

# SAMPLE ONLY

## PART THREE – TERMINATION

### Breach and Frustration

“Discharge” is process whereby a valid and enforceable contract is brought to an end, thereby releasing the parties to it from all further obligation to perform.

#### Contracts can be discharged in five ways:

1. By **performance**: when all the duties required in the contract are performed by all the parties, the contract comes to an end. It is called discharge by performance.
2. Through **breach**: when one party violates the conditions of lawful contract it is called breach of contract. When there is a breach by one party the other party gets a right not to perform his obligations it may also take action against the other party who has failed to perform.
3. Through **frustration**
4. By **agreement** between the parties
5. By **operation of law**: if any contract is declared void by law, then the parties involved are discharged from the liabilities of the contract.

Unless one of these occurs, the contract remains on foot and its obligation can be enforced by either party. However, if the contract is brought to an end, the parties' consequential rights, duties and liabilities vary according to the type of termination.

### A. The order of performance

Determining the order of performance (i.e., which party performs their obligations under the contract first) is a question of construction of the contract.

In every contract, there must be receipt of the bargain, therefore, it is necessary to decide who has to perform first. The Courts will construe the contract according to the objective intention of the parties, namely:

- **Dependent obligations**: those which are not required to be performed until the other party has performed their obligations.
- **Independent obligations**: those which must be performed regardless of the performance of the other party.
- **Concurrent obligations**: where performance of obligation occurs simultaneously.

**Automatic Fire Sprinklers Pty Ltd v Watson (1946) HCA**

Facts: Watson worked as a GM of Automatic Fire Sprinklers Pty Ltd and was dismissed. Watson continued to present himself to work even though there was no work for him to do since he had been dismissed and excluded from the company's offices. Court was asked whether he was entitled to salary.

Principles:

- Employer's obligation to pay is dependent on the employee's obligation to perform his tasks.
- If an employer wrongfully dismisses an employee and refuses to allow further performance of services, i.e., a breach of contract, the effect at common law is to terminate the contract of employment and to confine the employee to remedies in damages.

Reasoning: Since the employee was not given any work and therefore did not complete any tasks he was not entitled to any pay – therefore the salary was a price for the transfer of services.

The employee's remedies in the case of an ineffectual dismissal included a right to salary during the period where the employee continues to offer performance of employment because the employer's obligation to pay depends on the employee's obligation to perform his tasks.

*Case also discussed that in situations of contracts for sale of goods, where a buyer refuses to accept the goods, seller cannot sue for price as the price is only paid for the goods and not the promise to provide the goods, until they are accepted there is no indebtedness.*

*Suggested that parties can expressly convey that payment is to be made at a certain time irrespective of transfer of goods, in which case claim for payment can be made.*

*In respect to instalment payments for sale of land, instalments are paid for the promise to convey land and only the last instalment is paid for the actual conveyance of land.*

**B. 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 damages for the breach occasioned by the wrongful prevention;
- Sue for damages on a **quantum meruit** if the performance of an "entire" contract had commenced but had not been completed at the point of obstruction.

Refusal of tender of performance

Where a party cannot perform without the co-operation of the other, a tender (or offer of performance) is sufficient to make the other party liable. The offer to perform is treated as equivalent to performance to the extent that the party refusing to co-operate will be liable in damages.

## C. Discharge by performance

*What performance is sufficient to discharge the parties?*

### i) Entire contracts

An entire contract is one in which the parties have agreed, expressly or impliedly, that complete performance by the promisor, is a **condition precedent** to the enforcement of the contract, i.e., **performance must be exact.**

Where A's obligation to perform is dependent on B completely performing his or her obligations, B will not be discharged until he or she has completely performed and cannot call upon A to perform. Principles:

- A contractual obligation arises only when the other party has fully discharged their contractual duties (**Cutter v Powell**)
- Part contractual performance by promisor does not oblige the promisee to pay for the part of the contract that the promisor has performed (**Sumpter v Hedges**)
- Recovery will be refused even if the promisor has an excuse in respect of the failure of the condition precedent (**Cutter v Powell**)
- 'Exact performance' exceptions: **substantial performance** & **severable contracts.**

#### ★Cutter v Powell (1795) UK

Facts: Cutter signed a contract to be the second mate on a ship sailing from Jamaica. The contract stipulated that he would be paid 30 guineas "provided he proceeds, continues and does his duty...to the port of Liverpool". Three quarters of the way through the voyage he died. His wife sued for a proportionate share of his wages on a quantum meruit. Her action failed for Cutter's contract was "entire".

Principles:

- Where a contract is entire and the condition precedent has not been fulfilled, the contract price will not be recoverable.

Reasoning: Under the doctrine of entire contract, recovery will be refused even if the promisor has an excuse in respect of the failure of the condition precedent

#### ★Sumpter v Hedges [1898] UK

Facts: The plaintiff contracted to build two houses and stables for the defendant for \$565. When the houses just over half completed, the plaintiff ran out of money and abandoned the job. The defendant then completed the work. The plaintiff sued for payment for what he had done.

Principles:

- Part contractual performance by promisor does not oblige the promisee to pay for the part of the contract that the promisor has performed.

Reasoning: If no new contract can be inferred from the mere fact (i.e., it is an entire contract) and the defendant does not restrict or prevent performance, a plaintiff who has done part of what was required by the contract but who has not completed performance because of some personal breach cannot usually recover either damages or a quantum meruit, even though the defendant may take the benefit as an unjust enrichment.

The contract is an entire contract, the employer will not be happy with partial performance because the benefit received is not intended to be half built houses. Therefore, if you do not get the benefit that you have requested there is not a legal benefit.

# CONTRACTS NOTES

## LAWS5002 Semester One, 2016

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