

## LECTURE 1:

### DISCHARGE BY PERFORMANCE (CH 22 / CH 38 pg 756-767)

#### Main objectives:

- The significance of the fact that a contract has been 'discharged'
- How a contract can be 'discharged' by 'performance' and what constitutes performance?

#### The meaning of 'discharge'? ( pg 436 – 441)

Meaning that one party is excused from further performance of his or her obligations under a contract, nothing more legally than the party is required to do. Can be discharged by performance of the promises made or because something has happened that discharges the obligation. 4 types:

1. Discharge by performance
2. Discharge by agreement (ch 23)
3. Discharge by breach by one of the parties (ch 24)
4. Discharge by frustration (ch 25).

It is often a question of intention (and thereby construction to work out the parties intentions) however the resolution of the issue is a point of law.

#### Time for performance:

The time for performance of the contract is governed by the contract – whether its an essence of the contract is a question of interpretation.

*Bunge Corporation New York v Tradax Export – time obligations are governed by the contract, whether the time limit is an essence of the contract is a question of interpretation – “to be late ...what importance did the parties expressly ascribe to this consequence? ...in the absence of an expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole?”*

*Handley v Gunner – reasonable timeframe is an empirical generalisation. Need to look at the circumstances not at the time of the contract but at the time when performance ought to have taken place or whee the party demanding the performance asserts it should have taken place.*

*Reid v Moreland pg437 – reasonable timeframe – an obligation to perform within a timeframe will only occur if a timeframe has been stipulated and expressly agreed upon. Otherwise it must be looked at with the benefit of hindsight.*

*Electronic Industries v David Jones – coal strike meant a delay in the agreed timeframe for the demonstration to occur within David Jones, was agreed to delay for 4-6 weeks to allow for the strike to be over etc. No variation to the contract was made – the original contract was still operative. Sued for damages – argued they had agreed to remove the time frame. Held: High court - both parties remained bound by the original contract, there was a duty to comply with the reasonable requests from the other party, the plaintiff should have made his store available within a good and proper timeframe, what is reasonable depends on all the circumstances including the nature and purpose of the express stipulations.*

When a party fails to perform in accordance to the time stipulation the innocent party can recover losses for damage suffered as a result of that breach (*Canning v Temby*) however whether the innocent party can also terminate the contract for breach of a time stipulation depends upon the classification of that time stipulation (see 24.36-24.47).

NOTE: the argument if there is no time specified that can be implied or inferred for performance then the party that does not perform will NOT be in breach. See *Electronic Industries v David Jones* who argued this and lost! Generally the court will impose a reasonable time frame when no specific time agreement have been made, which makes common sense.

## **The order of performance of contractual obligations: 22.12**

Performance orders are usually made as part of the terms of the contract, however if they are silent on this it is a question of construction to ascertain the intentions of the parties to determine which obligations are to be performed (*Burton v Palmer*).

Courts distinguish between independent and dependant obligations. Historically they have always been seen as independent unless words expressly linked the obligations however, recently this has changed courts are more practical and less likely to presume a presumption of interdependency – today the presumption is that the obligations are dependant in character (22.13).

Dependant obligation – A's obligation to perform will be dependant upon performance by party B, unless the parties have agreed to perform concurrently. Eg employment contracts (employers obligation to pay is dependant on employees performance of the work required, if the employee does not perform then the employer is not obliged to make payment *Automatic Fire Sprinklers v Watson*.

Concurrent obligations – eg sale of land vendors / bank need to perform their obligations concurrently.

## **Co-operation, Good faith and performance:**

One party's ability to perform its obligations under a contract will depend on the co-operation of the other party in carrying out its own obligations (see *David Jones*). It may be that the co-operation is expressly provided for, parties will have to co-operate to fulfil their obligations this is in order to perform. If such an obligation is not expressed then it may have to be implied:

*Secured Income Real Estate v St Martins Investment* – written contract – “the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect”.

*Butt v M'Donald* – “a general rule applied to every contract that each party agrees by implication, to do all such things as are necessary on his party to enable the other party to enjoy the benefits of the contract”.

## **Prevention of performance:**

A party preventing the other party from performing will often discharge the contract. A contract may contain an express term to that effect, the courts will find that there is an implied term to this effect – *CSS Investments Pty Ltd v Lopiron Pty Ltd*. 2 ways for contractual obstruction:

1. Prevention of performance
2. Refusal of tender of performance.

## **The level of performance required for the discharge of a contract: (pg441-447/ 756-765)**

Where both parties have performed their obligations a contract is discharged by performance. A 'party' is discharged once they have completed their obligation. The parties must perform their obligations EXACTLY as required by the contract.

*Arcos Ltd v E A Ronaansen & Son* – confirmed the strictness of the exact obligations rule – lord Atkin stated: “if the written contract specifies conditions...those conditions must be complied with...the conditions of the contract must be strictly performed”

Performance by payment of money must be in legal tender. Discharge by performance, the key