



GREENWAY CHAMBERS

A GUIDE TO CONTRACT TERMINATION

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A. WHAT AM I READING?

1. The information in this paper is intended as a guide to identifying common issues that arise and principles of law that may apply when considering termination of a contract. The focus of the paper is on termination of construction contracts.

B. WHAT DOES TERMINATION OF A CONTRACT MEAN?

2. Termination of a contract is used to describe the process whereby a contract is ended before the parties' contractual obligations are fully performed. Upon termination the contract is discharged along with the primary obligations for performance and these are replaced by secondary obligations to pay damages.¹

C. IDENTIFY THE TERMS OF THE CONTRACT

3. The starting point in an analysis of contract termination rights is to identify the terms of the contract. This requires a consideration of the express terms of the contract and any implied terms. The impact of any variations or amendments to the contract should also be considered.

Express terms

4. The following steps assist in identifying the express terms of a contract:
 - a. identify and list the documents that potentially comprise the written terms of the contract.
 - b. consider whether each of the documents contain terms that have been incorporated into the contract?
 - c. consider whether the terms been incorporated into the contract in whole or in part?
 - d. consider whether any of the material terms are ambiguous or inconsistent?

¹ This is discussed in more detail in paragraphs 67 to 73 below

Implied terms

5. Query whether there are there any implied terms? Examples of implied terms in a construction contract include, a duty to exercise reasonable skill and care, and a duty to provide accurate design information.

Variations/Amendments

6. Has the contract been amended or varied?

D. IS THE INNOCENT PARTY ENTITLED TO TERMINATE THE CONTRACT?

Grounds for termination at common law

7. There are two principal grounds for termination at common law, namely:
 - a. termination for repudiation; and
 - b. termination for breach.

Termination for repudiation

8. The test of whether conduct is repudiatory or not is often stated by asking is there evidence of the wrongdoer's unwillingness or inability to render substantial performance of the contract? ²
9. Whether conduct amounts to repudiation is a question of fact to be determined objectively. The parties' subjective intention is not relevant. ³

² See *Shevill v Builders' Licensing Board* (1982) 149 CLR 620 at 625-626; *Laurinda Pty Ltd v Capalaba* (1989) 166 CLR 623

³ *Laurinda Pty Ltd v Capalaba* (1989) 166 CLR 623, 657-658

10. There must be strong or compelling evidence to support a claim for repudiation as it is not to be inferred lightly.⁴ Examples of repudiatory conduct include:
 - a. where a principal unlawfully orders a contractor off site permanently.⁵
 - b. where, during the time for performance of a contract, a principal issues new tenders or engages new contractors to complete works;⁶
 - c. defective works of such a serious nature to suggest the construction was beyond the contractor's level of competence.⁷

11. A party to a contract may demonstrate that he or she refuses to be bound further by that contract if he or she persistently maintains an untenable construction of the contract on a matter of essential substance.⁸ For a party to be repudiating when erroneously interpreting the contract, it must manifest an unwillingness to act in accordance with the contract even after it is informed of its erroneous interpretation of the contract.⁹ But the Court will not readily infer from a party's insistence on a wrong construction of a contract that he or she is unwilling to perform it according to its true construction.¹⁰

12. Whether conduct is sufficient to support a claim for termination for repudiation is often a vexed question. The same facts can support either parties' contentions. For example, if a contractor declares that it has left the site in the context of a dispute is that a repudiation? In that example, common issues to consider are:
 - a. has the contractor validly suspended works or abandoned site?

⁴ *Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd* (1997) 42 NSWLR 462 at 479; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 7

⁵ *Len Lichnauer Developments Pty Ltd v James Trowse Constructions Pty Ltd* [2005] QCA 214 at [15]

⁶ *Carr v J.A Berriman Pty Ltd* (1953) 89 CLR 327 at 351

⁷ *Mousa v Vukobratich Enterprises Pty Ltd* [2019] QSC 49 at [193]

⁸ *Summers v Commonwealth* (1918) 25 CLR 144 at 152; *Green v Sommerville* (1979) 141 CLR 594 at 611 per Mason J

⁹ *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 431–2

¹⁰ *Green v Sommerville* (1979) 141 CLR 594 at 611 per Mason J

- b. what is the objective evidence of the contractor's absence from site?
 - c. what is the objective evidence of the contractor's intention to come back on site?
 - d. is the contractor's absence from the site temporary or permanent?
13. If repudiatory conduct is established the innocent party is entitled to accept the repudiation and terminate the contract. ¹¹

Termination for breach

14. To decide whether a party may terminate for breach consider if the wrongdoer has committed a material breach of the contract entitling the innocent party to terminate at common law. To answer this question, a two-step process of analysis typically follows. *Firstly*, identify the facts giving rise to the breaches and *secondly*, classify the relevant terms of the contract said to be breached. This is particularly important as the consequence of a breach of a term will depend on the classification of the term breached. In other words, not every breach of a term justifies termination.
15. Broadly, terms are classified as either:
- a. essential terms;
 - b. intermediate terms; or
 - c. warranties.

¹¹ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd [2000] WASCA; Renard Constructions v Minister for Public Works (1992) 26 NSWLR 234*

Essential terms

16. A term is an essential term if a party would not have entered into the contract unless assured of strict or substantial performance of the obligation.¹² For example, where time is expressed to be of the essence.
17. A breach of an essential term gives rise to a right to terminate.¹³

Intermediate terms

18. An intermediate term is neither an essential term nor a warranty but may operate as either depending on the nature of the breach. Examples of an intermediate term in the context of construction contracts commonly include:
 - a. a term requiring a principal to give possession of the site to a contractor by a particular date;
 - b. terms relating to the time for performance or time for payment.
19. The test of whether a breach of an intermediate term justifies a right to terminate is whether the breach is so serious that it goes to the root of the contract and thus deprives the other party of substantially the whole benefit of the contract.¹⁴
20. For example, in *Koompahtoo Local Aboriginal Land Council v Sampine Pty Ltd* (2007) 233 CLR 115 Koompahtoo and a developer entered into a joint venture agreement for the sale and development of land. For approximately eleven months, a voluntary administrator of Koompahtoo sought the books and records relating to the joint venture

¹² *Tramways Advertising v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632

¹³ *Tramways Advertising v Luna Park (NSW) Ltd* (1938) 61 CLR 286

¹⁴ *Hongkong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 7 at 31; *Koompahtoo Local Aboriginal Land Council v Sampine Pty Ltd* (2007) 233 CLR 115 at 138, 140

from the developer so that the financial position of the joint venture could be ascertained. The developer failed, amongst other things, to keep the books and records.

21. In *Koompahtoo* the High Court held that the breach of an intermediate term, namely, an obligation to maintain financial records was sufficiently serious to justify termination as it prevented Koompahtoo from assessing the financial position and making informed decisions regarding the joint venture.¹⁵

Grounds for termination pursuant to an express contractual power

22. Typically, a contract may provide a right to terminate pursuant to an express contractual power upon the occurrence of specified events. I consider four such events below:
- a. termination after default;
 - b. failure to satisfy a condition;
 - c. automatic termination; and
 - d. termination for convenience.

Termination After Default

23. Typically, standard form contracts will include specified events of default that give rise to the right to terminate. For example, failure to pay on time and failure to complete building works by a specified date.

Termination upon failure to satisfy a condition

24. For example, a contract may confer a termination right upon a party's failure to obtain planning approval by a specified date.

¹⁵ *Koompahtoo Local Aboriginal Land Council v Sampire Pty Ltd* (2007) 233 CLR 115 at 147

Automatic termination

25. Automatic termination clauses are often included in standard form contracts. They are commonly referred to as “ipso facto” clauses.¹⁶ Typically, an automatic termination clause provides that if a party suffers a specified event of insolvency the contract is said to automatically terminate.
26. In the context of construction contracts, principals or head contractors typically insert ipso facto clauses into a contract enabling them to terminate in the event of the contractor or subcontractor suffering an insolvency event.
27. The recent introduction of the “Ipso Facto” legislative reforms (from 1 July 2018) may, depending on the date and type of contract, alter the operation of automatic termination provisions.
28. In broad terms, the reforms impose a stay on the enforcement of ipso facto clauses during a period of restructuring of a company. A stay is imposed on the exercise of a right to terminate as a result of the appointment of a voluntary administrator, the appointment of a receiver or controller or the proposal of a scheme of arrangement.
29. The period of the stay depends on the type of insolvency event that has occurred.
30. A party seeking to lift, expand or extend the stay must apply to court.
31. The new provisions apply to contracts entered into after 1 July 2018. The legislation does not have retrospective effect.
32. Relevant legislative provisions include:
 - a. *Treasury Laws Amendment (2017) Enterprise Initiatives (No. 2) Act 2017*;
 - b. *Corporations Amendment (Stay on Enforcing Certain Right) Regulations 2018*;

¹⁶ “ipso facto” means by the fact itself

- c. *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations (No. 2) 2018*;
 - d. *Corporations (Stay on Enforcing Certain Rights) Declaration 2018*;
 - e. *Corporations Act 2001*, ss 415D to 412G, 434J to 434M; 451E to 451H; and
 - f. *Corporations Regulations 5.1.50, 5.2.50 and 5.3A.50*.
33. Importantly, parties cannot contract out of the legislation.¹⁷ As a result, artificial contractual devices implemented to circumvent the legislation may fall foul of this prohibition.
34. Be aware certain contracts and contractual rights are excluded from the operation of the *Treasury Laws Amendment (2017) Enterprise Initiatives (No. 2) Act 2017*. For example,
- a. assignments or novations of, or amendments to, rights under contracts entered into pre -1 July 2018;
 - b. large scale building work contracts where total payments for the project is at least \$1 billion;
 - c. contracts for supply of goods or service to, or on behalf of, a public hospital or public health service
 - d. contracts with the Commonwealth government such as defence contracts or those involving the supply of essential information technology or critical services.

Termination for convenience

35. A termination for convenience clause affords one party the right to terminate at the convenience of that party, in the absence of a default or breach of the contract. Such clauses are commonly found in government contracts.

¹⁷ *Treasury Laws Amendment (2017) Enterprise Initiatives (No. 2) Act 2017*, Schedule 1, Part1, s.7

36. An example of a termination for convenience clause is one that provides that the principal may terminate “at its option, at any time and for any reason it may deem advisable”.¹⁸
37. A party seeking to lawfully terminate for convenience ought to compensate fairly the other party for the consequences of the termination.¹⁹ For example, by compensating for costs incurred by the contractor up to the date of termination and demobilisation costs.²⁰ Whether any loss of profit is compensable is an open question.
38. The availability of the right to terminate in reliance on a termination for convenience clause will depend, in large part, on the drafting of the clause. The courts have upheld the right to terminate for convenience where the clause is clear, unambiguous and unqualified.²¹
39. The more limited the drafting of the termination for convenience clause the more likely fetters on the right to terminate for convenience will apply. For example, a clause which provides that a principal “can terminate for convenience” or “can terminate by written notice” is more likely to attract an implied obligation of good faith.²²
40. There is no generally accepted contractual term implied in law in Australia requiring parties to act in good faith in the performance of a contract.²³ However, when terminating pursuant to an express contractual power consider if an implied obligation of good faith applies so that the right must be exercised reasonably and in good faith.²⁴
41. Bergin CJ in Eq rejected the implication of an implied term of good faith in *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154.

¹⁸ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) BCL 130

¹⁹ *Leighton v Arogen* [2012] NSWSC 1370

²⁰ *Abbey Developments Ltd v PP Brickwork Ltd* [2003] EWHC 1987

²¹ *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) BCL 130; *Starlink International Group Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2011] NSWSC 1154; *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* (2012) 268 FLR 433

²² *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at 174 per Finn J; *Apple Communications v Optus Mobile* [2001] NSWSC 365

²³ *David A Harris v AMP Financial Planning* [2019] VSC 24, per Digby J; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 195-196, 214

²⁴ *Renard Constructions v Minister for Public Works* (1992) 26 NSWLR 234

In *Starlink*, her Honour took into account factors such as that the parties were commercial parties who had been engaged in a commercial relationship for some years pursuant to a contract that contained a termination for convenience clause which was drafted in clear language. Bergin CJ in Eq held at [33] that to imply a term to the effect that there must be a good reason to terminate would be inconsistent with an express term of the contract.

42. If the obligation of good faith is to be implied, it has been held that the duty of good faith is to be equated with reasonableness and a duty to not act capriciously.²⁵
43. A party seeking to rely on a termination for convenience clause may, by drafting, expressly exclude the obligation of good faith.
44. Recently, Digby J in *David A Harris v AMP Financial Planning* [2019] VSC 24 at [68], held that a party to an agreement does not act unconscionably by terminating pursuant to a termination for convenience clause.

Anticipatory breach

45. A contracting party may before the date for performance disclose an intention not to perform or otherwise demonstrate an inability to perform when the date for performance arrives.²⁶

Election

46. If a breach giving rise to a termination right or conduct amounting to repudiation is established, the innocent party may elect to affirm the contract or to accept the breach and terminate the contract. A helpful summary of the main principles of election is contained in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 per Finn J at 89 to 92, [356] to [364].

²⁵ *Sundararajah v Teachers Federation Health Ltd* [2009] NSWSC 1443

²⁶ *Foran v Wight* (1989) 168 CLR 385

Terminating on an unknown ground

47. Lawful termination requires that the innocent party justify its election to terminate. However, the innocent party can subsequently rely on an unknown ground to terminate so long as the ground existed at the time the innocent party elected to terminate.²⁷ Therefore, the innocent party is not required to prove that it knew at the time it elected to terminate of the legal basis which justified the termination. Professor Carter states the principles succinctly as follows:²⁸

- A promisee who states no ground may rely on any available ground;
- A promisee who states one ground is not restricted to that ground;
- A promisee who state two or more grounds may rely on either ground, or any other ground.

Termination procedure

Terminating at common law

48. When drafting a notice of termination to terminate at common law there is no requirement to give detailed reasons for termination in the notice of termination.
49. However, use clear and unequivocal language in the notice stating that the contract is terminated and when termination is to take effect.²⁹
50. Adopt language that makes it clear that the termination is made at common law. This is important if the innocent party is seeking to recover loss of bargain damages.

²⁷ *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 701; [2001] HCA 64 at [29]; *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 373 and 378

²⁸ *Carter's Breach of Contract*, JW Carter, 2nd Edition, LexisNexis Butterworths 2018, paragraph [10-07] page 425

²⁹ *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 210 ALR 244

51. Be certain that the notice of termination has been properly served and that there is evidence to record service.
52. There is no obligation on the innocent party to first issue a notice to remedy when terminating at common law.

Terminating pursuant to an express contractual power

53. Follow the applicable termination procedure under the contract strictly. Commonly this will involve issuing show cause notices and notices to remedy under standard form contracts.
54. When drafting a show cause notice pursuant to an express contractual power it is not necessary to be accurate in every particular. A show cause notice may be valid even if it does not detail each alleged default. Further, a show cause notice does not have to attach all documents referred to because parties to large commercial contracts will be expected to maintain proper record keeping systems.³⁰

The effect of breach by the terminating party on the right to terminate

55. A party in breach of a non-essential term is not prevented by that breach from terminating the contract for repudiation by the other party.³¹ However, as explained below, an exception exists where the breach or the repudiation was caused by the terminating party's breach. In those circumstances, a principle of construction applies whereby the Court will strain against construing a contractual right to terminate an agreement in a manner that will permit a party whose default has created the apparent right to terminate to do so in the exercise of that contractual right.³² This follows as

³⁰ *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* (2013) 29 BCL 19; [2012] VSC 99 at 398, 401

³¹ *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd (No 9)* [2016] NSWSC at [172] per Ball J

³² *Hannigan v Inghams Enterprises Pty Ltd* [2019] NSWSC 321 at [95] per Robb J

there is a presumption that a party to a contract should not be permitted to take advantage of his or her own wrong against the other party.³³

56. In parallel with the above principle of construction there is a principle of law that applies whereby a party whose breach of contract has caused a breach of contract by the other party is not entitled to exercise a right to terminate the contract that would otherwise be available at common law.³⁴

The impact of express contract terms on the common law right to terminate

57. The legal consequences of terminating at common law may be different to the consequences for terminating pursuant to a contractual power. Therefore, it is important to identify which termination right is relied upon.
58. Circumstances may arise where an innocent party may be in a position to terminate both at common law and pursuant to an express contractual power i.e. there are concurrent termination rights.
59. It may be more advantageous for an innocent party to terminate at common law rather than under an express contractual power. For example, it may enable the innocent party to claim loss of bargain damages which may otherwise not be recoverable when terminating under an express contractual power. Further, terminating at common law may allow the innocent party to avoid onerous notice and remedy requirements in a termination clause.
60. There is no general rule that if a party terminates at common law it must also do so under an express contractual power by following the strict terms of the termination procedure.³⁵

³³ *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510 at 534 per Young J

³⁴ *Sharjade Pty Ltd v Commonwealth of Australia* [2009] NSWCA 373 at [54] per Hodgson JA; (2009) 15 BPR 28,443; *Hannigan v Inghams Enterprises Pty Ltd* [2019] NSWSC 321 at [106] per Robb J

³⁵ *Vinergy International (PVT) Ltd v Richmond Mercantile Limited FZC* [2016] EWHC 525 (Comm)

61. Whether a party attempting to terminate at common law must also terminate under an express contractual power will depend on the construction of the applicable termination clause.
62. It has been suggested that if there is uncertainty as to which termination rights apply, terminate at common law and in the alternative, terminate according to an express contractual power.³⁶
63. An ineffective termination pursuant to an express contractual power may nevertheless be effective at common law.³⁷
64. The default position is that the right to terminate at common law applies. However, the parties can by the terms of their contract exclude the common law right to terminate and limit termination to that under an express contractual power.³⁸
65. If the parties want notice and remedy periods set out in the contract to apply to repudiatory breaches at common law, they should include an express term to this effect.
66. A party may terminate pursuant to an express contractual power but nevertheless sue for loss of bargain damages on the basis of an existing right to terminate at common law.³⁹

E. CONSEQUENCES OF A LAWFUL TERMINATION

Termination consequences at common law

67. A valid termination of a contract at common law (for breach or repudiation) discharges the duty of the parties to perform their unperformed or future obligations⁴⁰ unless the parties expressly agree otherwise.

³⁶ *Shell Egypt West Manzala GMBH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporate)* [2010] EWHC 465 (Comm)

³⁷ *Kennedy v Collings Construction Co Pty Ltd* (1989) 7 BCL 25 at 39

³⁸ *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64

³⁹ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17

⁴⁰ *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477

68. Rights which accrued unconditionally under the contract prior to its termination are preserved.
69. Accrued rights include:
- a. the right to recover damages to compensate for:
 - i. costs to complete over and above the contract sum;
 - ii. for defective works;
 - iii. delay.
 - b. the right to receive performance.
70. It is irrelevant that the time for performance had not arrived at the time of termination.
71. Examples of accrued rights to receive performance which survive termination include the obligation:
- a. on a principal who terminates at common law to pay a contractor who accrued payment rights prior to termination;⁴¹
 - b. on a principal to enforce an on demand bond against a contractor as a right to do so had accrued under the contract prior to termination;⁴²
 - c. on a contractor to provide an on demand bond which remains in force until the conclusion of proceedings.⁴³

⁴¹ *Ettridge v Vermin Board of the District of Mutrat Bay* [1928] S.A.S.R. 124

⁴² *Southern Cross Constructions (NSW) Pty Ltd (Administrators Appointed) v Bucasia Pty Ltd* [2012] NSWSC 1419

⁴³ *Ewing International v Ausbulk (No 2)* [2009] SASC 381

72. Where a principal repudiates a contract, and the repudiation is accepted by the contractor, the contractor will remain liable to the principal for any breach that the contractor committed prior to the contract being terminated.⁴⁴
73. Importantly, termination at common law enables the principal to sue for damages for defective work. No claim for damages for defective works can be maintained where the principal contends that practical completion has not been achieved, the contract remains on foot and the contractor is in possession of the site. In those circumstances it cannot be said that the contractor has failed to fulfil its contractual obligations to rectify defects.⁴⁵

F. CONSEQUENCES OF AN UNLAWFUL TERMINATION

74. A party found to have terminated unlawfully may have itself repudiated the contract, entitling the other party to terminate and claim damages for wrongful termination. Such damages may include, for example, the costs of engaging a new contractor and other increases in the cost to complete.

G. RECOVERY OF DAMAGES FOLLOWING TERMINATION

Claim for damages at common law

Objective of award of damages

75. In assessing a potential claim for damages for breach of contract the objective is to arrive at a sum which places the innocent party in the same position as if the contract had been performed.⁴⁶

⁴⁴ *Paul Michael Pty Ltd v Urban Traders Pty Ltd* [2010] NSWSC 1246 at [45]

⁴⁵ *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 at [65-69]. This principle is regularly applied in NCAT, see for example *Little v J & K Homes Pty Ltd* [2017] NSWCATAP 84

⁴⁶ *Robinson v Harman* (1848) 1 EX 850 at 855

Categories of damages potentially recoverable

76. Expectation damages and reliance damages are potentially recoverable.
77. Expectation damages are commonly referred to as “loss of bargain” damages and include loss of profits on the remaining work. Reliance damages that may be recoverable include wasted expenses such as for the cost of purchasing materials not used in carrying out works.

Loss of bargain damages

78. Where an innocent party has elected to terminate the contract at common law (for breach or repudiation), loss of bargain damages is presumed to be recoverable.⁴⁷

Measure of loss for loss of bargain damages

79. The measure of loss for loss of bargain damages is the difference between the value of the unperformed obligations of the promisor and the contract price.⁴⁸ Importantly, this entitles the innocent party to losses post termination such as future profits foregone.
80. To quantify the loss of bargain damages the first step is to calculate the difference between the cost of completing the outstanding work, less the amount of the contract price remaining unpaid.⁴⁹

Measure of loss for damages for defective work

81. Damages for defective work are calculated, prima facie, as being the cost of bringing the work into conformity with the contract.⁵⁰

⁴⁷ *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at 259

⁴⁸ *Foran v Wight* (1989) 168 CLR 385 at 430

⁴⁹ *Rejun Constructions Pty Ltd Manningham Medical Centre Pty Ltd* [2002] VSC 579 at [21]

⁵⁰ *Bellgrove v Eldridge* (1954) 90 CLR 613; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272

Date of assessment of damages

82. In a contract for services damages are assessed as at the date of termination as opposed to the date of the breach. Damages awarded for the cost of rectification or replacement are usually assessed not at the date of termination but at the date of the trial.

Liquidated damages

83. If a contract is terminated at common law and the contract works are completed by an alternative contractor, the principal is usually unable to claim liquidated damages from the original contractor to the date of completion.⁵¹ This is because where works are completed by another contractor time ceases to have relevance⁵² as it would be beyond the contractor's power to stop damages running and within the power of the principal to continue them by delaying completion.⁵³
84. Therefore, the principal can usually only recover liquidated damages up to the date of repudiation.

Mitigation of loss

85. Consider if the innocent party has acted reasonably in mitigating its loss post termination.

Claim for damages pursuant to an express contractual power

86. The innocent party terminating a contract pursuant to an express contractual power is not automatically entitled to loss of bargain damages.⁵⁴
87. This is to be contrasted to the position of termination at common law (discussed above).

⁵¹ *British Glanzstoff Manufacturing Co Ltd v General Accident Fire & Life Assurance Corp Ltd* [1913] A.C. 143

⁵² *Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd* (1995) 75 B.L.R.1 at 9

⁵³ *Construction Insolvency, Security, Risk and Renewal in Construction Contracts*, Richard Davis, Sixth Edition, Sweet & Maxwell, paragraph 14-053, page 681

⁵⁴ *Shevill v Builders Licensing Board* (1982) 149 CLR 620

88. Therefore, unless there is an express term stipulating the available remedy, the innocent party will usually only be entitled to damages reflecting losses suffered up to the date of termination.
89. When terminating pursuant to an express contractual power consider if the contract includes a term limiting the quantum of damages recoverable.

H. PRACTICE POINT - BURDEN OF PROOF

90. The party making the positive assertion that a contract has come to an end through being validly terminated bears the onus of proving the facts to support that assertion.⁵⁵ The onus of proof does not switch to a party who makes the sometimes, unnecessary claim for declaratory relief in the negative, namely, that a contract has not been terminated.⁵⁶

I. CONCLUSION

91. In conclusion, when advising on the termination of a contract you may wish to consider:
- a. have you identified the applicable terms of the contract?
 - b. have you identified the appropriate right to terminate?
 - c. are there independent or concurrent rights to terminate and how do they impact on each other?
 - d. what are the potential legal and evidentiary obstacles to proving the right to terminate?

⁵⁵ *Massoud v NRMA Insurance Ltd* (1995) 62 NSWLR 657 at 660 per McClelland CJ in Eq; *Sanpine v Koombahtoo Local Aboriginal Land Council* [2005] NSWSC 365 at [181] per Campbell J

⁵⁶ *Hannigan v Inghams Enterprises Pty Ltd* [2019] NSWSC 321 at [69] per Robb J

- e. which right to termination gives your client a better outcome (i.e. damages) and why?

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