

Week 6 – Contract performance and breach

Performance of a contract

Duties of performance arise from the creation of a contract containing particular terms.

These terms give rise to legally enforceable obligations (rights and duties).

The performance of contractual duties discharges them.

Effect of performance

Voluntary performance discharges the obligation. When all the obligations are discharged, the contract is at an end.

Failure to perform voluntarily is a breach of contract.

Breach of contract does not discharge the contract – the obligations remain in existence and can be enforced by means of legal action. Sometimes a court may order that ‘**specific performance be carried out**’. However, the ordinary remedy for breach of contract is payment of **damages** instead of performance. In certain circumstances, you may also be given the right to **terminate** the contract. These remedies discharge the outstanding obligations.

Excusing performance

Performance of contractual promises is required unless the court excuses performance on the basis that performance is impossible.

- (1) Initial impossibility. If a promise is impossible from the outset it does not create enforceable obligations – e.g. the sale of a non-existent thing (unless the court interprets the contract to include a promise by the seller that the thing in fact existed).
- (2) Supervening impossibility/Frustration: When performance is initially possible but changed circumstances then make it impossible (or fundamentally different from what was originally envisaged) the situation is described as ‘supervening impossibility’.

If it can be inferred from the circumstances that the contracting parties have assumed the risk of changed conditions, they remain bound by the contract and must pay damages for non-performance even if circumstances change to make performance impossible.

The contract is said to be **frustrated** when

- The changed circumstances render the situation radically different from that at the time of formation; *and*
- If it cannot be inferred from the circumstances that the parties have assumed the risk of changed circumstances; *and*
- The party seeking relief is not responsible for the changed circumstances; *and*
- It would be unjust in the new circumstances to enforce the agreement

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982)

Contract; performance; frustration; discharge by frustration

Facts: Codelfa Construction agreed to build two tunnels in Sydney for the State Rail Authority for an agreed price. When contracting, both parties believed that nothing could prevent construction from continuing 24 hours a day. However, high levels of noise disturbed the local residents, who placed an injunction limiting the hours of work. Having to do work slowly would cost Codelfa extra money.

Issue: Had performance of the contract become frustrated by the changed circumstances in which construction now had to take place?

Decision: In a majority decision, the court held that performance as originally agreed had been frustrated.

Reason: it was clear from what was said when negotiating the contract, the both parties believed Codelfa would be able to work continuously. The unforeseen injunction made performance possible only in a way that was fundamentally different than what was originally contemplated.

Week 7 – Remedies for breach of contract

Types of remedies

- Common law remedies
 - Damages to compensate for loss
 - Terminating the right to perform.
- Equitable remedies
 - Specific performance
 - Injunctions
- Statutory remedies

For example, the sale of goods legislation of the states and territories sets out the remedies available in the event of a breach of the terms implied by that legislation into a contract for the sale of goods.
- Agreed remedies

Agreed terms of the contract regarding remedies

Choosing a remedy

The party suing is entitled to specify what particular relief they want. Sometimes this is a combination of remedies, such as terminating performance and also claiming damages. Sometimes a plaintiff asks for alternative remedies, e.g. specific performance, or if the judge is not willing to grant this, then argue in the alternative for damages

The nature of the performance owed may affect the remedies available.

- In some contracts, performance is a 'one-off' event, such as delivering a particular thing that has been bought and sold.
- In other contracts, performance is agreed to take place on a number of occasions over a period of time, e.g. when services of a particular type are to be performed each month for a year. These can be called 'on-going agreements'.

Damages for breach of contract

Damages are the 'ordinary' remedy for breach of contract. Damages consist of an award of money to be paid by the defendant to the plaintiff.

Damages for breach of contract are not intended to be punitive; they are compensatory. They compensate for a loss suffered by the plaintiff because of the defendant's breach of contract.

If the plaintiff's financial position after the breach is worse than it would have been had the contract been performed, there is a loss.

Damages aim to put the plaintiff in the same position as if the contract had been properly performed.

Week 8 – Vitiating factors (factors that invalidate contracts)

Behavioural imperatives in legal transactions

The law does not allow certain types of conduct, e.g. behaviour that is contrary to good conscience. If a legal transaction (including a contract) is entered into in such circumstances, it may be treated as void, or declared void by a court, even if the formal requirements of that transaction are satisfied.

A legal transaction is said to be '**void ab initio**' when the attempt to create it has no legal effect.

A legal transaction is said to be '**voidable ab initio**' when a valid transaction is initially created, but a court sets it aside as from its beginning. The word 'vitiating' is sometimes used to describe a contract that is made void.

If a legal transaction is void ab initio, or after it is set aside as void ab initio, the parties must be restored to their pre-contractual position. This is done by reversing any performance that was made. This process is called **restitutio in integrum**.

In Australian law, the validity of a legal transaction can be affected by any of the following circumstances:

1. Duress

Duress exists when one party uses, or threatens to use, unlawful force or harm to obtain the other party's agreement.

The force or harm may be physical harm to the person; or economic harm; or illegal actions over their goods (such as refusing to return goods).

The force or harm may be directed at the contracting party themselves, or to members of their family/very close to the contracting party.

If illegitimate pressure is used to get consent, the contract comes into existence, but can be set aside as void by the court if the person who was forced acts **within a reasonable time** of the duress subsiding.

2. Mistake

A mistake is a misapprehension of facts. A mistake might prevent the parties from reaching sufficient consensus to create a valid contract.

Mutual mistake:

There is a mutual mistake when the parties have different subjective understandings of their contractual rights/obligations. The agreement is judged objectively – what would a reasonable person conclude from the external evidence?

Bilateral (common) mistakes occur when both contracting parties make the same mistake, for example:

- Both parties assume the subject matter exists when it does not
- Both parties wrongly assume a seller owns the subject matter
- Both parties are mistaken about the identity or quality of the subject matter of the contract

If it can be inferred that **the agreement was intended to be conditional on the truth of the assumption**, the contract is voidable in common law: otherwise the contract remains valid in common law.

If a mistake is made as to the quality of the thing contracted for (as opposed to its identity, existence or ownership) the contract is only made voidable if the error 'makes the thing contracted for essentially different from the thing that it was believed to be'.