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In-House Preliminary Briefing Memorandum
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Anticipatory Breach

All contracts impose an obligation on each party not to impair the other's expectation of receiving due performance. When either party shows that it will not meet that obligation before the time for performance has arrived, the aggrieved party may resort to any remedy for breach under the doctrine of anticipatory breach.

Anticipatory breach arises when one party expresses lack of willingness or ability to perform its contractual obligations before their performance is due. This enables the other party to rely on a breach before it occurs. When one party foresees the other will inevitably breach the contract, the non-breaching party can sue for damages and/or terminate. The result is that the party claiming breach does not have to perform its obligations and cannot be liable for not doing so.

For an anticipatory breach to be found to have occurred, the defendant must have either:

- definitively resolved or decided against doing, in the future, what the contract requires – i.e. there is clear evidence that it is **not willing** to perform (*Rawson v Hobbs* [1961] HCA 72, [10] (Dixon CJ); *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* [1978] HCA 12, [24] (Jacobs, Mason and Stephen JJ)); or
- "become wholly and finally disabled" from performance – i.e. it is **not able** to perform (*Sunbird Plaza Pty Ltd v Maloney* [1988] HCA 11, [26] (Mason CJ), [46] (Gaudron CJ); both citing Dixon CJ in *Rawson v Hobbs*).

Anticipatory Breach must be declared prior to the time for performance: *Foran v Wight* [1989] HCA 51. It is available as soon as the promisor has communicated refusal or inability to carry out a contractual condition and the injured party is able to anticipate an inevitable breach: *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25. Nevertheless, the inevitability of a breach must be established in fact, not opinion or supposition: *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd* (No 2) [2010] FCA 1240 at [80].

Anticipatory Breach is available as a ground of termination if the breach is sufficiently serious. Demonstrating this 'seriousness' relies on satisfying various test elements:

(1) The facts must indicate an anticipated breach of all the defendants' obligations (*Hochster v De La Tour* [1853] 118 ER 922), an anticipated fundamental breach or breach of an essential term of the contract (*Loughridge v Lavery* [1969] VR 912; *Afos Shipping Co SA v Pagnan* [1983] 1 All ER 449) or an anticipated delay which will frustrate the performance of the contract (*Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401);
(2) The absence of readiness or willingness must have a fundamental effect on the fair carrying out of the bargain as a whole (*Forslind v Bechely-Crundall* [1922] SC (HL) 173);
(3) The absence of readiness or willingness must go to the 'heart' of the contract (*Francis v Lyon* [1907] 4 CLR 1023).
(4) The absence of readiness or willingness must indicate that the promisor will not perform the contract in a vital respect (*Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] QB 44); or
(5) The circumstances of the case must indicate that it would be 'unfair' to hold the promisee bound by the contract (*Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216).

The doctrine of anticipatory breach goes to the root of the commercial assumption that due performance of a contract will be required regardless of changed circumstances. It addresses the commercial situation that arises where there is a certainty, or a sufficiently serious anticipation, that the contract cannot be completed.

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KELLEHERS AUSTRALIA: www.kellehers.com.au / e: kellegal@kellehers.com.au
497 Swan Street, Burnley, 3121, Victoria, Australia