and Deane JJ (*Legione*)
    - It argued that its breach was trivial and inadvertent, that the vendors suffered no adverse consequences, and that the vendors stood to gain a windfall by obtaining Tanwar's development approvals and the corresponding increase in value of the land
    - Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ ([44]-[53]):
        - 'What was said by Mason and Deane JJ respecting the "subsidiary questions" must be treated with care. The issue in their judgment is expressed as "the respondent's submission that she is entitled to relief against the forfeiture of her interest in the land." But what is the interest of a purchaser in an uncompleted contract? Analogies drawn over a century ago with trust and mortgage are no longer accepted. The essentially contractual relationship rather than the relationship of trustee and beneficiary governs. The "interest" of the purchaser is commensurate with the availability of specific performance. That availability is the very question in issue where there has been a termination by the vendor for failure to complete as required by essential stipulation. Reliance on the "interest" therefore does not assist; it is bedevilled by circularity.'
        - The onus is on Tanwar 'to show that it is against conscience for the vendors to set up the termination of the contracts'

- Tanwar alleges that their failure to deliver the money on the final day specified for settlement was the result of an accident (the international money scandal)
    - However, Tanwar assumed obligations to complete which were couched in unqualified terms
    - Third party failure to provide finance 'was reasonably within the contemplation of Tanwar'

- Here:
    - There was no fraud or mistake
    - The delay was no accident
        - It was suggested that an international money scandal prevented the transfer in time
        - However, because this was the kind of risk that exists in international money transfers of this quantity, it was not an accident
        - Instead, it was just a *contemplated* risk – the risk was fairly within contemplation, yet it was left to the last minute
    - Exercising a right to terminate is not surprising
        - No 'lulling', unlike *Legione*
        - This settlement was the very last chance, as stated in the deed
    - The vendor (Cauchi) did not contribute to the breach (again unlike *Legione*)

- The sellers validly terminated and their termination is unrestricted by any unjust forfeiture
    - Equity does not intervene to prevent the effective exercise of the right to terminate

Decision

- On the facts, there exists no fraud, accident, mistake or surprise, and the vendor did not contribute to the breach in any way
- Therefore, there is no basis for equitable relief against termination and the seller is entitled to terminate
- (7:0 against buyers) Appeal dismissed

The reception of *Tanwar* seems to have been conservative and not overly enthusiastic. The notion that a buyer of land possesses in it an equitable interest is a long-entrenched equitable doctrine, and will take some time to be eroded.

Tanwar does indicate that the unconscionable exercise of legal rights is still a possible basis for restricting termination. It can be unconscionable to terminate, and there no longer needs to be 'exceptional circumstances'. However, unconscionability is not at large. The Court looks instead at well-developed principles, not the abstract concept in a loose sense.

What is clear is that *Legione* no longer correctly states the law of unjust forfeiture. Its subsidiary questions are irrelevant. *Tanwar* and *Ramanos v Pentagol* (sister cases) are now the authorities. They seem to require fraud, accident, mistake, surprise, or contributing conduct of the vendor as circumstances making it inequitable to terminate for breach of an essential term. However, the precise meanings to be accorded to these terms, and the scope of their application, remain unclear.

C *Unconscionability*

1 *Equity*

The unconscionable exercise of a legal right to terminate will be restricted by equity:

> *a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct … [a] power to grant relief in respect of any termination which happens to be unconscionable [has been recognised by the High Court].*[3]

The principle issue concerning unconscionability as a restriction upon rights to terminate a contract is whether it applies 'at large' or must be mediated by equitable doctrine.

***Tanwar Enterprises v Cauchi* (2003) HCA:**

Reasoning

- Tanwar doesn't deny the equitable doctrine preventing the unconscionable use of legal rights
- However, unconscionability is not at large – that is, equity cannot be applied without doctrinal mediation
    - A set of criteria is formulated – these are now the mediating doctrines
    - This is similar to what occurred in *CG Berbatis Holdings v ACCC*
    - Satisfaction of the equitable doctrine is now necessary for 'unconscionability'
    - This signals the reigning in of unconscionability – courts seek more distinct, precise criteria to apply

- Relief based on the 'unconscionable use of a legal right' is not at large:
    - '[20] The terms "unconscientious" and "unconscionable" describe in their various applications the formation and instruction of conscience by reference to well-developed principles. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large'
    - '[22] The conscience which equity seeks to relieve is a "properly formed and instructed conscience"'
    - '[24] [It is a] false notion that there is an equitable defence to the assertion of any legal right where it has become unconscionable for the plaintiff to rely on that legal right'
    - [35-39] Gaudron J's approach in Stern is specifically rejected: unconscionability such as to restrict a right to terminate is not at large

- When is termination unconscionable?
    - The 'subsidiary questions' posed in *Legione* by Mason and Deane JJ have been dropped as reliable indicia
        - In particular, a windfall gained by the vendor is irrelevant
        - Cf *Romanos v Pentagold Investments*
    - Only certain categories of case give rise to unconscionability
        - '[58] Fraud, accident, mistake or surprise identify in a broad sense the circumstances making it inequitable for the vendors to rely on their termination. Where accident and mistake are not involved, it will be necessary to point to the conduct of the vendor as having in some

[3] Seddon and Ellinghaus, above n 1, [21.25].

significant respect caused or contributed to the breach of the essential time stipulation.'

- The court discards notion that 'exceptional' circumstances need arise for unconscionability to prevent termination
    - The 'exceptional circumstances' requirement is dropped as a requirement for unconscionability
    - Ordinary unconscionability will do
        - Cf Deane J in *Legione*
    - But: '[37] the court will not readily relieve against loss of a contract validly rescinded for breach of an essential condition'
        - This suggests a bias against relieving for breach of an essential term
        - Something more is needed (unconscionability?)

The unanimous (7:0) nature of the High Court decision in *Tanwar* is significant, and subsequent judicial treatments appear to have accepted the categories of circumstances as outlined by the Court.

2 Trade Practices Act 1974 *(Cth)*

Under the *Trade Practices Act 1974* (Cth), any exercise of a right to terminate is potentially subject to ss 51AA, 51AB, and 51AC. These sections prohibit corporations from engaging in unconscionable conduct in trade or commerce, and termination clearly falls within their ambit of protection. However, no case law exists on this point as yet.

If the Act does apply, ss 51AB and 51AC adopt a broader definition of 'unconscionability' than s 51AA, and do not require mediation by equitable doctrine.

D *Implied Obligations*

Implied obligations to act in good faith, reasonably, and cooperatively extend to the exercise of a right to terminate (*Burger King*).

Burger King (2001) NSWCA:

Reasoning

- Here, BK's right to terminate is subject to implied obligations of good faith and reasonableness
- To terminate in the circumstances would be an invalid exercise of the right
- Obligations to act in good faith, reasonably, and cooperatively can prevent termination where it would be inconsistent with these duties to do so

Similarly, in *Renard* the right to terminate for breach was restricted by implied obligations to act in good faith and reasonably.

III LOSS OF THE RIGHT TO TERMINATE

A *Election, Affirmation and Waiver*

When presented with a right to terminate a contract, parties can do one of two things:

- Accept the breach (bring the contract to an end)
- Affirm the contract (continue performance notwithstanding the breach)

An election to affirm will result in a loss of the right to terminate for the breach that is affirmed.

***Carr v J A Berriman Pty Ltd* (1953) HCA:**

Reasoning

- If a right to terminate for Carr's failure to excavate the site by the required time arose, it was lost by affirmation
- After 29 May, Berriman's conduct (sub-contracting to fabricate steel) is only consistent with the continued existence of the contract
    - Even if the breach was capable of giving rise to a right to rescind, B lost that right by continuing to act as though the contract was in existence
    - For example, B kept badgering C for delivery of the excavated construction site
    - B also failed to provide notice specifying the date by which excavation must have been completed

A party may also waive the right to terminate for a particular breach. It is unclear whether waiver and affirmation are identical (see *Commonwealth v Verwayen*).

B *Estoppel*

A party who possesses a right to terminate may be estopped from doing so if they induce the other party to assume that the right will not be exercised, and the other party relies on that assumption to their detriment.

Legione v Hately* (1983) HCA*:

Reasoning

- Buyer assumed that William's statement meant they didn't have to pay at the original date, but had a 7 day extension
- Statement equivocal – no representation
- However, concept of estoppel available as a basis for invalidating a termination for breach

Equally, an estoppel may prevent a party from relying on a restriction upon a right to terminate where they have indicated it would not be relied upon. This could allow a party to terminate when they would otherwise have been unable to do so (see above Part II, Section A).

IV UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

A *Relevant Articles*

7.3.1	(1) A party may terminate for actual breach if it amounts to 'fundamental non-performance' (2) In determining whether non-performance is fundamental, relevant factors include (ie, it is more likely to be fundamental where): (i) The breach causes substantial deprivation of what the other party was entitled to expect (ii) Strict compliance with the obligation not performed is of the essence under the contract; (iii) The breach is intentional or reckless; (iv) The breach gives the other party reason to believe it cannot rely on future performance; (v) The non-performing party will suffer disproportionate loss if the contract is terminated.
7.3.2, 7.1.5	(3) A party may terminate for delay if: (i) It has served a notice allowing an additional period for performance; and (ii) That period has expired.
7.3.3	A party may terminate before the date of performance if it is clear that there will be a fundamental non-performance by the other.
7.3.4	Such a party may also demand an assurance of due performance, and terminate if it is not provided within reasonable time.
7.3.2	The right to terminate is lost unless notice is given within reasonable time after becoming aware (or having ought to become aware) of the non-performance
7.3.6	Termination gives rise to restitutionary or other compensatory rights.

B *Comparison to Australian Law*

UPICC recognises rights to terminate for:

- Breach of an essential term (substantial expectation, of the essence)
- Repudiation (intentional or reckless breach, cannot rely on future performance)
- Breach causing substantial loss
- Anticipatory breach/repudiation (if it is clear)

To this extent, it confers similar legal rights to Australian law.

A stricter approach to affirmation seems to be adopted – any right to terminate is lost unless notice is given within reasonable time of discovering it. A party is also entitled to demand assurances of performance, the giving of which may potentially give rise to estoppel or other equitable obligations to perform, the failure to give which may justify termination.