

Chapter 8

Performance And Breach Of Contract

- Discharge of contract: when all terms have been performed, end of contract
 - Usually discharged by voluntary performance (can legally force 'specific performance')
 - Or by remedy (compensation, payment of damage)
 - Or 'excused' – situation doesn't allow performance so seen as discharged
 - Or by rights to terminate contract (non-breaching party can immediate end)

- **Types of Breach**: failed to perform as promised (obligation not discharged)

⇒ can bring legal action=sue or remedies for breaching

⇒ **Non-performance**: total failure to do anything

-time arrives and nothing at all is done; or performance has no relation to what required

-if breach of condition, non-breaching party can immediate terminate

-if breach warranty, pay for damage, continue to be bound

- **Varley v Whipp [1900] 1 QB 513 (p. 170)**

⇒ **Partial performance**: less than complete performance

treat same as non-performance

- if breach of condition, non-breaching party can immediate terminate
- if breach warranty, pay for damage, continue to be bound

⇒ **Substantial performance**: close to complete performance that non-defaulting party receive substantial benefit

- If breach of condition is minor, though still breach of condition, performance cannot be rejected/terminated by non-breaching party

- Only target to loss from the breach

Depends on different situation:

- **Steele v Tardiani (1946) 72 CLR 386 (p. 170)**
- **Hoenig v Isaacs [1952] 2 A11 ER 176 (p. 171)**
- **Connor v Stainton (1924) 27 WALR 72 (p. 172)**

⇒ **Late performance**: perform at incorrect time even willing to perform

- If breach of condition: can terminate
- If breach of warranty: can claim damage but still need to pay
 - **Holland v Wiltshire (1954) 90 CLR 409 (p. 173)**

⇒ **Anticipatory breach (Repudiation)**: breach before due of promise, one party expresses that will not perform

- **Hochester v De la Tour (1853) 1 CLR 846; 118 ER 922 (p. 174)**

- If one party allege another breach this way it requires solid evidence, otherwise is the party is repudiating the contract (one party wants to terminate but blame the other to escape)

- Consequences: depends on

- 1) that term is 'condition/fundamental' or 'warranty' (importance of term)

Based on importance of term:

- Breach of condition
- Breach of warranty
- Breach of an innominate term

- 2) breaching effect on plaintiff (if serious, then same as breach of condition)

- **Cehave NV v Bremer Handelsgesellschaft mbH [1976] QB 44 (p. 197)**
- **Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61 (p. 198)**

- Divisible contract: one can be divided into two/more contracts, help to minimize loss

- contracted for single thing in business sense
- perform/enforce independently (not agreed conditionally or dependent on smth)
- breach one doesn't affect the other

For example, perform contract in diff time period

- **Phillips v Ellinson Brothers Pty Ltd (1941) 65 CLR 221 (p. 168)**
- **Government of Newfoundland v Newfoundland Railway Co (1888) 13 App Cas 199 (p. 169)**

- Interpreting terms

- Give words ordinary, natural meaning

- **Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310 (p 164)**

- Intention of parties: asks third party about intentions of parties

- **Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310 (p 164)**

- Give commercial meaning, if contract is commercial in nature, but cannot object to natural meaning

- Not looking at post-contract behavior in interpretation as parties may change behavior to influence meaning of terms

- **Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310 (p 164)**