



## The Concept of Abandonment in Contracts

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Recently we have written articles to guide our readers through the impacts of COVID-19 and that has brought to the forefront of many thoughtful minds the principles of frustration, force majeure and where the pandemic sits in our legal system, when considering contractual rights and obligations. But there is another principle which, to put it simply, shouldn't be abandoned from thought ...

When a person enters into a contract to sell their property, both the buyer and seller have obligations to see the contract through to completion. A vast majority of residential house and land contracts will provide a buyer with the opportunity to obtain finance and, if they are unable to obtain finance, the ability to terminate the contract. But what happens if the buyer neither affirms nor terminates the contract? And what if the seller takes no steps to enforce or terminate the contract, perhaps acting on the assumption of mutual abandonment?

The question is can parties abandon a contract without facing any legal consequences?

### Abandonment

Abandonment is a question of fact based on the behaviour of the parties.

A declaration of non-performance can be an express refusal to perform or can be inferred from conduct if that conduct

leads a reasonable person to determine that the party has no intention to meet its obligations. The innocent party may treat itself as being discharged from further performance and seek damages for loss, or keep the contract on foot and recover damages for the particular breach.<sup>1</sup>



If the innocent party wishes to enforce their rights to compel performance on the delaying party, what can they do?

First, they must ascertain whether time is of the essence of the contract.

In Queensland time is of the essence of all land contracts and is expressly included in our REIQ standard contract of sale. However, land contracts in other states differ from Queensland, New South Wales for example is the opposite.

If time is of the essence then a party must perform its obligations on time and even a short delay can trigger a common law right to terminate for breach. The innocent party may seek specific performance of the defaulting party's obligations.

If time is not of the essence then a notice needs to be served on the other party requiring completion within a reasonable time. If that notice is ignored then the innocent party will have certain rights under the contract for breach. The delay may also be seen as a repudiation of the contract, which we consider in more detail below.

For example, where a sale of land contract is conditional upon the buyer receiving finance, failure to notify the seller that finance has been approved, or that the buyer waives the benefit of this condition, entitles the seller to terminate the contract.

Negotiation between parties for an extension of time is possible in these circumstances, however if the time for a condition to be satisfied passes and neither party acts, to formally address the event, the breach will subsist.<sup>2</sup>

[If both parties take no steps to fulfil their obligations and complete the contract:](#)

If a party is not performing its obligations as required by the contract and the innocent party does not take steps to enforce the contract for an extended period, this may result in a finding that the contract has been mutually abandoned.<sup>3</sup>

In the Queensland Court of Appeal case of *Marminta Pty Ltd v French*,<sup>4</sup> Jerrard JA stated:

*...not only can an agreement be abandoned by conduct, but also that the question whether an agreement has been so abandoned does not require one to examine whether the party actually had the intention of abandoning the agreement; only whether their conduct, when objectively viewed, manifested that intention.*

*... to show that a contract has been abandoned by inactivity on both sides it is necessary to establish that the inactivity produces the clear inference that one party does not wish to proceed with the contract and the other consented to that situation.*

In the case of *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*<sup>5</sup> the joint judgment records:

*...when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract.*

[How much time must elapse before a contract can be considered abandoned?](#)

The court in *Tonner v Delaporte*<sup>6</sup> stated abandonment may be inferred when 'an "inordinate" length of time has been allowed to lapse during which neither party has attempted to perform, or called upon the other to perform, the contract between them'.

However, the fact that an 'inordinate' period of time has elapsed will not always be conclusive.<sup>7</sup> A seller should be cautious in presuming mutual abandonment of a contract as the Court will also ascertain whether the objective intention of the



parties was to abandon the contract by reference to their conduct. Inactivity of the parties must produce the inference that where at least one party did not wish to proceed the other party then consented to the abandonment. A contract can be ended by inferred agreement.<sup>8</sup>

For example, if a seller enters into a new contract while the other is still on foot, but the original buyer did not intend to abandon the contract or conduct themselves in a manner inferring consent to the abandonment, the original buyer may sue the seller or seek performance of the original contract. The court will not lightly conclude that a partly performed contract was abandoned without a clear demonstration that the parties intended to abandon their accrued rights.

[If a contract has been abandoned, can the same parties revive the same contract at a later date?](#)

If parties to a contract attempt to revive a contract at a later date, then it was in fact never abandoned. Abandonment requires the intention to relinquish a right to interest, without any intention to ever reclaim it. There are also issues with reviving a contract after significant time has elapsed with no activity, such as the accrual of UTI (unpaid tax interest) on transfer duty, which can be quite significant. Additionally time may no longer be of the essence, meaning the parties are not under any obligation to complete certain obligations within a specified timeframe.

## Repudiation

As discussed above, delay in performing obligations under the contract may enliven this doctrine in specific circumstances.

Repudiation is a 'serious matter and is not to be lightly found'.<sup>9</sup> To satisfy the requirements of repudiation a party must demonstrate a clear indication of an absence of readiness and willingness or an inability to perform their obligations

when viewed objectively by a reasonable person. Consideration is given to the conduct of one party and whether it 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'.<sup>10</sup>

However, repudiation does not automatically bring a contract to an end. Renunciation of the contract must be accepted by the other party for the contract to subsequently terminate and for any potential rights to damages to be triggered.

Repudiation will be established by reference to a party's words, conduct or position as a question of fact. General examples of such conduct include:

- Repudiation by express refusal to perform the main obligations under the contract;<sup>11</sup>
- Repudiation by express declaration of the inability to perform the contract, by words or conduct;<sup>12</sup>
- Repudiation implied by a party's words or conduct where a reasonable person would infer they are not bound or would only fulfil the contract in a manner substantially inconsistent with the contract. This may be inferred depending on proof of the requirement of seriousness in each case;<sup>13</sup>
- Repudiation by the implied inability to perform the contract, evincing the party is wholly disabled from performing or that they have a substantial incapacity to perform their obligations;<sup>14</sup>
- A party acts on an erroneous interpretation of the contract and breaches one or more terms evincing an intention not to perform except in accordance with their erroneous interpretation. This may be deemed repudiation based objectively on the conduct, not the subjective intention of the party;<sup>15</sup>



- Where a party had no legal right to terminate a contract but purports to do so, the wrongful termination may constitute repudiation if the innocent party elects to accept the repudiation and terminate;<sup>16</sup> or
- If a party commences proceedings in circumstances clearly demonstrating their intention to no longer be bound by the contract regardless of the outcome of those proceedings and the court's decision.

#### Acceptance of Repudiation

Acceptance of the repudiation by the innocent party, as mentioned above, is required for valid termination of the contract and to trigger their rights to damages.

By accepting the repudiation, the party accepts that the contract and all obligations to perform are discharged.

#### Mitigation of Loss

The question of mitigation will not arise until there has been clear acceptance of the repudiation.

Mitigation is relevant in circumstances where the repudiation occurs prior to the time performance is due and is sufficiently

serious that had the breach occurred at the specified time the other party would have been entitled to terminate. If the breach was partially anticipatory, where some of the contractual duties fall due for performance at the time of the breach, then the parties may also discharge the contract for repudiation and the innocent party would be wise to undertake measures to mitigate their loss.

An innocent party will be deemed to have mitigated their loss if they have taken reasonable steps for mitigation, even if those reasonable steps actually increase the loss which would have been suffered.<sup>17</sup>

#### **Summary**

The fact is, if abandonment is not clearly demonstrated then there is still a contract on foot and the seller enters into a new contract for the same property at its own risk. For a seller to ensure it has full freedom to contract, if it finds itself in a position of extended inactivity it should carefully consider whether it is more appropriate to formally terminate the contract (if it has the right to do so) as opposed to assuming the contract is abandoned.

If you want to discuss any property matters, please contact:

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<sup>1</sup> *Koompahtoo Local Aboriginal Council v Sanpine Pty Ltd* (2007) 241 ALR 88, 102.

<sup>2</sup> Refer REIQ Contract for Houses and Residential Land (16<sup>th</sup> ed) standard condition 3.4.

<sup>3</sup> *Tonner v Delaporte* [2018] WASCA 115.

<sup>4</sup> 2003 QCA 541 at [22].

<sup>5</sup> (1978) 138 CLR 423, 434.

<sup>6</sup> [2018] WASCA 115 at [114].

<sup>7</sup> *Fitzgerald v Masters* (1956) 95 CLR 420.

<sup>8</sup> *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192.

<sup>9</sup> *Shevill v Builders Licensing Board* (1982) 149 CLR 620.

<sup>10</sup> *Koompahtoo Local Aboriginal Council v Sanpine Pty Ltd* (2007) 241 ALR 88.

<sup>11</sup> *Galafassi v Kelly* (2014) 87 NSWLR 119.

<sup>12</sup> *Foran v Wight* (1989) 168 CLR 385.

<sup>13</sup> *Warnico AG v Samor SpA* [1979] 111 Rep 450.

<sup>14</sup> *Rawson v Hobbs* (1961) 107 CLR 466, 481.

<sup>15</sup> *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623.

<sup>16</sup> *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444.

<sup>17</sup> *Payzu Ltd v Saunders* [1919] 2 KB 581.