English Law of Contract: Discharge

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What is discharge?

• Discharge
  – Discharge = when rights and duties agreed in contract come to an end.
  – Discharge means that parties’ primary obligations under contract cease, but secondary obligations persist: see analysis by Lord Diplock in *Photo Production v. Securicor Transport* (1980).
  – Four ways for discharge to occur:
    1. Performance
    2. Breach
    3. Agreement
    4. Frustration
Discharge by performance (1)

- Disputes can arise over whether parties have performed their duties under the contract. Courts have developed various rules/doctrines to determine whether performance has occurred.
- General rule = performance obligation is strict (see “entire performance rule” below). Sometimes, though, performance obligation is qualified. No requirement to achieve guaranteed result, only to exercise reasonable care and skill.
Discharge by performance (2)

- **Entire performance rule**
  - Performance must match exactly that required by contract; if not, party does not have to pay for part-performance. Contracts for sale of goods treated as requiring entire performance, as are contracts for relatively small domestic building/renovation tasks.
  - This rule has some advantages …
  - … but also potential for injustice.
    - See e.g. *Cutter v. Powell* (1795); *Re Moore & Co. Ltd. and Landauer & Co.* (1921).

- **Mitigation of entire performance rule by the following …**
Discharge by performance (3)

• **Substantial performance**
  – The party who has substantially performed that required by contract, albeit with small discrepancies/defects, may claim for work done minus money spent by other party to patch up defects. Doctrine established by Lord Mansfield in *Boone v. Eyre* (1779).
  – Only applies in case of breach of warranty or innominate term amounting to warranty; not breach of condition.

• **Severable contracts**
  – If the contract can be divided into several stages where payment is due at the end of each stage, the price for each stage completed can be claimed even if subsequent stages not completed. Most employment contracts are severable, as are many large building contracts.

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Discharge by performance (4)

• Voluntary acceptance of partial performance
  – A party may agree to accept the other party’s part-performance. Agreement can be inferred from circumstances. Party who partially performs, may claim cost of such performance on quantum meruit basis.
  – Agreement to accept partial performance will only be inferred if the other party had genuine choice of accepting partial performance or not. See e.g. Sumpter v. Hedges (1898).

• Prevention by one party of the other party’s performance
  – If one party performs some of the agreed obligation but is then prevented from completing the rest due to the other party’s fault, the cost of work done can be claimed on quantum meruit basis.

• Rejection by one party of the other party’s offer to perform
  – If one party offers to perform (“tenders performance”) but the other party rejects this offer (tender), the tendering party is relieved from any further obligations and can claim damages for breach of contract. However, if the object of tender is money (as opposed to goods), rejection of tender does not extinguish the debt.
Discharge by performance (5)

- Delay in performance
  - The effect of delay in performance depends on whether the time of performance is “of the essence” for contract. If yes, any delay may permit termination of the contract; if not, termination only permitted if delay = substantial failure in performance and/or leads to frustration of contract (under normal rules on frustration – see below).
  - Time may be of essence if:
    1. Parties expressly stipulate this, or
    2. It is inferred from the nature of the contract, or
      - Contracts for sale of fresh fruit and vegetables will typically be contracts where time is of the essence. Also the case with charterparties (e.g. Mihalis Angelos). Cf contracts for sale of land (Law of Property Act 1925 s.41) and long-term leases (United Scientific Holdings Ltd. v. Burnley Borough Council (1978)).
    3. Appropriate notice is given by one party to the other party, e.g. situation in Oppenheimer case.
      - If contract fails to specify time for performance, performance is normally to occur within reasonable interval.

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Discharge by performance (6)

- Vicarious performance
  - Performance of one party’s contractual obligations by someone else (at request of that party) may usually be permitted unless this detrimentally affects interests of other party.
  - Vicarious performance not allowed if special reliance placed on skill or judgement of the party – the case, e.g. with many employment contracts and contracts with artists.
  - Contracts specifying that “every care will be exercised” in carrying out obligation concerned, will tend to prohibit, by implication, vicarious performance. See e.g. *Davies v. Collins* (1945).
  - If vicarious performance allowed, original contracting party still liable for performance. See e.g. *Stewart v. Reavell’s Garage* (1952).
Discharge by breach (1)

- Two main types of breach:
  - Actual
  - Anticipatory

- Both give rise to the right to discharge/terminate if sufficiently serious ("repudiatory breach").

- NB: Distinguish from rescission (rescission *ab initio*).

- NB: Breach need not result in termination/discharge: injured party could *affirm* contract or could ask for an order for specific performance.
Discharge by breach (2)

• **Actual breach:**
  – Situation of actual failure by a party to fulfill its obligations under the contract.
  – This will only lead to discharge if condition is breached or there is breach of an innominate term with serious consequences. Concomitantly, if the breach is only of a warranty, then the party can only sue for damages.
Discharge by breach (3)

• **Anticipatory breach (repudiation) (1)**
  - Indication by party that they will breach the contract in future: “intimation of an intention to abandon and altogether refuse performance of the contract … [or of ] an intention no longer to be bound by the contract” – Lord Coleridge in *Freeth v. Burr* (1874).
  - Indication may be express or implied. When implied, inference must be **reasonable**. The test is **strict**: conduct must clearly give the impression that the party is renouncing all important obligations under contract.
  - Finding implied repudiation can be difficult – e.g. with respect to instalment contracts to be performed over long period. Frequent failure to observe payment deadlines for batches of regularly delivered goods, will not necessarily amount to repudiation. See e.g. *Decro-Wall International SA v. Practitioners Marketing Ltd.* (1971).
Discharge by breach (4)

• **Anticipatory breach (repudiation) (2)**
  – Repudiation may be implied even if the repudiating party believes they are acting in conformity with the contract:
    • “if a party’s conduct is such as to amount to a threatened repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions”: Lord Wilberforce in *Federal Commerce and Navigation Co. Ltd. v. Molen Alpha Inc.* (1979).
  – However, if the party **mistakenly** believes it is **exercising a right under the contract**, it may not **necessarily** be treated as repudiating the contract. See *Woodar Investment Ltd. v. Wimpey Construction UK Ltd.* (1980).
  – Possible tension bw *Molen* and *Wimpey* arguably resolved by Privy Council in *Vaswani v. Italian Motors (Sales and Services) Ltd.* (1996). PC held that “if conduct relied on went beyond the assertion of a genuinely held view of the effect of the contract, the conduct could amount to repudiation. This is the position **if the conduct is inconsistent with the continuance of the contract**” (*per* Lord Woolf).
Discharge by breach (5)

- **Anticipatory breach (repudiation) (3)**

  - Anticipatory breach may lead to discharge and right to sue for damages for losses incurred. Discharge/termination does not necessitate particular form of communication from the injured party to the repudiating party, but there must be clear and unequivocal conveyance to latter that the injured party is treating the contract as ended: *Vitol SA v. Norelf Ltd (The Santa Clara)* (1996) *per* Lord Steyn. Mere failure to act will *often* – but not *always* – be insufficiently clear and unequivocal.

  - Right to sue for damages arises **immediately on discharge**; it is not necessary for aggrieved party to wait until time of performance due under the contract. See e.g. *Hochster v. De La Tour* (1853).

  - This ability to sue immediately has been explained on the basis that repudiation is not breach of repudiating party’s principal obligations to perform under the contract but is breach of *implied* term not to prevent the other party from being able to comply with its obligations under contract.
Discharge by breach (6)

- **Anticipatory breach (repudiation) (4)**
  - The right to treat the contract as repudiated is not lost by mere lapse of time. But note estoppel problem if lengthy wait → prejudice to breaching party.
  - If aggrieved party decides to keep the contract alive (affirmation), the contract is kept alive for the benefit of both parties.
  - Note possible problems for the affirming party as exemplified in *Avery v. Bowden* (1855).
  - NB: Decision to affirm contract or accept repudiation is final. Cf. *Stocznia Gdanska SA v. Latvian Shipping Co. (No. 3)* (2002) – case may be different if repudiation continues.
  - NB: Affirmation of contract will often not be possible because of lack of co-operation by repudiating party. But sometimes contract may be kept alive even if repudiating party refuses to co-operate, and affirming party may continue to perform their side of bargain and later sue for damages. See *White and Carter v. McGregor* (1962). This will now only be permitted where (i) co-operation from repudiating party is not necessary for affirming party’s continued performance; and (ii) affirming party has legitimate interest in continuing performance.
Discharge by agreement

- Parties can agree to discharge the contract
  - Agreement can lead to “bilateral” discharge (both parties benefit from discharge) or “unilateral” discharge (only one party benefits). The former pertains when neither party has yet performed their contractual obligations; the latter pertains when one party has performed its obligations and the other party seeks discharge.
  - The agreement must be supported by valid consideration and conform to any relevant form requirements.
  - Consideration usually is not a problem with respect to bilateral discharge, but can be issue with respect to unilateral discharge. In the absence of a deed, the party seeking unilateral discharge must provide fresh consideration (“satisfaction”) for the other party’s discharge agreement (“accord”).
Discharge by frustration (1)

- If an event occurs after the contract is entered into which makes performance impossible, and the parties are not at fault, contract is “frustrated” and thereby discharged.
- NB: Frustrating event must be subsequent to contract formation.
- Modern doctrine of frustration emerged from Taylor v. Caldwell (1863).
- Rationale for doctrine? Compare “implied term” theory, “just solution” theory and “construction” theory.
Discharge by frustration (2)

- Three main types of events which amount to frustration:
  1. Event makes performance **impossible**;
  2. Event makes performance **illegal**;
  3. Event makes performance **pointless**.

- Re (1), impossibility may be because of:
  - Destruction or unavailability of something essential for performance – e.g. music hall in *Taylor v. Caldwell*.
  - Death or illness or other unavailability of either contractual party (assuming that personal performance required).
  - Stipulated method not possible to use – see e.g. *Nickoll and Knight v. Ashton Edridge & Co.* (1901).

- The fact that performance is more onerous or costly than envisaged is not sufficient to frustrate contract:
  - “It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for” (Lord Radcliffe in *Davis Contractors v. Fareham* (1956)).
Discharge by frustration (3)

• Does English law also operate with *impracticability* as opposed to *impossibility* as a valid criterion for frustration? Generally not.

• Re (2), the contract will be frustrated if, subsequent to formation of the contract, the law changes to make its performance illegal. See e.g., *Fibrosa Spalka Akeyjina v. Fairbairn Lawson Combe Barbour Ltd.* (1943).
Discharge by frustration (4)

• Re (3), see the famous “coronation cases”: *Krell v. Henry* (1903) and *Herne Bay Steam Boat Co. v. Hutton* (1903).

• Basic point again is that if party makes a bad business deal, this of itself will not necessarily mean that contract is frustrated. See also *Amalgamated Investment & Property Co. Ltd. v. John Walker & Sons Ltd.* (1977).

• Frustration doctrine may be be inapplicable if:
  - Contract specifically provides for event concerned;
    • This will typically be the case with “force majeure” clause. However, provision of such a clause may not be sufficient to make frustration doctrine inapplicable if supervening event causes frustration by making performance illegal.
  - Event was foreseeable;
    • If e.g. contract made at time when price of raw materials being traded is volatile, assumption that the parties foresaw price increases, but no clear case law on point. Foreseeability rule does not apply if frustrating event is wartime restriction on trade with enemy.
  - Event was the fault of one of the parties.
    • See e.g. *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* (1935) and *The Super Servant Two* (1990).
Discharge by frustration (5)

- **Legal consequences of frustration**
  - Contract terminated from when frustrating event occurs; obligations cease to exist from that point, but contract not treated as void *ab initio* (cf. mistake).
  - **Liability** for resulting losses under **common law** is traditionally that “*loss should lie where it falls*”. Rule slightly ameliorated in *Fibrosa* case (see above) – money recoverable if no consideration provided for it; if party who had received money provided some consideration, none of money recoverable.
  - **Statute** has amended this approach. See **Law Reform (Frustrated Contracts) Act 1943**, s. 1(2) (obligations to pay more) and s. 1(3) (obligations other than money payment). Latter section still does not resolve all problems: What = “valuable benefit”, particularly regarding provision of services? What of recovery of expenses for work done but where no valuable benefit arises?
Discharge by frustration (6)

- **Legal consequences of frustration (cont.)**
  - See *BP Exploration v. Hunt* (1979) per Robert Goff J.: valuable benefit will often not be the provision of services but end result of the services. A sensible approach?
  - Another hole left by the statute is when party incurs expenses prior to frustrating event but contract does not specify advance payment; if no valuable benefit can be said to have been provided, the party is stuck with its loss.
  - Moreover, the statute does not apply to contracts of insurance, contracts for sale of specific goods which are frustrated by the goods perishing, or contracts for carriage of goods by sea, or most other charterparties.