

## Module 1 – GRAW [15.10] – [15.250]

### Discharge by Performance

#### 15.1 How Contracts may be discharged

- “Discharge” simply refers to the process whereby a valid and enforceable contract is ended, thereby releasing parties to it from all further obligations to perform. Contracts can be discharged in five ways:
  - By Performance.
    - The basis of discharge by performance
      - When parties enter into a contract it is because they want to achieve certain mutual end aims.
    - Performance must be exact
      - While the above seems to flow quite logically from the nature of a contract, there is one important qualification – generally, PERFORMANCE MUST BE EXACT. Each party’s performance must be exactly what was required by the contract. IF IT IS NOT EXACT, the party whose performance falls short of what was agreed will not be entitled to demand that the other party perform his or her part of the bargain.
    - The Potential for injustice
      - The requirement that performance be exact can generate unfair results, especially where the substandard performance is the result of something outside the control of the defaulting party.
        - Demonstrated in *Cutter v Powell* (1795) 6 TR 320; 101 ER 573.
    - Exceptions to the rule
      - Exact Performance is subject to five exceptions:
        - Several contracts
          - The contract in *Cutter v Powell* (1795) 6 TR 320; 101 ER 573 was what is called an “entire” contract – unless each party performs his or her obligations under it in full, the other party cannot be forced to do what he or she agreed to do in return. Must be distinguished from what are called “severable” or “divisible” contracts.
          - A severable contract is one that clearly indicate that some performance less than the whole contracted for may give the performing party some right to demand at least part of the agreed return performance. As a rule, it is presumed that contracts are not severable.
        - The de minimis rule
          - Occasionally, a party can fall short of exact performance by an insignificant margin. ‘THE LAW DOES NOT CONCERN WITH TRIFLES’, and it allows courts to disregard trifling departures from a

contractual obligation. Consequently, parties whose performance falls slightly short of perfection will not be affected by the shortfall

- Shipton, Anderson & Co v Weil Bros & Co [1912] 1 KB 574

○ Substantial performance

- Where there has been substantial performance of the agreed obligation, although not enough to activate the de minimis rule, the defaulting party may still be permitted to retain and enforce all the rights conferred by the contract.
- Effectively, the substantial performer gets the right to enforce the contract and the innocent party gets damages as compensation for the fact that performance is not exact. It gives a similar response to the doctrine of substantial performance.
  - Hoenig v Isaacs [1952] 1 All ER 176
- The critical prerequisite for the doctrine to operate is that actual performance must be substantially which was agreed. The restriction on the operation of the doctrine is illustrated in
  - Bolton v Mahadeva [1972] 1 WLR 1009

○ Acceptance of partial performance

- The rule that performance must be exact is really for the benefit of the party who is to receive the benefit of that performance.
- In this way both parties are satisfied; the partial performer need no longer meet the original obligation, the other party gets a performance which, although less than that originally contracted for, is still acceptable, and the lesser benefit received is reflected by a reduction in the reciprocal obligation.
- **MUST RESULT FROM A FREE AND WILLING AGREEMENT.**
  - Sumpter v Hedges

○ Obstruction of performance

- Can take one of two forms:
  - Prevention of Performance
    - When one party prevents performance, the other may regard the contract as at an end, will be released from further obligation and may sue for either damages or on a quantum meruit (if performance for an “entire” contract had commenced but had not been

completed at the point of obstruction).

- Refusal of Tender of Performance
  - Refusal of tender of performance is similar to prevention of performance. The difference is that, one party is not prevented from performing – the other party simply refuses to accept the proffered performance
    - Startup v Macdonald (1843)
  - Where tender would be futile
    - A useful extension of the tender rule is that if one party intimates to the other that it is pointless to tender performance (usually because it will not – or cannot – be accepted), performance need not actually be tendered before the rule takes effect.
    - Innocent party is therefore absolved from further liability to perform and can immediately enforce the reciprocal obligation.
      - Mahoney v Lindsay (1980) 33 ALR 601
  - Tender of Payment
    - There is one major exception to the rules regarding tender outlined above – tender of payment. Where one party is required to pay money, tender occurs by the debtor offering the exact amount due.
- Other Considerations
  - Situations where performance is required within a given time.
    - Contracts often stipulate a time by which performance is to occur.
    - If the purchased price on time, can the vendor automatically refuse to sell the property?
    - Stated succinctly, the applicable rule is this – at common law stipulations as to time are always “of the essence”, in equity they are not. There are three exceptions:
      - The contract expressly makes time “of the essence”
      - The subject matter is such that the parties must have intended time to be of the essence.
      - Although time may not have been of the essence in the contract as originally agreed, one of the parties has made it so by serving a valid “notice to complete”.

- Four requirements for a valid notice to complete:
  - The recipient of the notice should already be in default;
  - The party giving the notice should be ready, willing and able to complete;
  - The time stipulated by which performance is required must be reasonable; and
  - The notice must leave the recipient no doubt that performance is necessary.
- Situations where personal performance appears necessary.
  - When A engages B to perform some task, can B delegate it to C? Clearly, if A was aware that this was B's intention, there can be no grounds for complaint. But even if it wasn't the case, this would be allowed UNLESS the contract expressly or impliedly forbids such vicarious performance.