Diagram 12A gives an overview of **when** the claimant can withhold her own performance. The question is often put in terms of when a claimant can *terminate* the contract on the other party's *breach*. But, we need to put this issue in the context of *other* circumstances when a contract party is entitled not to perform her part of the contract.

1. If the claimant C's expectation is disappointed, the question, at the highest level of generality, is whether that expectation is a contingent condition or a promissory obligation:

2. A **contingent condition** is one that neither party is responsible to bring about, but both parties' obligations to perform or to keep performing, depend on it.

3. The contingent condition may be a ***condition precedent*** (for example, where the contract is said to be contingent on a license or planning permission being granted).

4. if the condition precedent fails, the obligation to perform the contract simply does not arise. There is no breach and neither party is liable to the other.

5. Alternatively, the contingent condition can be a ***condition subsequent*** (for example, where the parties' continuing performance is contingent on continued funding from a specified source).

6. If the condition subsequent fails, again, neither party has breached the contract. The contract either states what happens in this circumstance or the contract is discharged.

7. A **promissory condition** refers to something that the defendant has an *obligation* to bring about. But whether the defendant's breach of this condition entitles the claimant to withhold her own performance depends on whether the claimant's reciprocal promissory obligation is 'dependent' or 'independent' of the defendant's performance.

8. If the claimant's performance is **independent** of the defendant's performance, the claimant *cannot* withhold her performance even if the defendant fails to perform, although the defendant is liable to the claimant for breach. For example, a tenant's

covenant to pay rent is **independent** of the landlord's covenant to repair: the tenant cannot withhold payment even if the landlord fails to repair. Since this may leave the claimant vulnerable on the defendant's breach, courts will not find an obligation as being 'independent' unless the contract makes this very clear.

9. Contractual obligations are normally classed as **dependent**, so that each party's obligation to perform is dependent on the other's performance, or readiness and willingness to perform.

10. Nevertheless, whether the claimant withhold her own performance because of the defendant's breach also depends on whether the defendant's obligation is 'entire' or 'divisible':

11. An obligation is **'entire'** if it must be *completely* performed *before* the other party is obliged to perform (this is called the 'entire contract' rule). For example, if the claimant engages the defendant to build a conservatory for £40,000, **payment on completion.**

12. So long as the defendant has not finished the whole job, the claimant need not pay- the defendant cannot sue, for part payment. The defendant has not fulfilled the condition precedent triggering the payment. Sir George Jessel, Master of the Rolls, explained that 'if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe and ask you to pay one half the price'. On the other hand, you can sue for not getting both shoes. The *doctrine of 'substantial performance'* was developed to protect the defendant who has substantially performed his obligations. This requires the claimant to pay but she can deduct the amount of any loss suffered from the defendant's incomplete or defective performance.

13. In order to avoid the problems associated with 'entire' obligations, courts lean towards finding obligations to be **'divisible'.** On breach, the claimant has an action for damages, but can't *necessarily* withhold her own performance by **terminating** the contract. Whether it does, depends on the ***status*** of the term breached.

14. *At the time of formation*, a term may be classified by the parties themselves, by statute or by the courts.

15. A **condition** is an essential term.

16. If the defendant breaches this (sometimes called a 'repudiatory breach'), the claimant is entitled to terminate the whole contract. It's irrelevant that the actual consequences of the breach might be relatively trivial. The claimant can also claim expectation damages for losses *up to* termination and *beyond* (ie for loss of the bargain)

17. A **warranty,** a non-essential or subsidiary term.

18. If the defendant breaches this, the claimant is not entitled to terminate the contract, even if the actual consequences of the breach are very serious. The claimant can only claim damages for losses *up to* the time of the action (but not for loss of the bargain, since the contract continues).

19. Because of the potehtial unfairness of the condition, warranty classifications, the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* in 1962, recognized an intermediate category of terms called **innominate terms**. In general, these are terms which

- have not been clearly classified by the parties, statute, or binding precedent *at the time of formation* and
- can be breached in different ways with consequences of varying seriousness.

20. Whether termination is available for breach of innominate terms depends on whether the actual *consequences* of breach reaches the high threshold of depriving the claimant 'of substantially the whole benefit which it was intended he should obtain from the contract'.

21. If so, the claimant can terminate the contract.

22. If not, he cannot terminate. For example, in *Hong Kong Fir*, a ship owner chartered out a ship (the *Hong Kong Fir*) for 24 months. The ship owner breached the term requiring the ship to be 'in every way fitted for ordinary cargo service' by failing to provide

competent maintenance personnel. The ship broke down a lot and only spent 2 months of the first 7 months of the charter period at sea. The sea-worthiness term was held to be an innominate term because it could be breached by the slightest trifling breach like a missing nail or medical supplies. On the facts it was held that, the claimant was *not* substantially deprived of the whole benefit of the contract because the defendant had taken remedial steps and there was still 17 months of the charter to run.