

LAW OF CONTRACT II

– DISCHARGE –

1.1. Discharge by Performance

A contract can be discharged by each party having fulfilled all of its **primary** obligations; **secondary** obligations, which regulate the parties' conduct following a breach, will survive the discharge of the primary obligations.

- a) For a conditional and dependent contract to be discharged by performance, it must be determined whether
 - a. The obligation is **entire** (literal) or **divisible** (lenient)
 - i. If the obligation is **entire** as a matter of construction – meaning complete performance is a condition precedent to enforcement – then the party in breach may not recover the contract price
 1. *Cutter v Powell*¹, *Sumpter v Hedges*²
 - ii. If the obligation is **divisible**, payment obligations arise, and become enforceable, upon performance of each part of the contract
 1. *Government of Newfoundland v Newfoundland Rail Company*³
 - b. **Exact** or **substantial** performance is required
 - i. **Exact** performance is required to discharge a contract, unless it can be shown that, as a matter of construction, it is clear that the parties agreed that **substantial** performance would be sufficient
 - ii. The **Substantial Performance Doctrine** provides that, even where a party provides *imperfect* performance they shall have the right to recover the contract price, if they have provided **substantial performance**
 1. Courts will prefer to interpret contract terms so that the contract price can be recovered for substantial performance – however cannot overcome an unequivocal agreement that performance must be exact
 - a. *Hoening v Isaacs*⁴, *Jacob & Youngs v Kent*

¹ *Cutter v Powell* – Cutter employed as second mate for 30 guineas, provided he “proceeds, continues and does his duty”. Cutter died before completing journey. Widow sued Powell for *quantum meruit*, unsuccessful. Held that completion of the *whole* journey was a ‘condition precedent, without performing which the defendant is not liable’.

² *Sumpter v Hedges* – Sumpter employed to build house, was forced to abandon halfway due to financial troubles. Held that ‘where there is a contract to do work for a lump sum, until that work is completed the price of it cannot be recovered.’

³ *Gov. v Newf.* – Company was contracted to construct and work 100 miles of railway in Canada. Only 17 five-mile sections (85 miles) were completed. Held that ‘[T]he contract is not so framed as to make the grants of land dependent in any way on the completion of the whole line... as each of those sections was completed the right to 25,000 acres of land became perfect’. With regard to the subsidy, implausible to construe right accruing only upon completion. The ‘provision with regard to five-mile sections [had] the effect of relaxing the extreme stringency’ of the contract, so that upon completion of each 5-mile stretch, 1/68th of the whole subsidy became payable. Claim for subsidy could be set off against claim for damages for Company’s non-completion.

⁴ *Hoening v Isaacs* – Hoening employed to perform decorative work for Isaacs’ apartment. £750 to be paid ‘net cash, as the work proceeds and balance on completion’. Isaacs paid £400 but refused to pay balance on the

2. Was the performance **substantial**?
 - a. Nature and seriousness of the defects
 - i. *Hoening v Isaacs*⁵
 - ii. *Bolton v Mahadeva*⁶
 - b. Cost of the defects or omissions versus the contract price
 - i. *Hoening v Isaacs*
 - ii. *Jacob & Youngs v Kent*⁷
- iii. If there is found to be **substantial performance** the performing party recovers the contract price subject to a set-off for the rectification cost; however, if the 'cost of completion is grossly and unfairly out of proportion to the good to be attained' the measure is the difference in value
 1. *Jacob & Youngs v Kent*
 2. *Hoening v Isaacs*

ground that work done was defective. Was completion a condition precedent to payment? Held that 'when a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions'.

⁵ *Hoening v Isaacs* – Only £55 to repair (7%), compared to £750 price. Failures did not go to the root of the contract, entire performance was not a condition precedent of enforcement, 'unless the breach does go to the root of the matter (like abandonment halfway through), the employer cannot resist payment of the price.' Must bring about cross-claim for the defects or set them up in diminution of the price. Measure is amount the work is worth less, usually calculated by the cost of making them good.

⁶ *Bolton v Mahadeva* – Bolton installed a combined heating and domestic hot water system. Work was improperly done. Bolton sued for £636, cost of rectification was £174. Held that primary obligation had not been substantially performed. Costs of remedying defects were 25-30% of the contract price, furthermore the defects were significant in nature: the heating was generally ineffective in its primary purpose.

⁷ *J&Y v Kent* – Plaintiff built country home for D for app. \$77 000. Contract specified Reading pipe would be used – in honest error it was not. No loss of value to home, replacement cost significant. Held the defect was trivial and insignificant, there was no explicit entire performance clause, court leant against imputing existence of entire obligation: 'there will be no assumption of purpose to visit venial faults with oppressive retribution'. The measure to offset damages from the contract price was the diff. in value rather than cost of replacement.

1.2. Discharge by Mutual Consent

Discharge by Contract

- a) A contract may be extinguished by a further contract
 - a. *McDermott v Black*⁸
 - i. Requires valid consideration

Discharge by Abandonment

- a) A contract is discharged by abandonment where both parties treat the contract as at an end
 - a. *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*
 - i. There must be clear intention to abandon the contract, and the intention must be objectively manifested
 - 1. *CGM Investments Pty Ltd v Chelliah*⁹
 - ii. Courts will rarely infer abandonment

Discharge by Discretionary Termination Provisions

- a) Contracts can confer a discretionary right to terminate, which confers an unconditional or unfettered power to terminate a contract
- b) Not unlawful, but may be subject to different common law rules which restrict their use, and statutory rules that regulate unfair provisions

Discharge by Failure of a Non-Contingent Condition

Parties may agree that, upon failure of a condition, the contract is to be discharged. If satisfaction of the condition is beyond either party's control, discharge is **automatic**. If satisfaction of the condition is within a party's control, discharge/termination may be **elective**.

- a) Contracts may terminate as a result of non-fulfilment of contingent condition. Depending on construction, the right to terminate may be conferred upon one or both the parties
 - a. *Perri v Coolangatta Investments Pty Ltd*¹⁰
 - i. Termination may arise upon proof that the specified event, which neither party has promised will occur, has not occurred within a specified time, or if not specified, within a reasonable time

⁸ *McDermott v Black* – Plaintiff was induced by fraudulent misrepresentation into a purchase. P withdrew allegations in return for a three-week extension. D agreed. Deadline passed, P refused to complete, and D terminated the contract. P then sued for damages in tort (for deceit). Cause of action failed. Valid consideration.

⁹ *CGM v Chelliah* – Finkelstein J: 'the question whether a contract has been abandoned does not require one to examine whether the parties actually had the intention of abandoning the agreement; only whether their conduct, objectively viewed, manifests that intention.'

¹⁰ *Perri v Coolangatta Investments* – Plaintiffs owned Lilli Pilli, wanted to buy from D a Cronulla property. SC6 stated the contract was entered into subject to purchasers selling Lilli Pilli. D pressed for sale and attempted to terminate on August 8. Sought court declaration they had terminated. P waived condition in Feb next year and sought specific performance. Held it was not a condition of contract formation, rather one of performance, and thus implied obligation to complete sale of Lilli Pilli within reasonable time. D able to terminate after reasonable time had elapsed.