



Adam Rollnik*

Termination for breach of contract

Introduction

Whether, in particular circumstances, a party can legitimately terminate a contract (or merely sue for damages for breach of warranty) is a vexed question that gives rise to uncertainty and disputes. The purpose of this paper is to consider and broadly define the three discrete categories of breach of contract which give rise to a right to terminate. In addition, recent jurisprudential developments in Australia, including recognition of the intermediate term doctrine, will be evaluated and considered.

In essence, there are three categories of breach of contract that give rise to a right to terminate. These are:

- Breach of an essential term (also known as breach of a 'condition').
- Repudiation (otherwise known as renunciation, which includes anticipatory and actual breach giving rise to a right to terminate).
- Sufficiently serious breach of an intermediate term of the contract causing substantial loss of benefit (some times referred to as 'fundamental breach' or 'breach that goes to the root of the contract').¹

Other breaches of contract, which do not fall within one of these categories (and which are usually referred to as a breach of warranty or breach of a non-essential term), will give the wronged party a right to sue for damages but will not yield a right to terminate.

Consequently, it is of crucial importance when evaluating any given dispute, or when considering a decided case in order to analyse legal doctrine, to determine with precision the discrete category of breach within which the dispute falls (and more than one category may apply in any given case). In this paper each of the three categories of breach and their practical application in recently decided cases will be considered. As part of this analysis it will be evident that the correct jurisprudential analysis of any breach of contract is important in order to determine whether the breach in question gives rise to a right to terminate.

Breach of an essential term

The first category of breach that gives rise to a right to terminate is breach of an essential term. Whether a term of a contract is an 'essential term' (otherwise known as a 'condition') is to be determined by reference to the intention of the parties at the time the contract is entered into.² The parties' intention that a term is to be an essential term of the contract may be evidenced, first, by the express words used by the parties or, second, by considering the operation of the relevant term in the context of the contract as a whole.

For example, in *Natwest Markets Australia Pty Ltd v Tenth Vandy Pty Ltd*,³ the contract in issue provided at clause 12.05 that:

'... the obligation of the Lessee to pay rent [and make other payments] ... are fundamental and essential provisions of this Lease and ... any default by the Lessee ... may be treated by the Lessor upon notice to the Lessee as being a fundamental breach of the lease ...'.

In this instance the parties agreed that the covenant to pay rent was an essential term of the contract breach of which gave rise to a right to terminate.⁴ While in this case the parties used the words 'fundamental' and 'essential' to ensure that the term in question would operate as an essential term of the contract, no particular words are required.⁵ Similarly, if the parties expressly state that 'time is of the essence' of the contract or of a particular term of the contract, then performance on time will be an essential term.⁶ Breach of an essential term gives rise to a right to terminate regardless of the actual effect of the breach on the wronged party, however slight.⁷

In addition to those circumstances where express words are used to identify essential terms, a term will also be essential in the circumstances described in *Framways Advertising Pty Ltd v Luna Park (NSW) Ltd*⁸ (*Framways Advertising*). In that case Jordan CJ stated that:

'The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.'⁹

Further, in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*,¹⁰ the High Court (Stephen, Mason and Jacobs JJ) added the following to the *Tramways Advertising* test:

'... the quality of essentiality depends ... on a judgment which is made of the general nature of the contract and its particular provisions, a judgment which takes account of the importance which the parties have attached to the provisions as evidence by the contract itself as applied to the surrounding circumstances.'¹¹

Tramways Advertising and *DTR Nominees* have been followed by lower courts on many occasions. For example, in *South Dowling Pty Ltd v Cody Outdoor Advertising Pty Ltd*,¹² McDougal J in the NSW Supreme Court had to determine whether a clause in a licence agreement was an essential term. The relevant clause obliged the licensor to warrant that if it sold the land relevant to the licence it would ensure that the purchaser entered into an agreement with the licensee to preserve the licensee's rights under the licence. The licensor failed to do so and the court applied the *Tramways Advertising* test and determined that the clause was 'central' to the licence agreement because it provided the mechanism for ensuring that the rights given to the licensee remained available notwithstanding changes in the ownership of the land. Accordingly, the court found that the licensee would not have entered into the licence agreement without being assured of strict performance of the relevant clause, and so the clause was an essential term of the agreement.¹³

Similarly, in *Oliver v Lakeside Property Trust*,¹⁴ Barrett J in the NSW Supreme Court had to determine whether, in relation to a services agreement, an obligation on the service provider to provide the services until completion of the work was an essential term of the contract. Barrett J also applied the *Tramways Advertising* test and held that the obligation to provide the services until the completion of the project was an essential term because the other party would not have entered into the contract unless assured of a strict or substantial performance of the promise to provide the services until completion.

These cases show the importance of the *Tramways Advertising* test in determining whether any particular

term is an essential or non-essential term. On this test a term will be essential if, but only if, it can be shown that the other party would not have entered into the contract unless assured of strict or substantial performance of the promise.

However, it also needs to be borne in mind that if there is uncertainty about whether a term should be considered to be essential or not, or if the matter is finely balanced, the courts will generally hold that the term is not essential.¹⁵ The courts adopt this approach because of the general preference to construe contracts in a manner that encourages performance rather than avoidance.¹⁶

Repudiation (also known as renunciation)

The second broad category of breach that gives rise to a right to terminate a contract is where one party repudiates the contract. Before considering this category it is important to state exactly what is meant by the word 'repudiation'. As the High Court has recently made clear in *Koompahtoo*,¹⁷ the word repudiation has two distinct meanings. First, there is the narrow meaning. Used narrowly, repudiation occurs where one party evinces an intention no longer to be bound by the contract, or to fulfil the contract only in a manner substantially inconsistent with that party's obligations.¹⁸ This may be termed renunciation.¹⁹ The majority of the High Court in *Koompahtoo* recently stated, in relation to whether a party has repudiated a contract, that:

'The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.'²⁰

On the other hand, repudiation is also used in a much broader sense. Used broadly, repudiation means any breach of contract which justifies termination.²¹ In this paper the term 'repudiation' will be used in the narrow sense, that is, interchangeably with the term 'renunciation'.

So what does repudiation (renunciation) mean as a matter of practical application? In *Shevill v Builders Licensing Board*²² (*Shevill*) Gibbs CJ explained as follows:

'... a contract may be repudiated if one party renounces his liabilities under it — if he evinces an intention no longer to be bound by the contract ... or shows that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way.'²³

The test set out in *Shevill* was applied by the High Court in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*²⁴ (*Laurinda v Capalaba*). In this case Laurinda was the equitable lessee of premises in a shopping centre and Capalaba was the equitable lessor. Pursuant

to a deed executed between the parties, Capalaba was obliged to deliver a lease in registrable form, or to register the intended lease, at a time after Laurinda began to occupy the premises. No time limit for taking these steps was set out in the deed and so the lessor was obliged to take these steps within a reasonable time.²⁵ Despite this obligation, Capalaba did not deliver a lease in registrable form, or register the lease, as it was required to do. Consequently, Laurinda served a notice to complete and after the expiration of the 14 day notice period which Laurinda had laid down, Laurinda terminated the contract. In these circumstances Mason CJ stated that:

‘Mere delay on the part of Capalaba in performing a non-essential contractual obligation cannot justify a refusal by Laurinda to perform its obligations. Something more — whether it be conduct amounting to a clear repudiation by Capalaba or the requirement to complete or failure to comply with a valid notice given by Laurinda fixing a time for completion and making time of the essence in that respect — would be required.’²⁶

That is to say, in the circumstances, Laurinda had to either take steps to make time of the essence by providing an effective notice to complete the contract within a reasonable time (effectively making the requirement to complete an essential term of the contract), or it had to show that Capalaba’s conduct amounted to a clear repudiation of the contract.

The brief facts of *Laurinda v Capalaba* are these. On 28 November 1985 Capalaba’s solicitors wrote to Laurinda and advised that Capalaba had executed the lease and a copy would be sent to Laurinda ‘shortly’. A few days later on 1 December 1985 Laurinda took possession of the premises when the shopping centre was opened. A month later, on 3 January 1986, Laurinda paid Capalaba’s solicitors the costs of and incidental to stamping and registration of the lease. Two months later, on 14 March 1986, Laurinda requested a copy of the lease. On 25 March 1986 in response, Capalaba’s solicitors wrote to Laurinda and said that the lease had been executed by Capalaba and that it would be returned ‘in the not too distant future’ and that they would provide it to Laurinda ‘as soon as we are able to’. Five months later, on 21 August 1986, Laurinda’s solicitors sent Capalaba’s solicitors a notice to complete and made it clear that it was now critically important for the lease to be registered immediately, stating in the notice that:

‘... it appears reasonable that our clients require your client to complete registration within 14 days from the date hereof. ... If the registration is not completed within that time then our clients naturally reserve their rights in respect of your client’s default.’

Then, on 3 September 1986, the day before the expiration of the 14 day notice period set out in Laurinda’s notice to complete, Capalaba’s solicitors responded and stated that the letter of 21 August 1986 had been referred to the lessor for a ‘response’ and that the lessor’s instructions would be communicated when they were ‘received’.

The majority found that the 14 day notice period in Laurinda’s notice to complete, which sought to make time of the essence, was not adequate, primarily because evidence was led to the effect that registering the lease within 14 days may not have been possible. In addition, the majority found that the notice itself was ineffectual because it was equivocal as to Laurinda’s position if Capalaba did not comply. That is, Laurinda was obliged to make it clear in the notice that either time was being made of the essence of the contract or that Laurinda would regard itself as entitled to terminate in the event of non-compliance, and the terms of the notice provided by Laurinda’s solicitors were not sufficient to have this effect (the mere reservation of rights in respect of default in the notice was not enough to achieve this purpose).

Despite this, the court unanimously found that Capalaba’s conduct as lessor was nevertheless a repudiation (renunciation) of the agreement, applying the test set out in *Shevill*. The court noted the contract will be repudiated if, viewed objectively, the lessor’s conduct would convey to a reasonable person in the situation of the lessee, that the lessor was unable to perform the contract or that it intended not to perform it, or to fulfil it only in a manner substantially inconsistent with its obligations and not in any other way.²⁷

The factors which led the court to hold that the lessor’s conduct amounted to a repudiation included:

- the lessor’s letter of 28 November 1985 advising that the contract and lease had been executed and would be sent ‘shortly’ — but failing to send same;
- the lessor’s letter of 25 March 1985 responding to a request for a copy of the lease, and advising that the lease would be forwarded in the ‘not too distant future’ — but failing to send same, and also failing to provide any explanation for the continuing delay; and
- the lessor’s letter of 3 September 1986 (which Deane and Dawson JJ described as ‘bordering on the contemptuous’) on the last day before the expiration of the 14 day notice period, where the lessor’s solicitors gave no explanation for the continuing delay and simply stated that the lessor’s instructions would be sent to the lessee when they were ‘received’.

The repudiation test as formulated in *Shevill* has also been applied in other recent cases including *Perigold Truffles of Tasmania Pty Ltd v Patrick Fitzgerald*.²⁸ In this case the parties entered into a verbal joint venture agreement in 2000 for the harvesting of truffles. The plaintiff (Perigold) provided the expertise, knowhow and trees, and the defendant (Fitzgerald) provided the land for the joint venture. The parties agreed to split the profits 50/50 and they agreed that a written joint venture agreement would be signed in due course. No such written agreement was signed.

The parties got into some minor disputes about fencing, pruning and the use of herbicides in 2005, and the plaintiff pressed the defendants to sign the joint venture agreement that the plaintiff had prepared. The defendant's refused and on 27 March 2006 the defendants sent an email to the plaintiff and said, 'Due to a number of reasons, we have decided not to sign the JV.' The plaintiff claimed that the defendant had repudiated the agreement.

In finding for the plaintiff and holding that the defendant had in fact repudiated the oral joint venture agreement the Court applied the test as set out in *Shevill*. The Court held that the email sent by the defendant to the plaintiff on 27 March 2006 (in which the defendant's stated they would not sign the agreement), amounted to a repudiation of the agreement because:

- the facts showed that the parties had originally always contemplated a written agreement;
- the defendants had intimated during other correspondence that they would sign a joint venture agreement at some stage;
- the defendants had participated in other negotiations with the plaintiff, in contrast to their outright refusal to negotiate with respect to the proposed written joint venture agreement;
- the defendants, by the 27 March 2006 email, refused to sign any written agreement in any form and gave no reasons for this position, and
- accordingly evinced an intention no longer to be bound by the agreement (given that the court found there was in fact a joint venture agreement on foot).

For these reasons the court held that the defendants' refusal to sign in the circumstances would have conveyed to a reasonable person in the situation of the plaintiff that the defendants were 'disavowing' any joint venture agreement. In addition, the solicitors for the defendant had subsequently written to the plaintiff's solicitors and had denied the existence of any joint venture agreement. The Court stated that if the 27 March 2006 email was not enough to evince an intention to dis-

avow the agreement then the letter denying its existence certainly was.

This case and *Laurinda v Capalaba* demonstrate how the courts have applied the repudiation test set out in *Shevill* and the factors that may lead a court to find that one of the parties has evinced an intention no longer to be bound by the contract. These cases also show that parties and their advisors need to consider their conduct carefully where there is a contractual dispute on foot to ensure, as far as possible, that their conduct does not amount to a repudiation of the agreement.

Sufficiently serious breach of an intermediate term causing substantial loss of benefit

So far we have considered breach of an essential term, and repudiation (renunciation), as two discrete categories of breach that give rise to a right to terminate. The third category of breach that gives rise to a right to terminate is where there is a sufficiently serious breach of an intermediate term that causes the wronged party a substantial loss of the intended benefit of the contract.

A majority of the High Court in *Koompahtoo*²⁹ recently made it plain that the 'intermediate term' doctrine forms part of the fabric of Australian contract law, essentially³⁰ following the well known decision of the English Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*³¹ (*Hongkong Fir*). However, while the High Court majority has firmly accepted the intermediate term doctrine, the decision is not without controversy and its jurisprudential effect may in any event be minimal. These issues, along with the majority's decision, are discussed below.

In *Koompahtoo*, the majority considered the Court of Appeal's analysis in *Hongkong Fir* and endorsed their approach of classifying some contractual terms as 'intermediate'. Intermediate terms are a sub-category of non-essential terms that may or may not, depending on the seriousness and consequences of the actual breach, give rise to a right to terminate.³² Whether breach of an intermediate term gives rise to a right to terminate will only be known once the consequences of the breach are identified. In this regard the majority stated:

'... the question whether a breach by one party relieves the other of further performance of his obligations cannot always be answered by treating a contractual undertaking as either a "condition" or a "warranty". Of some stipulations 'all that can be predicted is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal

consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise.³³ ...

‘We add ... recognition that, at the time a contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence ...’³⁴

The facts of *Koompahtoo* may be shortly stated. On 14 July 1997, Koompahtoo Local Aboriginal Land Council (Koompahtoo) and Sanpine Pty Ltd entered into a joint venture agreement. The agreement was to develop and sell a large area of land north of Sydney. Koompahtoo contributed the land and Sanpine was to manage the project. Each party had a 50 per cent interest in the joint venture and Sanpine was entitled to a management fee. Among other things, Sanpine was responsible for rezoning the land, obtaining approvals for subdivision and preparing the land for sale. However, although liabilities in excess of \$2.3m were incurred by Sanpine on the security of mortgages over the land, the project never proceeded even to the stage of rezoning. In June 2002 the NSW Aboriginal Land Council appointed an investigator of the joint venture and an administrator was thereafter appointed in April 2003. The administrator made attempts to obtain books of accounts and financial records from Sanpine. However, this was impossible because proper books of accounts and financial records were never created by Sanpine. That is, while a mortgagee claimed to be owed \$2.3m on account of the management fees charged by Sanpine, Sanpine was not able to produce any meaningful joint venture accounts to show where the \$2.3m had gone. It was on this basis that the administrator terminated the agreement on behalf of Koompahtoo in December 2003.

Sanpine then commenced proceedings and sought a declaration that Koompahtoo’s termination was invalid and that the agreement remained on foot. The Judge at first instance found in favour of Koompahtoo — holding that the breaches were sufficiently serious to give Koompahtoo the right to terminate. The Court of Appeal by majority, (and in error)³⁵ analysed the case on the basis of repudiation (renunciation) instead of on the basis of a sufficiently serious breach of an intermediate term. On this footing the majority of Court of Appeal reversed the decision of the trial judge and held that, because Sanpine had not evinced an intention no longer to be bound by the contract, Sanpine’s breaches did not give rise to a right to terminate.

However, the High Court unanimously overturned the Court of Appeal’s decision and held that the major-

ity of the Court of Appeal had fallen into error by proceeding on the footing that the trial judge’s findings were based on repudiation (renunciation) of the contract, whereas in fact the trial judge had proceeded on the basis of sufficiently serious breach of an intermediate term. (The confusion in the Court of Appeal arose because the trial judge used the term ‘repudiation’ in its broad sense (any breach justifying termination) whereas the majority in the Court of Appeal construed the term repudiation to mean renunciation).

The High Court found that Sanpine’s breaches of contract, including its failure to provide accounts or financial statements recording expenditure of \$2.3m over a number of years, gave rise to a right to terminate. The majority did so on the basis that the obligation to ensure that proper books of account were kept was an intermediate term of the contract, breach of which, in the circumstances, gave rise to a right in *Koompahtoo* to terminate the contract. In this regard, and in considering whether a term is intermediate breach of which may give rise to a right to terminate, the High Court majority stated:

‘... the intention that is relevant is the common intention of the parties, at the time of the contract, as to the importance of the relevant terms and as to the consequences of failure to comply with those terms.’

That is, there is a two stage process in determining whether a particular breach will give rise to a right to terminate. First, consider whether the term is intermediate in nature — is it a term which may, depending on the consequences of breach — give rise to a right to terminate? This is determined from the common intention of the parties at the time the contract is made. Second, consider whether the consequences of breach are sufficiently serious to justify termination: has the breach deprived the wronged party of a substantial part of the benefit for which it contracted? In this regard the majority in the High Court noted the following factors which led to a conclusion that the requirement to provide proper books of account was an intermediate term of the contract:

- the contract established a joint venture for a land development project of considerable size and complexity, to be carried out over a number of years;
- Koompahtoo brought its land, and Sanpine brought its management and financial expertise, to the joint venture;
- Sanpine’s obligations as to dealing with joint venture funds and maintaining proper books of account were of importance not only in working out the result of the joint venture after development and sale of the land but also to enable the parties (or someone such

as the administrator) to know material facts and to make decisions and judgments informed by that knowledge;

- it was not within the contemplation of the parties that it should be necessary to engage in extensive legal process to find out what became of the money borrowed on the security of the land, or to assess the financial state of the joint venture; and
- the terms of the contract itself, which provided that Sanpine was to ensure that proper Books (and accounts) were kept so as to permit the affairs of the joint venture to be assessed, and which also entitled each party to inspect the Books at any time with reasonable facility and within a reasonable time.³⁶

In regard to the consequences of breach, the majority noted that a trivial breach of the obligation to ensure proper books of account were kept would not give rise to a right to terminate.³⁷ However, in this case, the breach in question meant that Sanpine was not able to inform the administrator or even the trial judge of the true financial position of the joint venture including the expenditure of over \$2.3m borrowed on the security of Koompahtoo's land. The breaches were gross and their consequences were serious and therefore:

'Koompahtoo was deprived of a substantial benefit for which it contracted. Such breaches justified termination.'³⁸

While the majority's decision lays down the law in Australia in relation to intermediate terms, the doctrine itself has been criticised³⁹ and its actual practical effect may be limited. In Cheshire and Fifoot's *Law of Contract* (2008) the authors opine that:

'It is difficult to see the necessity for introducing such a third category of terms as a means of legitimising termination by reference to the extent of loss actually caused by a breach. Unless otherwise agreed, a breach that substantially deprives the other party of the benefit of a contract should entitle that party to terminate it, no matter whether the term in question is essential, intermediate, or inessential. The identification of a third kind of term distinct from, and intervening between, essential terms (conditions) and inessential terms (warranties), further proliferates an already over-elaborate terminology, and is an obvious invitation to circularity of reasoning. Many judges acknowledge, even if only indirectly, that loss of substantial benefit may be sufficient as such to justify termination by the injured party'⁴⁰

Kirby J in minority in *Koompahtoo* delivered a strong dissenting judgment also along these lines. His honour stated:

'If the classification of a contractual term as "intermediate" is nothing more than a function of *ex post facto*

evaluation of the seriousness of the breach in all of the circumstances then the label itself is meaningless. It is not assigned on the basis of characteristics internal to, or inherent in, a particular term, as the joint reasons themselves acknowledge. Rather, it is imposed retrospectively, in consequence of the application of the judicial process. Effectively, there is no basis, and certainly no clear or predictable basis, for separating "intermediate" terms from the general *corpus* of "non-essential" terms or "warranties" prior to adjudication in a court. This throws into sharp relief the extreme vagueness of the *Hongkong Fir* "intermediate term". Its imprecision occasions difficulties and confusion for parties and those advising them. It has the potential to encourage a proliferation of detailed but disputable evidence in trial courts and consideration of such evidence in intermediate courts.'⁴¹

It is submitted that there is much force in Kirby J's view, and recent academic comment endorse these criticisms of the majority.⁴² However, as noted by Kirby J in his minority judgment, there has long been two 'competing taxonomies' in relation to the intermediate term doctrine,⁴³ and Professor Carter, among others, maintains support for the position adopted by the majority.⁴⁴ Given the majority's decision in *Koompahtoo* and their endorsement of the intermediate term doctrine the debate about its efficacy may now have become academic. However, it is suggested that the adoption into Australian law of the intermediate term doctrine will not have a substantial effect on the rights and liabilities of contracting parties in any event. This is because it has long been held that a breach of a non-essential term which is so serious that it goes to the root of the contract, and thus deprives the wronged party of substantially the whole benefit of the contract, gives rise to a right to terminate.⁴⁵ If a breach of contract in fact deprives the wronged party of the substantial benefit of the contract then it is likely that the court will find (*ex post facto*) that the term breached was an intermediate term. That is, it is difficult to see many cases arising where a party can establish that a breach of a non-essential term deprived it of substantially the whole benefit of the contract, but where that same party is not able to also establish that the term breached was an intermediate term of the contract (in such a case the wronged party, despite being deprived of substantially the whole benefit of the contract, would not be lawfully entitled to terminate).

Conclusion

The three categories of breach that give rise to a right to terminate are clearly defined, as is evident from the deci-

sion in *Koompahtoo*, and from the leading text book writers.⁴⁶ These categories are: breach of an essential term; repudiation (aka renunciation); and sufficiently serious breach of an intermediate term giving rise to substantial loss of benefit.⁴⁷

In any analysis of a dispute the category (or categories) of breach which is or are relevant and which are being considered must be clear. The cases show that the word 'repudiation' has two meanings and this can cause confusion. First, repudiation means renunciation (evinced an intention no longer to be bound, or an inability to perform the contract);⁴⁸ and second, it means any breach of contract which justifies termination by the other party.⁴⁹ The term is sometimes used in different ways by judges in decided cases and practitioners and others need to be alive to this issue and ensure that, in considering the law, the particular category of breach is clearly identified.



* LLB (Hons), B.App Sc (Chem), LLM, Senior Associate, Mallesons Stephen Jaques.

1 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 (*Koompahtoo*); *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* 2008 234 CLR 237 at 256-257.

2 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 627 per Gibbs J.

3 [2008] VSCA 207 (unreported, Nettle, Ashley and Neave JJA, 22 October 2008).

4 Above n3, per Nettle J, at [12].

5 NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (2008) at [21.17].

6 *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327.

7 *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514; *Re Ronim Pty Ltd* [1999] 2 Qd R 172 (Court of Appeal); *Bowes v Chaleyey* (1923) 132 CLR 159 at 191 per Higgins J.

8 *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, per Jordan CJ.

9 *Ibid* at 641. This test was adopted by the High Court in *Associated Newspapers v Bancks* (1951) 83 CLR 322.

10 (1978) 138 CLR 423.

11 *Ibid* at 431.

12 [2005] NSWSC 391 (unreported, McDougall J, 2 May 2005):

13 The test from *Tramways Advertising* refers to 'strict or substantial compliance' although in this case the court found that strict compliance was in fact required in the circumstances.

14 *Oliver v Lakeside Property Trust Pty Ltd* [2005] NSWSC 1040 (unreported, Barrett J, 18 October 2005).

15 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549.

16 Above n15, at 556-7.

17 *Koompahtoo* above n1, at 135.

18 *Koompahtoo* above n1, at 135.

19 *Koompahtoo* above n1, at 135.

20 *Koompahtoo* above n1, at 135.

21 *Koompahtoo* above n1, at 136. It should also be noted that the High Court suggested that the term repudiation has been used in the past to mean 'termination', applying it to the party relying on the default, and that it would be better if the term 'repudiation' was not used in this way.

22 (1982) 149 CLR 620.

23 *Shevill* above n2 at 625-626.

24 (1988) 166 CLR 623.

25 *Laurinda v Capalaba*, above n24 at 650 per Deane and Dawson JJ.

26 *Laurinda v Capalaba*, above n 24 at 633.

27 *Laurinda v Capalaba*, above n24 at 647 per Brennan J and at 658 per Deane and Dawson JJ.

28 [2008] NSWSC 643 (unreported, Hammerschlag J, 18 July 2008).

29 Above n1.⁵⁰ The majority comprised Gleeson CJ, Gummow, Heydon and Crennan JJ; and Kirby J was in minority.

30 The majority stated that the breaches relied on by *Koompahtoo* (found to be intermediate terms of the contract) deprived *Koompahtoo* 'of a substantial part of the benefit for which it contracted' (at p147). On the other hand, in *Hongkong Fir*, Lord Diplock LJ referred to (intermediate) terms breach of which give rise to the wronged party being 'deprived of substantially the whole benefit which it was intended that he should obtain from the contract'. [Emphasis added]

31 [1962] 2 QB 26.

32 *Koompahtoo* above n1, at 138.

33 Above n1. at 138, 139 quoting Diplock LJ in *Hongkong Fir* at 69-70.

34 *Koompahtoo* above n1, at 140.

35 *Koompahtoo* above n1, by the majority at 145-7 [68, 69] and by Kirby J at 150 [83].

36 *Koompahtoo* above n1, at 146. The majority noted that there was much to be said for the argument that the requirement to keep proper Books was in fact essential, but nevertheless the majority based its decision squarely on the intermediate term doctrine [70].

37 *Koompahtoo* above n1, at 146. It is worth noting that it has been argued that where a term of a contract may be breached in various ways, some material and some not, that characteristic will normally indicate that the term in question is an intermediate term. See JW Carter, 'Intermediate terms arrive in Australia and Singapore', (2008) 24 JCL 226 at 242.

- 38** *Koompahtoo* above n1 at 147.
- 39** NC Seddon and MP Ellinghaus, Cheshire and Fifoot's *Law of Contract*, (2008).
- 40** Above n37 at [21.22].
- 41** *Koompahtoo* at 156 per Kirby J.
- 42** Dharmananda, K and Patamatheos A, 'Termination and the third term: discharge and repudiation', 1 LQR 2008, 124(Jul), 373-379.
- 43** That accepted by the majority in *Koompahtoo* and supported by Professor Carter, and that proffered by Kirby J and supported by Dr Seddon and Associate Professor Ellinghaus.
- 44** JW Carter, 'Intermediate terms arrive in Australia and Singapore', (2008) 24 JCL 226.
- 45** *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 31 per Mason J; *Federal Commerce & Navigation Co. Ltd v Molena Alpha* [1979] AC 757 at 779.
- 46** NC Seddon and MP Ellinghaus, Cheshire and Fifoot's *Law of Contract* (2008); and J Carter, E Peden and GJ Tolhurst, *Contract Law in Australia* (2007).
- 47** While there was some doubt about the incorporation of the intermediate term doctrine into Australian law prior to *Koompahtoo* the majority decision has now put the matter beyond doubt.
- 48** *Koompahtoo* above n1, at 135-136.
- 49** *Koompahtoo* above n1 at 135-136.