




The Law of Contract

Termination and remedies

Reference CACL Chapter 11/12

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Introduction

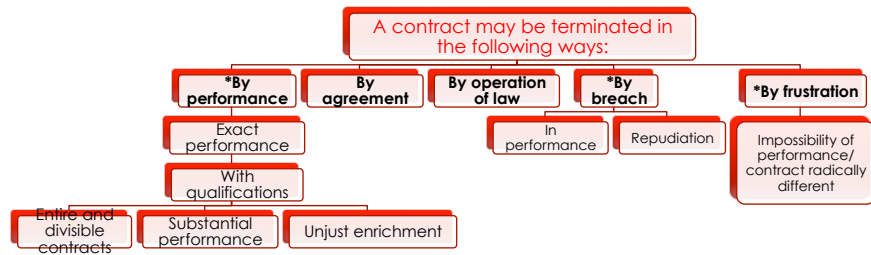


- We have reached the **end stage of the contract journey**...
- **But note:** in fact **most contractual disputes are settled (resolved)** well before they go to court. Why?
 - **Time** taken, **expense** involved, **uncertainty** of result, **stressful**
 - **Bad** for **long-term** business **relationships** ('you don't do business with people who sue you')...
 - see slide 4 week 2 (which ones are **relational contracts** where you might be reluctant to sue if there is a breach?)
 - **Parties can negotiate** a **better outcome** through compromise or mediation
- So what we are examining in this topic is the very **tip of the contractual dispute resolution iceberg**...but what an interesting tip it is!
- **First** we check how a contract can be brought to an end – **termination** - and **second** at the **remedies** available to the innocent party where there has been a breach of contract.

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Termination of contract

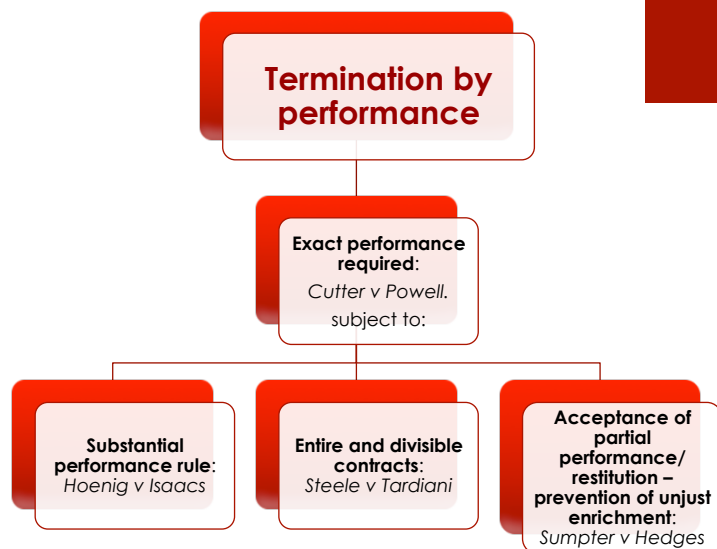
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Termination by performance

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Termination by performance: see CACL fig 11.2 and next slide

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- **Basic rule:** parties must **perform fully and exactly** or **there is a breach**: *Cutter v Powell* (CACL 11.21). Consider if C v P is a fair result?
- To **soften the effect of this rule** courts have developed three concepts:
 - 1. the concept of the **entire and the divisible** contract.
 - See examples: CACL 11.22 and *Steele v Tardini* (CACL 11.25) – if a contract is *divisible* (can be chopped up into small parts) a person will be paid the contract price for a part that has been performed exactly
 - 2. the concept of **substantial performance** (see def: CACL 11.23).
 - If there is substantial performance of an entire or part of a divisible contract, P can sue for the contract price *less the amount it costs to bring it up to exact performance*: *Hoenig v Isaacs* and *Bolton v Mahadeva*: (CACL 11.24A and 11.24B)
 - 3. the concept of an **unjust enrichment of the innocent party** – if s/he has **accepted part performance of the contract** s/he should **pay a reasonable price for the part that has been accepted** – eg X accepts the 2/3 of the fish that are of *reasonable quality* (CACL 11.26): *Sumpter v Hedges* (CACL 11.26A)
 - no requirement to pay for part performance if there is **no choice** but to accept (like Bolton or Sumpter)

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Termination by agreement CACL 11.30-11.150

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- The **parties** themselves may agree *in the contract* that the contract will be terminated.
 - **Example 1:** Fixed term lease – parties agree that after 6 years lease is automatically terminated
 - **Example 2:** Condition precedent – performance dependent on something – (eg X and Y agree X will build a bridge but performance is 'subject to a permit being issued by the government' – no permit – contract terminated)
 - **Example 3:** Condition subsequent – if an event occurs the contract is terminated (eg X and Y agree that X will explore for coal seam gas but, if world gas price falls below \$X, the contract can be terminated)
- The parties may terminate by a **subsequent agreement** to either **cancel** or, more commonly, **vary the original contract**.
 - Normal in a long term **relational contract** (like a construction contract) where circumstances change constantly and parties need to find a way to make the contract work

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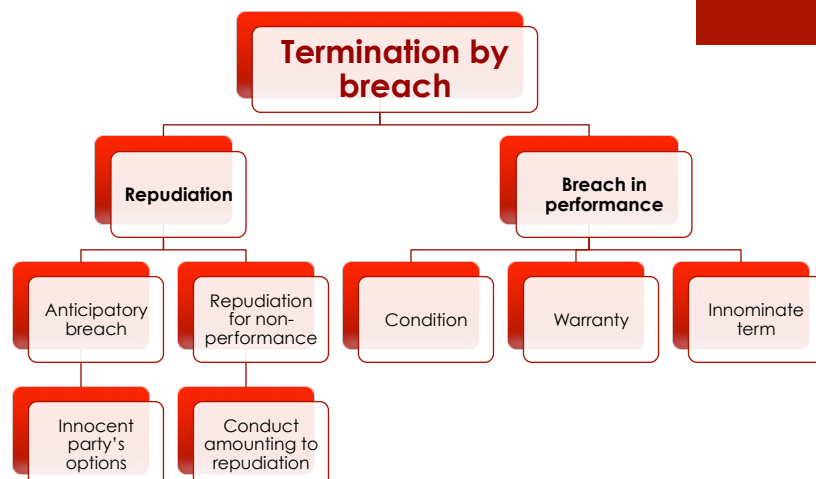
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■ **Time clauses** (CACL 11.28) –

- These are terms in a contract that specify when performance must occur (eg delivery on or before Jan 1). What if that doesn't happen?
- General rule – Usually these terms are *warranties* (enabling damages only). However if the time for performance is said to be "of the essence" such a time clause is regarded as a *condition* (enabling termination if the term is breached).

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Termination by breach (CACL 11.160 and fig 11.3)

Two situations:

1. Repudiation (CACL 11.170)

- **When one party indicates that it will not or cannot perform or complete the contract - this is called a repudiation of the contract.**
- **Example:** owner has hired X Ltd, a construction company, to build an apartment building. Half way through, X informs you that it is not able to complete the building = repudiation (unless the cause is a frustrating event – see slides 11-14)
- **Anticipatory breach** (CACL 11.180) – if the repudiation occurs *before* the time when the contract was due to start it is an anticipatory breach: see *Jack and IT* example (CACL 11.180)
- **Conduct amounting to repudiation** (CACL 11.190)
 - Party unwilling or unable to perform the contract: *Laurinda v Capalaba* (CACL 11.193) – delay in getting lease into registrable form - and *Progressive Mailing House* (CACL 11.195) – cumulative effect of 'minor' breaches = repudiation
- **Effect of repudiation** (CACL 11.200)
 - Innocent party has an option – ignore breach and insist upon performance **or** accept repudiation and treat contract as terminated

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2. Breach in performance (CACL 11.260)

- **conditions and warranties**
 - See definition (CACL 11.270)
 - the label that the parties themselves use may not be accepted by the court: *Schuler v Wickham* (CACL 11.270)
- **the innominate term:** *Hongkong Fir Shipping* (CACL 11.300)
 - See High Court decision in *Koompahtoo* (CACL 11.305)

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Watersun Homes....this is what repudiation and breach actually looks like....

Repudiation



Breach

- "They used second hand bricks instead of new ones" (classify)
- "Ours bricks haven't been cleaned" (classify)
- "The sales reps told us you at signing that it should only take 4 months to build at worst 5 months." (1. advise whether oral statement is a term 2. what should client have done after this statement was made?)

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Termination by frustration

Test: is the contract illegal, impossible or radically different as a result of the frustrating event? (see def in *Davis Contractors* CACL 11.313)

If so, **contract automatically terminated** and court has discretion to do what is fair:
Frustrated Contracts Act 1978

Application of doctrine



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Termination by Frustration

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The principle (CACL 11.310 – 11.315)

- **General rule** – Courts support contracts – you must do what you promised to do – **failure to perform is a breach** (as we have seen earlier) and courts are reluctant to allow excuses.
- In very unusual circumstances a court may say you are excused from performing because of an event that 'frustrates' (destroys) the purpose of the contract: *Davis Contractors* (CACL 11.313) – see classic statement from Lord Radcliffe about frustration.
- **5 Conditions that must be met** (CACL 11.315)
 1. An event that occurs **after** the contract is made
 2. Causes a **fundamental change** to the nature of the contract
 3. That is **not the fault** of either party
 4. And was **not foreseeable**
 5. So it would be **unfair to enforce the contract**

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Application (CACL 11.320 – 11.470)

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- **Supervening illegality** makes contract **illegal** (eg illegal to import rice from Japan after Fukushima nuclear reactor meltdown) (CACL 11.330)
- **Death or illness** where contract is for **personal services** (CACL 11.340)
- **Destruction of subject matter** makes performance impossible: *Taylor v Caldwell* (CACL 11.355)
- **Common objective no longer possible:**
Krell v Henry (CACL 11.370).
 Compare *Herne Bay v Hutton* (CACL 11.390)
- **Other supervening factors resulting in "radical difference":** *Codelfa Constructions v SRA* (CACL 11.430)
 See the facts and what the High Court decided.



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■ Examples of circumstances *not* amounting to frustration

- union 'green bans' not frustrating: *Meriton Apartments* (CACL 11.445)
- change in law not "frustrating": *Scanlon's New Neon v Tooheys* (CACL 11.450)
- To incur extra cost or suffer inconvenience is not "frustrating":
Tsakiroglou v Noble Thorl (CACL 11.470) – as an example of the reluctance of the court to allow excuses to affect the obligation to perform....



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Cyclone Debbie – a frustrating event!

- This a photo of apartments on Hamilton Island that had been leased to tourists at Easter. The owner has cancelled. Can tourists sue for breach of contract?



- And this is the boat that was booked by some tourists to take them on a cruise to Hamilton Island. The owner has cancelled. Can tourists sue for breach of contract?



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- **A party cannot plead frustration if:**
 - Contract itself covers the event – eg *force majeure clause*: *Claude Neon* (CACL 11.477)
 - Parties should have foreseen the event (CACL 11.478): *oOh! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd* (CACL 11.472)
 - Fault or self-induced frustration: *Lauritzen AS v Wijsmuller* (CACL 11.478)

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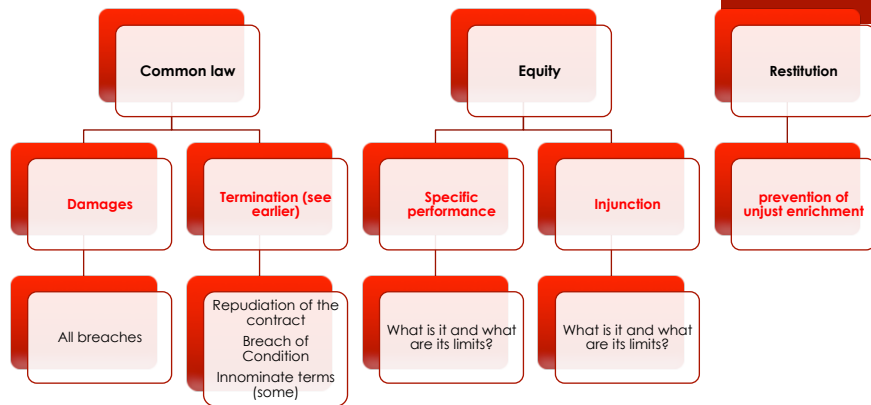
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- **Effect of frustration** (CACL 11.480)
 - Automatic termination of entire contract from date of event
 - Future obligations discharged but rights and liabilities already accrued remain.
 - *Frustrated Contracts Act* (Vic) ss37-38 – court has discretion to fairly distribute the loss: CACL 11.485

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Remedies for breach of contract



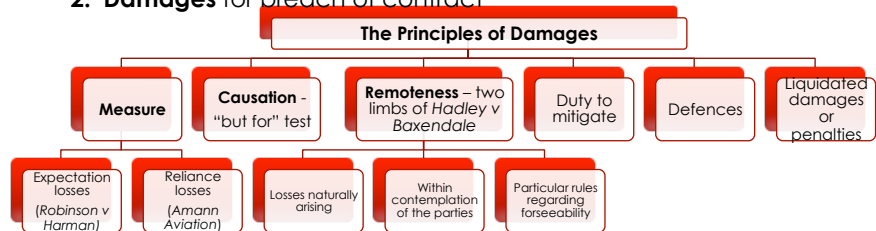
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Remedies for breach of contract

1. **Termination** – see earlier under “Termination”

2. **Damages** for breach of contract



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The three principles re damages for breach 21

- **1. The measure of damages – what are the damages designed to do?**
 - **Expectation losses** – usual – 'put innocent party in the same position he or she would have been in *if contract had been performed properly*': the principle of *Robinson v Harman*
 - Sometimes *Robinson v Harman* principle means **reinstatement costs**: see *Tabcorp v Bowen* (CACL 12.110) – put the office building as it was – not just compensate for loss of value
 - Office building renovated by tenant in breach of agreement. What damages is landlord entitled to?
 - Drop in value = \$33,000 or
 - Reinstatement cost = \$1.34 million
 - HCA said:
 - **Reliance costs** – unusual – where no profit expected but expenses incurred in anticipation of contract innocent party may be compensated for money spent in reliance on contract (see *Amann Aviation* (CACL 12.100))

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- **2. Causation principle:**
 - P must prove that the loss or damage was **caused by the breach** – that is, plaintiff must show that **'but for'** the breach the loss would not have occurred
 - 'but for' test is really just a guide – really just ask whether, as a matter of **common sense**, did the breach cause this loss?
Eg *Alexander v Cambridge Credit*
 - audit contract breached – auditor careless (breach of implied warranty that service would be carried out with reasonable care). P suffered loss – but D argued it was govt policy, the economic crisis and P's own negligence that caused the loss, not the breach of implied warranty

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■ 3. Remoteness principle

- the loss must be reasonably foreseeable at the time of contracting. The loss is foreseeable if it is within either of the two limbs of **Hadley v Baxendale** (CA 12.123):

- **First limb:** A loss 'arising naturally' from the breach

- loss occurring in 'the natural course of things'
- 'a reasonable person would contemplate this kind of loss'
- 'within reasonable contemplation of the parties'
- 'a serious possibility' or

- **Second limb:** Loss 'actually contemplated' by the parties –

- 'notice given to D that this loss would occur'.

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- To understand the remoteness principle look carefully at the facts of **Hadley v Baxendale** (CA 12.123) and **Victoria Laundry v Newman Industries** (CA 12.125) and **Day v O'Leary** (CA 12.140).

- **Ensure you understand why:**

- in **H v B**, the plaintiffs failed in their action to recover the lost profits they suffered...**why?**
- in **VL v NI**, the plaintiffs were compensated for their normal lost profits but not for the loss of the lucrative government contract...**why?**
- in **Day v O'Leary**, plaintiffs received damages for cost of replacing the floor but did not recover for lost rent...**why?**

- P must **mitigate his or her losses** as far as is possible: **Payzu v Saunders** (CA 12.160)

- Example: You are an accountant with one of the big 4 accounting firms. You are unfairly dismissed when news of an affair with a young staffer becomes public (office romances are not a ground for dismissal) with one year of your contract left (you are on \$200,000 per year). What damages can you seek?

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Baxendale

- DressMakers Ltd specialises in making costumes for the film industry. MovieMakers Pty Ltd hires Dressmakers to make costumes for an Australian mini-series set in World War 1 (and (being for the centenary of the end of the World War 1 in 2018). This is a huge opportunity for DressMakers. It relies on MachineMakers Pty Ltd to repair and service their sewing machines promptly (usually a two-day turnaround). In anticipation of the mini-series, they agree with MachineMakers that it will service and repair all their sewing machines over a two week period. MachineMakers is not aware of the special circumstances. Unfortunately, there is a problem getting parts to repair the machines and the work takes 6 weeks. This means Dressmakers cannot do the work required and it loses the contract for the mini-series (profit around \$75000 on the contract) as well as its normal business for three weeks (profit of \$15000 per week).
- What can Sewing claim by way of damages?
- Would it make any difference if Machines knew of the mini-series contract?

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Particular rules regarding remoteness

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- **1. Difficulty of quantifying damages is no bar to recovery**
 - It may be difficult to assess loss but this does not relieve the court of the duty to estimate: *Howe v Teefy* (CACL 12.200)
- **2. Damages not usually recovery for inconvenience and/or disappointment and/or injured feelings**
 - *Falko v McEwan* (CACL 12.220) but see:
 - *Jarvis v Swans Tours* (CACL 12.235) – a sad case, indeed, but Mr J won. Why?
 - *Baltic Shipping v Dillon* (CACL 12.240) – Mrs D 'disappointed when cruise ship hits a rock
 - *Boncristiano v Lohmann* – (CACL 12.240) – extending recovery for 'stress' to a building case
- **3. Ordinary, nominal and exemplary damages** (CACL 12.260-280)

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Equitable remedies (CACL 12.340)

- **1. Specific performance**
 - General principle – common law favours awards of damages and will only order specific performance where damages are inadequate compensation (unique goods/land)
 - When will it not be granted:
 - Where damages are adequate
 - Where contract is for personal services
 - Where supervision required – *Ryan v Mutual Tontine* (CACL 12.380)

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- **2. Injunction (CACL 12.400)**
 - Order **restraining** a person from doing a wrongful act (like breaching a contract) or **compelling** someone to do something (like perform a contract)
 - NB Cannot get a court order to compel someone to do something for which the court would not have ordered specific performance
 - Example – court will not order specific performance of employment contract with Monash University (see previous slide – won't enforce personal contract of services) and therefore will not issue injunction restraining a person from working anywhere else (because that is getting in by the back door)

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