

PART X – TERMINATION BY CONSENT

I CONTRACTUAL AGREEMENT

A *Ending a Contractual Relationship*

There are several ways a contract can come to an end:

- Breach (Part VIII above)
- Non-fulfilment of a contingent condition (Part IX above)
- Consent (Part X)
 - Express agreement
 - Implication from conduct
- Abandonment (Part X)
 - Conduct that shows neither party wants to keep the contract on foot
- Frustration (Part XI below)

Here we are concerned with the effect of termination by the express or implied agreement of the parties.

B *Requirements for Express Agreement*

Express agreement to end a contract consists of the parties making a further contract to undo what they were earlier obliged to do. Such an agreement is known as a 'contract of discharge'.

In order to determine whether such a contract has been made, it becomes necessary to look to the criteria of formation considered previously. There needs to be valid formation of a new contract (offer, acceptance, consideration, intention, certainty, etc).

BP Refinery (Westernport) v Shire of Hastings (1977) HCA:

Facts

- 15 December 1969: BP to Shire: 'I hope I may assume that there will be no difficulty over transferring to BP Australia Limited those rights and privileges which ... have been vested in BP Refinery (Westernport) Proprietary Limited.'
- 23 December 1969: Shire to BP: 'I desire to ... advise that the effect of the transfer ... will be considered at an early meeting and you will be advised in due course of Council's determination in the matter.'
- The Council alleged that the letters constituted an agreement to terminate

Issues

- Were the letters capable of being construed as offer and acceptance of a new agreement to discharge obligations under the existing contract?

Reasoning

- The letters were not formulated in the language of offer and acceptance, so they cannot be not a contract
- Consideration could have been provided by the giving up of obligations

- The promise to release the other from rights they had under the existing arrangement
- Clear and certain? Mutual release?
 - 'A contract can only be terminated by agreement if there is manifested a bargain between the parties so to terminate it. The appellant company's letter of 15 December 1969 cannot be read as a contractual offer to rescind; and the respondents' letter of 9 February 1970 cannot be read as an acceptance. It is merely notice of a resolution which the council has passed.'

Decision

- Because the letters were not linguistically consistent with offer and acceptance, no new contract arose and the existing agreement could not be terminated on a consensual basis

1 *Consideration*

Where parties agree to terminate a contract prior to performance, the mutual promise to release the other from obligations constitutes consideration.

A problem arises in respect of a contract to terminate an agreement where one of the parties has already performed their obligations. Such a party is not being released from any remaining duties to perform, so the other party cannot rely on that promise as consideration (since performance has already taken place).

To overcome this problem, contracts of discharge are often recorded in deeds.

2 *Medium*

A contract terminating a prior agreement does not have to be in writing, even if the original contract was in writing, or even a deed (*Creamoata*).

(However, a contract of variation must be in writing where the *Statute of Frauds* required the original contract to be so recorded.)

C *Implication from Conduct*

Contracts can come into existence as inferred from conduct. The process of inferring an agreement to discharge is more readily embarked upon than an inference of contract formation.

Creamoata v Rice Equalisation Association (1953) HCA:

Facts

- Each of the eight NSW rice millers had made a contract with the Association in a deed providing for the proportion of rice to be purchased from the Rice Marketing Board
- Each agreed not to attempt to alter their assigned allocation of rice without first consulting the other millers
- A clause in the Association's constitution provides that resignation of a member does not impact on any agreements previously made with a miller

- Creamoata ('C') joins the association in order to obtain an allocation
 - He receives a standard allocation (5.5%), which he is not allowed to alter without consultation
 - There is an indication that C would help a rival board with their milling operations
 - The board members of RGA are worried that the rival board will cut into their share of the rice distribution market
 - RGA makes a supplemental deed to the effect that they agree not to assist the new rival growers' co-operative
 - C refuses to sign the supplemental deed
 - At a meeting, C resigns
- C now applies for a rice quota above 5.5%

Issues

- Has the contract between C and the Association come to an end as a result of the purported resignation?

Reasoning

- The Association claims that an implied contingent condition prevents C from relying on the constitutional clause to receive an allocation without being a board member
 - They claim the agreement is subject to the recipient of rice being a board member (since its practice is to dole out rice solely to board members)
- C argues that the contract came to an end upon his resignation
 - C purported to resign
 - The Association approved his resignation
 - C claims that this terminates the original contract and releases him from his obligations
- Kitto J (at 323-4):
 - 'Whether they would "all remain together"; whether the appellant would "continue with us"; what was to be the future of the "set-up which has been most carefully and laboriously built up"; by such forms of expression as these the chairman repeatedly faced the appellant with the choice they were being given. The appellant was told that "our members have interpreted the position as determination on your part to go your own way and to sever yourself from the Association and its methods". The board of the respondent Association then resolved that the appellant "should resign from the Association and from their activities".'
 - C evinced an intention to treat the deed as at an end
 - The words and conduct of the Association board evince an intention to treat the contract of employment as at an end
 - Leaving the Rice Equalisation Association therefore constitutes an agreement to terminate all their contractual obligations

Decision

- The contract came to an end by agreement

Creamoata illustrates how agreement to terminate a contract may be inferred from the conduct and statements made by parties. Whether a contract has been terminated will depend on all the circumstances; the more unequivocal the conduct, the more likely it is that an intention to terminate will be inferred and the termination to have indeed taken place.

III ABANDONMENT OF A CONTRACT

A Circumstances of Abandonment

Where the parties treat the contract as at an end, the contract may be inferred to have been abandoned – even if there is no express agreement to that effect. Factors indicating an abandonment of the contract include:

- Elapse of some significant period of time during which performance is inactive (*Fitzgerald v Masters*, though there was no abandonment here); and
- Mutual unwillingness to perform (*DTR Nominees*).

Abandonment is less likely to be inferred where:

- The contract has been partially performed by one or both parties (as in *Fitzgerald v Masters*);
- Proprietary rights have been created (as in *Fitzgerald v Masters*); or
- A party can be estopped from abandoning the contract.

***Fitzgerald v Masters* (1956) HCA:**

Facts

- 1927: Fitzgerald ('F') and Masters ('M') enter into a contract of sale for a 50% interest in F's farm
 - The price is set at £850
 - £350 paid before signing
 - The balance is to be paid by monthly instalments of £10
 - Further payments of £130 are made
 - Masters is entitled to possession from the date of the contract
- 1929: Masters begins work on farm.
- 1931: Masters moves to farm with wife and child
 - Offers further payments, but Fitzgerald requests him not to
- 1932: Masters leaves the property
 - M consults his solicitor and has the contract stamped and registered
 - M tells F he intends to retain his equity in the property
 - Fitzgerald says: 'You put your money into the property, Rupe. You own half of it, and I won't let you down. You will get your money back some day.'
 - Masters: 'It will be a long time, Jack, but I will probably have to take you through the Equity Court to do it.'
- 1937: Masters writes letter to Fitzgerald prompted by account sent to him (no reply)
- 1948: Master's solicitor writes to Fitzgerald asking for 'suggestions' (no reply)
- 1951: Fitzgerald dies; further correspondence ensues
- 1953: Masters commences action
- In total, M had paid for more than half the price of the sale, but F's estate wanted to cancel the half-interest from his bank and the authorities
- Effectively, there was silence between M and F for a total of 16 years

Issues

- Mr F's executor claims:

- No contract was made because cl 8 includes terms of a standard form that did not actually exist, and was thus uncertain; or, in the alternative
- The parties made an agreement to terminate when the seller said 'you'll get your money back one day'; or else
- The contract was abandoned
- Was the contract abandoned?

Reasoning

- The contract was sufficiently certain
- Did the parties agree to terminate?
 - No, the conversation should be interpreted in context
 - It cannot be inferred that they agreed to terminate their agreement
- Can the 16 year delay evince a mutual intention to abandon the contract?
 - No, the delay is not a basis on which to infer abandonment
 - It is true that there is a doctrine of abandonment such that a long period of silence or inactivity can amount to termination by abandonment
 - However, this was not the case here
 - A lot of money was paid by the buyer, amounting to part performance
 - Masters stamped and registered the contract
 - This was a contract involving the transfer of a proprietary interest
 - As such, there needs to be *strong* evidence on which to infer abandonment, *especially* where money has been tendered

Decision

- The contract was not abandoned; the buyer is entitled to completion

Abandonment is a possible inference where parties evince mutual unwillingness to perform (*DTR Nominees*).

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) HCA:

Facts

- [See above Part VIII]
- The wrong plan was lodged by the vendor; each party accused the other of breach
 - However, neither party has a right to terminate the contract

Issues

- Had DTR Nominees and Mona Homes abandoned the contract?

Reasoning

- Here, only a deposit was paid (unlike *Masters*)
- Neither party *wanted* performance (also unlike *Masters*, where the contract was stamped)
- Though only five months of inactivity had elapsed (compared with 16 years in *Masters*), the parties' conduct indicated an unwillingness to perform
 - A very different case to *Masters*

Decision

- The contract was abandoned

B *Estoppel*

Estoppel can also be used as a basis to prevent or infer abandonment. However, it is rarely applied.

IV VARIATION OF CONTRACTS

A *Distinguishing between Variation and Termination*

Where the parties change or alter their agreement, the contract is said to have been varied. This differs from termination, where obligations are discharged and rights to performance are lost. Variation arises as an issue in the context of abandonment where one party asserts that the contract has come to an end, and the other resists this claim by arguing that the contract has merely been varied.

A contract is unlikely to have been terminated where one party is willing to remain bound and the variation does not expressly provide for termination (*David Jones*).

Electronic Industries v David Jones (19xx) HCA:

Facts

- May 1949: Electronic Industries ('EI') agrees to install television demonstration equipment in a Sydney store owned by David Jones ('DJ') and give demonstrations from 11 July to 23 July 1949
- June 1949: a coal strike occurs
 - DJ telephones EI to ask for a postponement until a date to be fixed
- 30 June: EI writes: 'We appreciate the difficulties you face and ... will be pleased to vary our agreement with you by an alteration of the dates.'
 - EI suggests 22 August as a possibility
- 14 July: DJ replies: 'prefer to discuss the matter when the industrial position had become clear'
- September: EI writes: 'In view of the settlement some weeks ago of the coal strike ... we would like to ask if you are yet able to indicate your wishes as to dates.'
 - DJ replies, declining to proceed at 'this late date'.

Issues

- David Jones claims that the contract had been terminated:
 - They removed the original date from the contract and did not insert a new one
 - The failure to fix a new date is said to constitute termination
- Is the contract varied, terminated or abandoned?

Reasoning

- The contract had been varied but *not* terminated
 - EI intended to remain bound
 - One date was, in fact, replaced with another: 'within a reasonable time'
 - The date was not so much removed as impliedly altered

Decision

- The contract was varied and not terminated
- Therefore, legal obligations still exist

B *Requirements for Variation*

Where the *Statute of Frauds* requires that the original contract be in writing, the contract of variation must also be in writing. In general, contracts intended to endure for more than one year must be in writing.

However, if the original contract is not required to be in writing, variation can be written or oral. For example, the millers in *Cremona* successfully formed an oral agreement to terminate an existing written agreement.

C *Replacement or Amendment?*

Does a variation result in a new contract (with the old one terminated) or an existing contract modified while on foot? The answer to this question can be important, as the date of formation may be relevant to the application of new statutory provisions or other requirements. For example, in *Reece Bros*, the jurisdiction in which the variation took place affected the applicability of a taxation provision. If the old contract was extinguished and a new contract supplanted in its place, the tax could apply. However, if the contract was merely altered it would be formed outside the applicable jurisdiction.

A similar issue arises in *Sara Lee*. There, in determining whether a variation constitutes alteration on foot or termination and replacement, the Court has regard to the parties intentions and the extent of the amendments (*Sara Lee*).

Commissioner of Taxation v Sara Lee (19xx) HCA:

Facts

- 31 May 1991: a Purchase and Sale Agreement is made for the sale of Sara Lee to a Swiss company, Roche
 - The Agreement is signed by director of Sara Lee who was not authorised to do so at the relevant time
 - It requires completion not before 31 July 1991
 - Completion is subject to several conditions, among them government approval
- 20 August 1991: Sara Lee's director's signature is subsequently ratified
- 30 August 1991: an Amendment Agreement is made
 - The price of the sale is increased by USD\$1 000 000
 - The number of employees to be retained is reduced from 54 to 14
 - Clause 11 provides as follows:
 - 'Effect on Agreement. This Amendment to Purchase and Sale Agreement shall be deemed an amendment of the Agreement ... Except as provided in this Amendment ... the Agreement remains in full force and effect.'
 - A deed of assignment is made to Nicholas, a subsidiary of Roche (not extant in May 1991):
 - 'pursuant to a Purchase and Sale Agreement ... dated May 31, 1991, as

amended'

- The Commissioner of Taxation claims that since Sara Lee sold their business in May 1991 in that tax year, they made a capital gain for the purposes of assessing income tax
 - However, the contract is ratified after the end of the financial year
 - The amendment agreement contains a specific amendment clause
 - Nicholas didn't exist at the time the assignment was made
- The *Income Tax Assessment Act 1936* (Cth) s 160U(3) provides that:
 - Where the asset was acquired or disposed of under a contract, the time of acquisition or disposal shall be taken to have been the time of the making of the contract

Issues

- Was the contract, after amendment, made in the 1991 tax year?
- Sara Lee claims that the capital gain falls into the 1992-3 tax year due to the Amendment Agreement, which had the effect of terminating the original agreement and replacing it with a new one
 - Sara Lee wanted to push the transaction into the 1992 tax year so as to be able to claim certain deductions when the sale took place

Reasoning

- Is the original contract the relevant time of the transaction, or were the assets disposed of by virtue of the August agreement which replaced it?
 - It depends on whether the contract of variation abrogates and replaces the original or merely alters it
 - The effect of an amendment may be determined by reference to two factors:
 - Whether the parties intended the amendment to replace the original; and
 - The degree of alternation involved in the amendment (which discloses the intention of the parties)
- Here, the original agreement is not terminated and remained on foot despite the amendment
 - Clause 11 of the amendment specifically refers to the original remaining in full force
 - This signals that the parties intend the contract to continue pursuant to the 31 May agreement
 - Though there were several changes to the Purchase and Sale Agreement, these were not significant enough to justify treating the original agreement as terminated and replaced
- The effect of ratification is retrospective, anyway, so the director was authorised to enter into the 31 May Agreement
- It was also argued that because the contingent conditions could not be fulfilled until the 1992 tax year, no binding contract existed until then
 - However, the conditions were ones of performance and not formation
 - A valid contract came into existence on 31 May regardless of the fact that it would not need to be performed until the conditions had been met

Decision

- Because the parties intended the Amendment Agreement not to replace the original Purchase and Sale Agreement, it did not
- Consequently, the transaction took place in the 1991-2 tax year and the Commissioner of Taxation is entitled to payment for the capital gain that took place therein
- Appeal allowed