

ADVANCED CONTRACT LAW

SUMMARY

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1. Introduction

1.1 Terminology

Promissory Condition

Contractual obligation whose performance goes to the root of the contract. A's obligation to perform does not arise until execution of promise by B

Innominate or Intermediate term

Contractual obligation whose performance may or may not go to the root of the contract

Contingent Condition

An event/eventuality which triggers contractual consequences

Contingent condition precedent to the formation of contract

No binding contract exists until fulfilled, i.e. "subject to contract", something has to happen before contract is formed. Duty to perform will not arise until fulfilment of a condition **neither side promised would be fulfilled.**

Condition precedent to performance

No obligation to perform until fulfilment

Condition subsequent to performance

Obligation to perform is immediately binding but comes to an end after fulfilment.

Performance

Carrying out promissory obligations

Fulfilment

Where contingencies are met

Rescission of a contract

Does not mean termination of contract, but rather the bringing of the contractual obligations to an end.

Repudiation

Acts or omissions by a party which constitute breaches of contract, and are so serious as to go to the root of the contract

Renunciation

Communication of repudiation by unequivocal, clear and unambiguous words or actions.

Mere Warranty

Contractual obligation whose performance does not go to the root of the contract

Warranty

Contractually binding representation of past, present or future fact e.g. sale of a business as a going concern

2. Immediate duty to perform contract

In general, breach of a contract can only arise when the immediate duty to perform the promise allegedly breached has arisen, and secondly, the time allowed for performance of that promise has expired without the promisor having carried out the substantive element of the promise.

Whether an immediate duty to perform the contract has arisen depends on whether the contract stipulated that either time must elapse or that conditions precedent to performance of that obligation has arisen before the duty to perform the particular promise would arise. If the contract provides such a stipulation, it must be considered whether time has in fact elapsed or that the conditions precedent have been fulfilled, or alternatively, that the need to satisfy either stipulation has been waived.

The conditions precedent to the duty to perform may take the form of either a:

- ◆ Contingent condition;
- ◆ Promissory condition; or
- ◆ Concurrent condition.

3. Contingent conditions

- The term “contingent condition” is generally used to describe situations in which the obligation to perform a major promise of an existing binding contract is dependent on the fulfilment of a condition precedent that neither party has promised will occur.
- These forms of contingent conditions include that condition that the purchaser obtain suitable finance, or the need for a vendor to obtain development approval.
- In such cases, the party whose immediate duty of performance is dependent on the fulfilment of the condition precedent is at liberty to withhold performance of the contract without being held to be in breach, as long as the condition remains unfulfilled.
- In some specific circumstances, the need for fulfilment may be eliminated prior to the expiration of time allowed for the contingency to occur. For example, this may result where there has been mutual agreement between the parties, or from a unilateral act of waiver by the party in whose benefit the condition is expressed.
- Where the relevant contingency does not arise within the allocated time, the party for whose benefit the time period was allowed is entitled to terminate their obligation for further performance unless there has been conduct amounting to waiver or estoppel, or the party has failed to observe an implied promise to effect fulfilment.

3.1 *The nature of conditions precedent to performance*

- A promisor is entitled where they are not in breach to withhold performance of his or her obligations pending fulfilment of the condition precedent to performance.
- If the condition precedent to performance fails such that it becomes incapable of ever being fulfilled because the time expressly or implied stated for the occurrence of the contingent event expires without the event taking place, the promisor may elect themselves to be permanently discharged from his or her obligation to perform. This will lead to the termination of the contract.

3.1.1 Contingent conditions are not promissory

- While some conditions precedent are said to be promissory (i.e. that fulfilment has been promised), others are non-promissory or “contingent”.
- Promissory conditions are the essential promises in a contract for which any breach justifies the termination of the contract. They are commonly referred to as merely “conditions”.
- Non-promissory conditions or contingent conditions precedent to a duty of performance occur where there is no promise that the condition precedent will be fulfilled. That is, where there has been no fulfilment, no breach arises and the duty of performance which was stated to be dependent on the fulfilment of the condition precedent does not arise.

3.1.2 Contingent conditions may be conditional to performance or formation

- A condition precedent may be conditional on the existence of a binding contract or to the obligation to perform the major promises of a contract which has an existing binding effect.
- In *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, the distinction between the two forms of condition precedent was stated to be that for the first type of condition precedent, no contractual rights are enforceable by the parties until the condition itself is fulfilled.
- For the second type of condition precedent, a binding contract exists although the obligation of either party to perform depends on the fulfilment of the condition. In such a case, non-fulfilment of that condition may entitle the innocent party to terminate.



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