A CASE NOTE ON *KOOMPAHTOO LOCAL ABORIGINAL LAND COUNCIL v SANPINE PTY LIMITED*

Brooke Hobson*

I Introduction

Much contractual litigation arises in the case where one party has terminated a contract and the court is required to determine whether the party was entitled to do so. The case of *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* ('*Koompahtoo*')[1] is important because it offers an authoritative statement on when a party to a contract is entitled to terminate the contract due to a breach by the other party. In doing so, it clarified what 'repudiation' of a contract is, as opposed to renunciation, and more significantly made it clear that the concept of intermediate terms as outlined in Diplock J's judgment in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* ('*Hongkong Fir*')[2] is indisputably part of the common law in Australia.[3] However, the differing view of Justice Kirby on this point clearly indicates that the law in this area is not completely settled and there is hence a need to reassess it.

II Facts

In July 1997, the appellants, Koompahtoo Local Aboriginal Land Council ('Koompahtoo') and the first respondent, Sanpine Pty Limited ('Sanpine'), entered into a joint venture agreement ('the Agreement') for the development and sale of a large area of land in New South Wales. Koompahtoo contributed the land and Sanpine was appointed as the manager of the project. Each had a fifty percent interest in the joint venture, with Sanpine also entitled to a management fee equal to twenty five percent of the project costs. The project was controversial within the Aboriginal community. Many financiers found the project

* Fourth year LLB/BA student, University of Notre Dame Australia, Fremantle, Western Australia.

1 (2007) 233 CLR 115.

2 [1962] 2 QB 26.

3 Michael Borsky, 'High Court States Principles of Repudiation: Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd' (2008) 36 *Australian Business Law Review* 67, 67.

unattractive as the land in question was owned by an Aboriginal Land Council. This created additional difficulties and meant that finance was very difficult to obtain. The project therefore never even proceeded to the stage of obtaining rezoning for the land, although more than $2 million in liabilities were incurred.

In June 2002, the New South Wales Aboriginal Land Council appointed an investigator of Koompahtoo. This resulted in the second appellant (Mr Lawler) being appointed as administrator in February 2003. A mortgagee went into possession of the land in April 2003. For the remainder of 2003, the administrator attempted to obtain from Sanpine information on the financial position of the joint venture. However, Sanpine had not kept proper accounts or financial records of the joint venture. Therefore the administrator, on Koompahtoo's behalf, terminated the Agreement for breaches committed by Sanpine. Sanpine commenced proceedings in the Supreme Court of New South Wales, seeking a declaration that the termination was invalid and the Agreement was still on foot. At first instance, the case was heard by Campbell J. He formulated the question to be decided in the following manner, whether on the proper construction of the Agreement and in the events which have happened, the Agreement was validly terminated by Koompahtoo by its letter to Sanpine.[4] Campbell J answered this question affirmatively and dismissed Sanpine's proceedings. He did this on the basis that the breaches by Sanpine were sufficiently serious to give Koompahtoo a right to terminate.[5] Sanpine then appealed to the Court of Appeal of the Supreme Court of New South Wales and Giles and Tobias JJA (Bryson JA dissenting) allowed Sanpine's appeal.[6] Koompahtoo then appealed to the High Court of Australia.

III Issues

The principal consideration for the High Court in this case was whether Koompahtoo had validly terminated the Agreement with Sanpine. This involved firstly determining whether Sanpine breached the Agreement with Koompahtoo. If Sanpine had breached the Agreement, then the next question to be determined was whether these breaches entitled Koompahtoo to terminate the Agreement. To do this, the High Court had to consider the relevant legal principles which would govern an innocent party's entitlement to terminate upon a contractual breach.

---

4 *Koompahtoo* (2007) 233 CLR 115, 123.

5 *Sanpine v Koompahtoo Aboriginal Land Council* [2005] NSWSC 365 (Unreported, Campbell J, 22 April 2005) [374].

6 *Sanpine v Koompahtoo Aboriginal Land Council* [2006] NSWCA 291 (Unreported, Giles, Tobias Bryson JJA, 2 November 2006) [180-181].

This in turn would involve a consideration of the classification of contractual terms, and in particular the type of terms and obligations breached in this case. Prior to *Hongkong Fir*,[7] an innocent party was only entitled to terminate a contract if the other party breached a condition or repudiated the contract. However, Diplock LJ in *Hongkong Fir*[8] introduced the concept of an intermediate term when he said:

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties," … [o]f such undertakings all that can be predicated 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.[9]

This development in English law meant that an innocent party would have the right to terminate if the breach was of an intermediate term and deprived the party of substantially the whole benefit of the contract. A major issue in *Koompahtoo*[10] which the High Court had to consider was whether intermediate terms formed part of the law of contract in Australia.

IV Decision

The High Court allowed the appeal, holding unanimously in favour of Koompahtoo, that Sanpine had breached the Agreement and that these breaches entitled Koompahtoo to terminate the Agreement. Gleeson CJ, Gummow, Heydon and Crennan JJ ('the majority') delivered a joint judgment. The joint judgment accepted Diplock J's decision in *Hongkong Fir*[11] that there were three types of contractual terms, namely, conditions, warranties and intermediate terms.[12] This is significant as it clearly endorsed this tripartite classification of contractual terms as part of Australian law. Kirby J however delivered a judgment that reached the same conclusion as the joint judgment but followed a different course of reasoning. Most significantly, Kirby J disagreed with the endorsement of intermediate terms (also often called innominate terms).[13] He espoused a bipartite scheme of classification, under which an innocent party would only be entitled to terminate for breach of an essential term, or for 'breach of a non-essential term causing substantial loss of benefit'.[14]

---

7 [1962] 2 QB 26.
8 [1962] 2 QB 26.
9 *Hongkong Fir* [1962] 2 QB 26, 69-70.
10 (2007) 233 CLR 115.
11 [1962] 2 QB 26.
12 *Koompahtoo* (2007) 233 CLR 115, 139.
13 *Koompahtoo* (2007) 233 CLR 115, 159.
14 *Koompahtoo* (2007) 233 CLR 115, 159.

A *Joint Judgment*

The first issue that the judges had to consider was what Sanpine's obligations were and whether these had been breached. It was only if there had been a breach that the issue of repudiation and termination would arise. The terms of the Agreement, as extracted in the judgment, reflected that Sanpine was responsible for, *inter alia*, engaging bookkeeping and accounting services, maintaining financial records and establishing and using a bank account for the joint venture. Sanpine was also required to make monthly reports to the Management Committee regarding expenditure and progress.[15] In regard to whether Sanpine had breached the Agreement, the majority agreed with the approach of Campbell J, the primary judge. Campbell J had reduced Sanpine's alleged breaches into four categories, these being: '(1) Sanpine's obligations concerning rezoning, (2) document production and maintenance, (3) banking and spending of money, and (4) failure to maintain proper books'.[16] The majority agreed with Campbell J's findings that there were breaches of the obligations only in categories two, three and four.

After agreeing with the conclusion of the trial judge that Sanpine had breached the Agreement, the majority judges then turned to examine the legal principles relevant to this case. They first considered what is meant by renunciation, saying that this may refer to 'conduct which evinces an unwillingness or an inability to render substantial performance of the contract'.[17] This involves looking at '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'.[18] They compared this with repudiation, which may be said to refer to 'any breach of contract which justifies termination by the other party'.[19] The judges made it clear that this case was concerned with whether Sanpine's breaches were of the type that justified termination by Koompahtoo, thereby constituting repudiation, and not with the issue of renunciation. The judgment also noted that the terms termination and repudiation should not be used interchangeably.[20] The term repudiation should be applied to the conduct of the party in default, while termination applies to the conduct of the party relying on the default.[21]

---

15 *Koompahtoo* (2007) 233 CLR 115, 125-127.
16 *Koompahtoo* (2007) 233 CLR 115, 130.
17 *Koompahtoo* (2007) 233 CLR 115, 135.
18 *Koompahtoo* (2007) 233 CLR 115, 135 citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, 659.
19 *Koompahtoo* (2007) 233 CLR 115, 136.
20 *Koompahtoo* (2007) 233 CLR 115, 136.
21 *Koompahtoo* (2007) 233 CLR 115, 136.

The majority judges then turned to outlining the two relevant circumstances where a breach entitles the other party to terminate the contract. The first, which is not contentious in this case, is where there is a breach of an essential term. The majority relied on the judgment of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[22] and said as follows:

> It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and … the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination.[23]

However, this is discussed only briefly as the case was not decided on the basis that Sanpine breached essential terms.

The second relevant circumstance, which is what is more important in this case, is where there has been a 'sufficiently serious breach' of a non-essential term which can be classified as an intermediate term.[24] Here, the majority applied *Hongkong Fir*[25] in which Diplock J had said that there are some types of terms which, when breached, may or may not deprive a party of the substantial benefit of the contract, and the legal consequences of such terms 'depend upon the nature of the event to which the breach gives rise'.[26] It is interesting to note however, that the term 'intermediate' was never used by Diplock J in *Hongkong Fir*. It has been attributed to the catchwords in the law reports which included the phrase 'intermediate stipulation'[27] and has been used ever since. Regardless of the origins of the term itself, the majority endorsed the tripartite classification, and noted that it had also been cited with 'evident approval'[28] in the case of *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*.[29]

The majority judges then examined the judgments of both Campbell J and the Court of Appeal. Campbell J had used a similar definition of repudiation to the majority, that it requires 'conduct by a contracting party which, as a matter of common law, entitles the other contracting party to terminate the contract'.[30] Campbell J had also distinguished between essential and intermediate terms, and relying on the latter,

---

22 (1938) 38 SR (NSW) 632.
23 *Koompahtoo* (2007) 233 CLR 115, 138.
24 *Koompahtoo* (2007) 233 CLR 115, 138.
25 [1962] 2 QB 26.
26 *Hongkong Fir* [1962] 2 QB 26, 69-70.
27 J W Carter, G J Tolhurst and Elisabeth Peden, 'Developing the Intermediate Term Concept' (2006) 22 *Journal of Contract Law* 268, 271.
28 *Koompahtoo* (2007) 233 CLR 115, 139.
29 (1987) 162 CLR 549, 562.
30 *Koompahtoo* (2007) 233 CLR 115, 142.

decided in favour of Koompahtoo based on the seriousness of the breaches of contract found to have occurred.[31] The High Court held that the judgment of Campbell J was misinterpreted by the Court of Appeal. There was no challenge in the Court of Appeal to the finding that breaches had occurred but Giles JA 'treated the central question as whether Sanpine, by its conduct, evinced an intention to perform the Agreement only in a manner that suited it and in no other way'.[32] The majority in the Court of Appeal had therefore treated it as a case of renunciation, but the High Court here emphasized that that was not the basis of Campbell J's decision.

After considering the facts, the legal principles and the two prior judgments, the majority came to the conclusion that the approach of Campbell J was correct. The majority judges emphasized that attention should be focused on the contract, and the nature and seriousness of the breaches.[33] They said that whether it was an essential term was a question of construction, 'to be decided in the light of its commercial purpose and the business relationship it established'.[34] Having regard to the Agreement, Koompahtoo was the one which provided the land, and as an Aboriginal Land Council, was subject to legislative controls and scrutiny regarding the use of the land. In this light, the majority found that the 'ability to make an assessment of the affairs of the joint venture … was vital'.[35] However, the majority did not base its decision upon the ground that the breaches by Sanpine constituted breaches of essential terms. They said that even if all of the terms were intermediate, they agreed with the primary judge, Campbell J, and with Bryson JA, who had delivered the dissenting judgment in the Court of Appeal, that the breaches by Sanpine were 'gross, and their consequences were serious'.[36] The breaches 'went to the root of the contract' and therefore, as a matter of construction, they deprived Koompahtoo of a substantial part of the benefit for which it contracted.[37] These breaches were therefore such that termination was justified.[38]

B *Judgment of Kirby J*

Kirby J agreed with the majority judges that the appeal should be allowed, as the facts of the case supported the conclusion reached by Campbell J and that the Court of Appeal had 'erred in giving effect to the

31 *Koompahtoo* (2007) 233 CLR 115, 142.
32 *Koompahtoo* (2007) 233 CLR 115, 143.
33 *Koompahtoo* (2007) 233 CLR 115, 145.
34 *Koompahtoo* (2007) 233 CLR 115, 146.
35 *Koompahtoo* (2007) 233 CLR 115, 147.
36 *Koompahtoo* (2007) 233 CLR 115, 147.
37 *Koompahtoo* (2007) 233 CLR 115, 147.
38 *Koompahtoo* (2007) 233 CLR 115, 147.

contrary conclusion'.[39] Therefore, he agreed that the orders of Campbell J should be restored. However, Kirby J's decision is significant because he disagreed with the majority's acceptance of intermediate terms and proposed the application of a different taxonomy to determine when termination is justified.

Kirby J began by considering the judgments of Campbell J and that of the Court of Appeal, and he reached the same conclusions as the majority, that Campbell J's decision was made on the basis of sufficiently serious breaches of intermediate terms and that the Court of Appeal was wrong in deciding that Campbell J had decided on the basis of renunciation.[40]

Kirby J noted that the issue of whether Sanpine breached the Agreement or not was no longer in contention. He stated that there were 'two essential questions requiring resolution'.[41] The first question was concerned with determining what the principles of common law in Australia which govern the entitlement to terminate a contract for repudiation are.[42] The second question involved considering how those principles should be applied to the present case.[43]

Kirby J's analysis of the relevant legal principles began by identifying two different taxonomies as to the right to terminate a contract at common law, one contained in Carter's *Breach of Contract*[44] and the other in *Cheshire and Fifoot's Law of Contract* by Seddon and Ellinghaus.[45] Both recognize breach of essential terms and renunciation (where a party is unable or unwilling to perform) as giving a right to terminate.[46] Carter also claims that there is a right to terminate for a 'sufficiently serious breach of an intermediate term'.[47] The alternative formulation in the Seddon and Ellinghaus text states that a right to terminate will arise from a breach causing a substantial loss of the benefit of the contract.[48]

After identifying these two taxonomies, Kirby J expressed his first point of disagreement with the majority. He disagreed with adopting the test

---

39 *Koompahtoo* (2007) 233 CLR 115, 148.
40 *Koompahtoo* (2007) 233 CLR 115, 149-150.
41 *Koompahtoo* (2007) 233 CLR 115, 152.
42 *Koompahtoo* (2007) 233 CLR 115, 152.
43 *Koompahtoo* (2007) 233 CLR 115, 152.
44 John Carter, *Breach of Contract* (2nd ed, Lawbook Co Ltd: Sydney, 1991) 60.
45 N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, (8th Australian ed, Chatswood; NSW: Lexisnexis, 2002) 927.
46 Carter, above n 44, 60; Seddon and Ellinghaus, above n 45, 927.
47 Carter, above n 44, 60, cited in *Koompahtoo* (2007) 233 CLR 115, 153.
48 Seddon and Ellinghaus, above n 45, 927, cited in *Koompahtoo* (2007) 233 CLR 115, 153.

espoused by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,[49] with regard to breaches of essential terms as discussed above. According to Kirby J, this test requires looking at the intention of the parties, thereby introducing subjective considerations which are inconsistent with the modern approach to contract law.[50] Kirby J said that the preferable test is 'to inquire into the objective significance of breach of the term in question for the parties in all the circumstances'.[51] This is an objective test that can be applied to the facts. It does not require retrospective inquiries into what the parties may have thought when entering the contract. Kirby J also made the point that the actual consequences of a default that has occurred should not be taken into account in determining whether a term is essential.[52] The categories of terms would be meaningless unless they can be determined by some inherent characteristics, rather than the consequences of a breach.[53] This was the first part of the joint judgment with which Kirby J disagreed.

Kirby J then considered the second point on which he disagreed with the reasoning in the joint judgment. In regards to intermediate terms, he found that if a term is only categorized as 'intermediate' by evaluating the seriousness of the breach after it has occurred, the label is meaningless.[54] The label 'intermediate' is not assigned on the basis of inherent characteristics, which means that a court needs to adjudicate on the matter to determine whether they are non-essential or intermediate.[55] Kirby J therefore concluded that this classification was vague and confusing.[56] Kirby J also disagreed with the adoption of that classification for several other reasons, including that it does not have the weight of history on its side being a relatively new introduction to the law of contract,[57] that it is inconsistent with Australian legislation governing particular contracts,[58] and that it is not reflected in codifications of contract law in other common law countries.[59]

Kirby J then gave an alternative formulation where a right to terminate arises in respect of (1) a breach of an essential term, (2) a breach of a non-essential term causing substantial loss of benefit, or (3)

---

49 (1938) 38 SR (NSW) 632.
50 *Koompahtoo* (2007) 233 CLR 115, 155.
51 *Koompahtoo* (2007) 233 CLR 115, 155.
52 *Koompahtoo* (2007) 233 CLR 115, 155.
53 *Koompahtoo* (2007) 233 CLR 115, 155.
54 *Koompahtoo* (2007) 233 CLR 115, 156.
55 *Koompahtoo* (2007) 233 CLR 115, 156.
56 *Koompahtoo* (2007) 233 CLR 115, 156.
57 *Koompahtoo* (2007) 233 CLR 115, 156.
58 *Koompahtoo* (2007) 233 CLR 115, 157
59 *Koompahtoo* (2007) 233 CLR 115, 157.

renunciation.[60] So, unlike the majority, Kirby J found that there were only two types of contractual terms, essential and non-essential terms.

In applying the legal principles to this case, Kirby J found that the breaches by Sanpine were of 'substantial importance in the context of the agreement between the parties'.[61] Koompahtoo's reason for entering into the contract was to obtain the managerial expertise of Sanpine and the breaches were therefore related to the basis of entering the contract. However, Kirby J did not consider the terms breached to be essential terms because they could also have been breached in very minor ways.[62] Instead his Honour applied the second limb of his test, saying that these were breaches of non-essential terms which caused a 'substantial loss of benefit' and therefore still entitled Koompahtoo to terminate the agreement.[63]

VI Comments

This case has firstly drawn upon and clarified the important distinction between repudiation and renunciation. However, the more significant aspect of this case relates to the discussions on the different classifications of contractual terms, the endorsement by the joint judgment of *Hongkong Fir* and Kirby J's disagreement with this. As pointed out above, in their joint judgment, Gleeson CJ, Gummow, Heydon and Crennan JJ decided that the innocent party was entitled to terminate where there was a breach of a condition or where there was a sufficiently serious breach of an intermediate term.[64] The majority judges thought that this classification, in bringing greater flexibility to the law of contract than a system where termination was allowed only for breach of a condition, would thereby promote the interests of justice.[65] The tripartite classification was developed to overcome the perceived injustice of the strict distinction between conditions and warranties which existed at common law and was adopted by some statutes, particularly in the area of sale of goods. Whilst the attempt to overcome this injustice is a worthy goal, the classification adopted by the majority judges is not the best way to achieve that goal for the reasons explained below.

Firstly, it makes the process of determining under which category a

60 *Koompahtoo* (2007) 233 CLR 115, 159.
61 *Koompahtoo* (2007) 233 CLR 115, 160.
62 *Koompahtoo* (2007) 233 CLR 115, 160.
63 *Koompahtoo* (2007) 233 CLR 115, 160.
64 *Koompahtoo* (2007) 233 CLR 115, 136-138.
65 *Koompahtoo* (2007) 233 CLR 115, 139.

particular term falls much more complicated. If it is found to be non-essential, then the question must be asked whether it is an intermediate term, and if yes, it must then be considered whether the breach was 'sufficiently serious'. Kirby J's classification minimizes the steps necessary to determine whether termination is justified. Some have categorized the adoption of intermediate terms as 'convenient'.[66] However, in comparison to the model proposed by Kirby J, it is arguably a more complex and confusing classification.

Secondly, as indicated above, Kirby J proposed a simpler classification that involves only two types of terms. This type of classification is not totally without support.[67] For example, Andrew Phang advocates the adoption of a 'hybrid approach', which involves first asking whether the term is a condition and if not, then asking whether the breach confers 'the right to rescind the contract because the nature and consequences of the breach were substantial'.[68] This is essentially the same as Kirby J's classification. This approach also accords with that taken by Ormrod LJ in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*[69] that it should not be treated as involving a third category of terms.[70] The process proposed by Kirby J would be much faster and less confusing for all parties involved. If it is not an essential term, then the only remaining question is whether the breach caused a 'substantial loss of benefit'. The majority's approach favours flexibility above certainty.[71] Kirby J's approach maintains flexibility by allowing for termination for breaches of terms other than essential terms and achieves this in a clearer and more certain manner.

Thirdly, there arises a problem for parties to a contract in determining whether a term is intermediate or not. It can only be determined after a breach and the resulting consequences have occurred. This makes the label 'meaningless' as it is not assigned on the basis of the characteristics inherent in the particular term.[72] This means that there is no clear and predictable basis for separating 'intermediate' terms from non-essential terms without adjudication in a court.[73] A formulation that can only be resolved by resorting to the courts would not promote the interests of

66 Carter, Tolhurst and Peden, above n 27, 271.
67 Andrew Phang, 'On Architecture and Justice in Twentieth Century Contract Law' (2003) 19 *Journal of Contract Law* 229; Kanaga Dharmananda and Anthony Papamatheos, 'Termination and the Third Term: Discharge and Repudiation' (2008) 124 *Law Quarterly Review* 373, 377.
68 Phang, above n 67, 243.
69 [1976] QB 44.
70 [1976] QB 44, 84.
71 Borsky, above n 3, 70.
72 *Koompahtoo* (2007) 233 CLR 115, 156, (Kirby J).
73 *Koompahtoo* (2007) 233 CLR 115, 156, (Kirby J).

justice. Furthermore, a formulation that sacrifices certainty to provide flexibility also fails to promote the interests of justice.

It could be argued that it does not matter which approach is followed as they are likely to lead to the same result anyway. The majority's conclusion is in favour of Koompahtoo on the basis that the breaches 'deprived Koompahtoo of a substantial part of the benefit for which it contracted'.[74] Similarly, Kirby J found that the 'defaults deprived Koompahtoo of the substantial benefit of the Agreement'.[75] The two different classifications have led to the same result, with almost identical language being used. It is difficult to see how these two classifications would differ when applied to a particular case.[76] Kirby J also acknowledges that this might well be a terminological problem.[77] However more importantly, he notes that 'getting the classification right has significant implications for countless contracting parties and legal practitioners, as well as for trial judges'.[78] Although the practical result may be the same, it is important to express the classification in as clear a manner as possible and this is what the formulation espoused by Kirby J achieves. This view also finds support in the work of Seddon and Ellinghaus, who make the comment that

> [i]t is difficult to see the necessity for this innovation. What is really in issue in innominate term cases is the effect of the breach. Classifying the term in such a case is redundant and can only produce confusion.[79]

A final point to make is that the law in this area is by no means certain due to the judgment in *Koompahtoo*.[80] For example, the majority did not clarify the law as to the test for determining whether terms are essential or non-essential. Although they extracted the test from Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*,[81] it has been noted that there was 'a curious absence of reference to principles of interpretation'.[82] The majority judges concentrated only on the particular facts, not on elucidating the relevant law. The use of the word 'vital' when describing Koompahtoo's ability to make an assessment of the joint venture also demonstrates the lack of clarity in this area of law.[83] If the term breached is described as 'vital', which is very similar to being 'essential', it then makes it very difficult to determine the

74 *Koompahtoo* (2007) 233 CLR 115, 147.
75 *Koompahtoo* (2007) 233 CLR 115, 161.
76 Borsky, above n 3, 70.
77 *Koompahtoo* (2007) 233 CLR 115, 157-158.
78 *Koompahtoo* (2007) 233 CLR 115, 158.
79 Seddon and Ellinghaus, above n 45, 941.
80 (2007) 233 CLR 115.
81 (1938) 38 SR (NSW) 632.
82 Dharmananda and Papamatheos, above n 67, 375.
83 *Koompahtoo* (2007) 233 CLR 115, 147.

difference between a condition and an intermediate term. It has been suggested that the only solution to this persistent confusion and lack of clarity may be legislative intervention.[84]

Despite the fact that, on a practical level, there may not be much difference between the two classifications of terms raised in *Koompahtoo*, it is still important that the classification adopted be clear and easy to apply. It is therefore unfortunate that Kirby J was in the minority in *Koompahtoo* as Australian courts will continue to be bound by a more complicated and confusing classification of terms, although perhaps Kirby J's judgment may possibly lead the High Court to reconsider its position.

84 Jane Swanton, 'Discharge of Contracts for Breach' (1981) 13 *Melbourne University Law Review* 69, 88.