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# LAW & DISORDER

VOLUME 110 - November 2015

Contracts, Penalties and John Fytit's New Book

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For further information on the events, book launch or other matters referred to in this ezine please go to [www.lawanddisorder.com.au](http://www.lawanddisorder.com.au).

The Law & Disorder eZine attempts to provide legal information in an entertaining and amusing manner to help clients avoid predictable legal issues.



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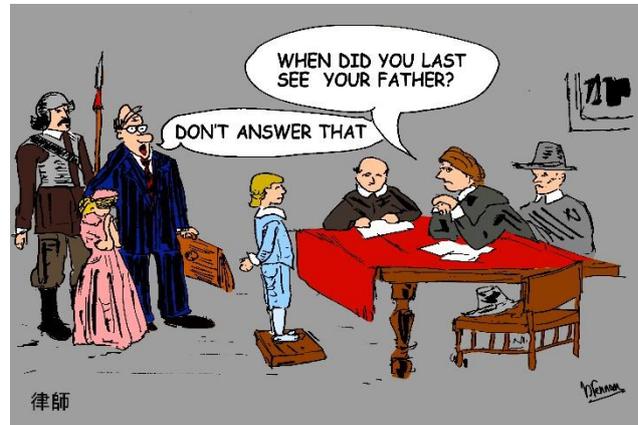
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## Contracts - Terminate or Wait?

The trouble with entering into a contract (e.g. to buy property) is that it is human nature that no sooner do you get in than you, or maybe your spouse, want to get out. But the law will not let you do so easily as commerce requires certainty. So you are stuck, and it is at that stage you ask your lawyer to look carefully at the contract to see if it is watertight.



The terms of a contract can be divided into two types:

1. Non-essential terms otherwise called warranties. The court will order damages to compensate you rather than allow you to walk away. Therefore, small breaches by the other party are not much help in getting out of a contract.
2. Essential terms otherwise called conditions or material terms. For instance, a conditional contract where you need to be satisfied as to finance or due diligence within 14 days. However, essential terms (even where the contract is marked "time of the essence") are divided into yes you got it - two types:
  - a. Where substantial performance is sometimes acceptable e.g. The seller does not have a copy of a stamped lease at completion.
  - b. Where they must be strict compliance e.g. for handing over the money on time. Having established over the centuries a hard line on time being of the essence and that is that, the courts have been beset by reasons where they should relax their decision e.g. accident, surprise or mistake. Or a harsh or unfair outcome, such as the receipt by the vendor of an unmerited windfall or unconscionability (meaning foul play not just criminal). Lawyers have worked hard to create exceptional circumstances where the court has reluctantly given some flexibility. For instance, a short delay if your lawyer misses the bus and is late for the completion. Lawyers get less leeway in commercial matters where they are expected to have their own car.

Therefore, you cannot throw a fit and terminate a contract for some minor breach unless being fussy is reasonable in the circumstances.

## Penalty - A Bad Word



In Shakespeare's Merchant of Venice, Shylock insisted on a pound of flesh as it was the penalty upon which Antonio had agreed if he defaulted on his debt. In that case, there was some fancy footwork by a lawyer and Shylock lost out.

The general rule is that the court will make you stick to contractual agreements. If courts interfered with stupid bargains, then commerce could be much reduced.

But the court will not allow you to go overboard and agree on a penalty that is extravagant, unconscionable and out of proportion to the loss suffered e.g. a pound of flesh. At the time of entering into the contract, any agreed damages for default must seem a genuine pre-estimate of loss, commercially justified and intended to compensate rather than reward.

For instance, when you buy a house the deposit is ten per cent of the purchase price. If you do not go ahead, you lose the deposit. But if, in the circumstances, it seems over-generous, the court could allow less e.g. you did not need to pay an estate agent again, or advertise, or incur other costs of selling a house.

Here are matters the court may take into account:

1. The bargaining strength of both parties.
2. The level of sophistication of the parties.
3. The information available to the parties at the time contract was entered into.

The court will look for substance over form, so it should not matter how your lawyer dresses it up.

The clause will be struck out to the extent it is a "penalty" (meaning unreasonable). However, you can still sue for damages for the genuine amount of loss.

Shylock ended up being forced to convert to Christianity, was fined half his wealth and reduced to a life share in the other half. Shylock was unrepresented.

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## New Book - I'll Have the Law On You

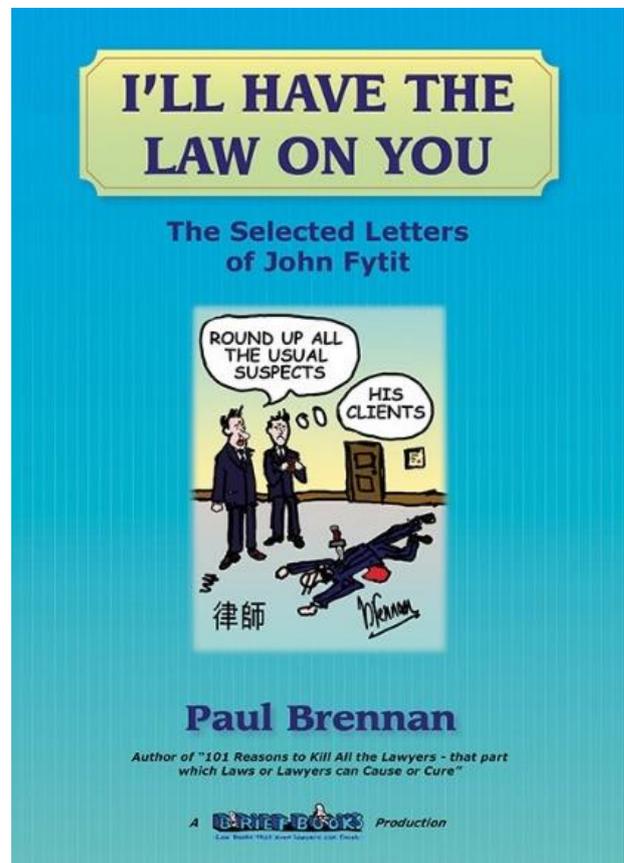
This is the first major edition of John Fytit's\* works and is as close as we will come to the autobiography that he never wrote.

Readers of his legal advice column will have followed Fytit's journey from embittered sole practitioner to liberated and unrestrained legal adviser.

His thirty years' experience in legal misfortunes equipped him to give the public the legal advice they truly desired.

Variously known as a Legal Agony Aunt and Legal Agony Ombudsman, his ambition to be a Legal Agony Commissioner was cut short.

\*Pronounced "Fight it" and not "Fit it".



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### Disclaimer:

The content of the Law & Disorder eZine is to give you legal basics and in some instances included unashamedly to try and make you laugh. In law it is sometimes difficult to work out what is serious and what is just for fun. Therefore, if you plan to do anything legal, rely on your own lawyer's advice or instruct me to look at the particular facts of your case. Not only will I deny responsibility for the legal content but also for some of the jokes.



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