



**Miles and Dowler, *A Guide to Business Law 21st edition***

**Study Aid – Chapter summaries**

**Chapter summary – ch 15 – discharge of contracts and remedies for breach of contract**

1. “Discharge” means “release from a contract”. If a party is discharged, that party does not have to do anything else under the contract. A contract may be discharged in a variety of ways.
2. Discharge by performance (full).
3. Discharge by part-performance.
4. **Discharge by agreement.** Parties are generally free to negotiate whatever contract they want. Sometimes the contract itself may contain terms to specify when it will come to an end (be discharged).
5. **Discharge by subsequent agreement.** After a contract has been made, the parties may agree to discharge or vary their contractual obligations by negotiating another agreement. The parties can discharge or vary their original contract in a variety of ways:
  - **mutual discharge:** where both parties agree not to proceed with their obligations;
  - **release:** where one party releases the other from further performance;
  - **novation:** where one party to a contract is replaced by someone else;
  - **merger:** where a lesser agreement, such as a simple contract, is swallowed up by a later and greater agreement, such as a deed, containing similar terms;
  - **accord and satisfaction:** a new agreement to replace another that prevents a breach of contract; or
  - **waiver:** where an agreement is altered to the benefit of only one party.
6. **Discharge by operation of law.** In some situations, a contract may be discharged by the operation of legal rules beyond the control of either party, including:
  - material alteration of a written contract without consent;
  - bankruptcy;
  - the death of a party (in some situations); or



- merger.
7. **Discharge caused by breach of contract.** Breach of a condition discharges the innocent party from the contract if that party wishes. If a party to a contract breaches a warranty (a less important promise) of the contract, the other party must proceed with the contract but has the right to sue for damages. Breach of a warranty does not allow the innocent party to treat the contract as discharged.
  8. **Discharge by frustration.** Sometimes after a contract has been formed by the parties something might occur that is outside the control of the parties and that makes performance of the contract either impossible or substantially different from what the parties agreed upon. This is called “frustration”: see *Davis Constructions Ltd v Fareham Urban District Council*.
  9. Frustration may occur as a result of various intervening events, including:
    - **change of law:** (illegal purpose) (see *Fobrosa v Fairbairn*);
    - **destruction of subject matter** (see *Taylor v Caldwell*);
    - **contracts of personal service:** in a contract for personal services, the death or illness of, or injury to, the performer will frustrate the contract;
    - **failure of the purpose (condition) of the contract** (see *Krell v Henry*); or
    - **intervention from outside sources:** see *Czarnikow Ltd v Rolimpex* and *Codelfa Constructions v SRA*.
  10. **Limits to frustrating events.** There may be no frustration if the agreement provides for it occurring: see *Claude Neon v Hardie*. There may be no frustration if the event was caused by either party. There may be no frustration if the event was foreseeable and the parties failed to make adequate provision for it: see *Davis Contractors v Fareham*.
  11. **Common law consequences of frustration.** At common law, existing obligations to the time of frustration continue, while obligations arising after the frustrating event disappear. Sometimes the effect of frustration was unfair because a party may have paid money or delivered goods prior to the frustrating event and could not recover that benefit. The common law might allow recovery of money or goods if there was a total failure of consideration by the party receiving payment or goods.

Equity also allowed a plaintiff to recover money for the work performed or goods supplied up until the frustration occurred under the principle of “restitution”, ie to prevent a party in a contract being unjustly enriched at the expense of the other party.
  12. **Frustration and statute law.** The *Frustrated Contracts Act 1978* (NSW) corrects any injustice arising from frustration. The Act allows for the court to make orders about:



- repayment of money paid prior to frustration (s 12);
  - payment of money for any benefit received under the contract;
  - payment of any reasonable costs in performing the contract; and
  - discharge from promises made but unperformed because of frustration: s 7.
13. **Exclusion/limitation clauses.** An exclusion clause is a clause that excludes the liability of one party for a breach of contract or for other wrongful acts. A limitation clause limits liability to specified amounts.
14. An exclusion/limitation clause may be enforced if it forms part of the contract. There are several recognised ways for this to happen:
- it is contained in a signed agreement (see *L'Estrange v Graucob*);
  - reasonable notice has been given to the other party before the making of the contract (see *Thornton v Shoe Lane Parking* and *Toll v Alphapharm*);
  - where the parties had numerous previous dealing with each other on the same basis (see *Balmain Ferry v Robertson*); or
  - any onerous/unusual clause must be fairly and reasonably brought to the others attention: see *Interfoto v Stiletto*.
15. An exclusion clause will be interpreted contra proferentum. If the wording of the exclusion clause is very broad, unclear or ambiguous the courts will interpret any ambiguity or lack of clarity against the party in whose favour the clause is written. This means that the court will use its best endeavours to interpret the exclusion clause against the party seeking to rely upon it: see *Sydney City Council v West* and *TNT v May & Baker*.
16. **Effect of statute law on exclusion clauses.** The Sale of Goods Acts and the *Trade Practices Act 1974* (Cth) will not permit many of their implied conditions and warranties to be excluded in consumer transactions. The new national consumer laws have the same effect. Similarly, the *Contracts Review Act 1980* (NSW) will allow a court to review and set aside any unfair or harsh contract and this would include contracts containing unfair exclusion clauses.
17. **Remedies for breach of contract.** A remedy in contract law means some legal redress for an innocent party who has suffered some injury or loss because a contract has been broken. Remedies are available under common law and equity and in recent times statutes such as the *Contracts Review Act 1980* (NSW), the *Trade Practices Act 1974* (Cth) and the State and Territory Fair Trading Acts and the new Australian Consumer laws (ACL) allow various remedies for breach of contract and other improper /unfair /unconscionable conduct.
18. **Repudiation or rescission.** Where an important promise (a condition) in a



contract is broken, the innocent party can choose to repudiate the contract (treat it as finished) and claim damages. A court may also grant rescission (termination) of a contract where there has been a serious breach.

19. **Damages.** When a party breaks an important promise or essential term in a contract (a condition) the innocent party may terminate the contract and/or claim damages. Where a party breaks a less important promise or non-essential term in a contract (a warranty) the innocent party may claim damages but is unable to terminate the contract as the breach is not as serious. “Damages” is the main remedy at common law when a contract is broken. Damages is simply the payment of money as a method to compensate for losses caused by the broken contract.

20. **Amount of damages.** We can distinguish between:

- **general/ordinary damages:** the normal measure in damages. An amount of money to place the plaintiff in the position they would have been in had the contract been fully performed as intended (see *Sovereign Motor Inns v Bevillesta Pty Ltd*);
- **nominal damages:** where a breach is proved but the plaintiff is unable to prove any losses. An amount may be ordered to be paid to recognise that a breach of contract has occurred (see *Charter v Sullivan*);
- **exemplary damages:** where a sum is awarded in excess of actual losses as a means of punishing a party who has deliberately broken a contract (not normally found in contract law); and
- **liquidated damages:** in contract law more properly called “agreed damages”. The parties agree on a fixed sum in the event of a breach. If the court accepts the amount as a genuine pre-estimate of losses that would be caused by the breach, then this amount is paid on breach of contract. If not, the court may treat the agreed damages as a penalty clause and strike it from the contract and proceed to decide the amount of damages in the usual way.

21. **Rules as to damages.**

- The purpose of damages is to put the innocent party in the position in which he or she would have been if the other party had not broken the contract.
- The plaintiff must prove a causal connection between the breach of contract and the losses/injury (causation).
- Not all damages (losses) are paid for. The losses must have been reasonably foreseeable. The plaintiff can only expect damages that the defendant should have reasonably foreseen as arising from the breach of contract (see *Hadley v Baxendale*) or when the defendant had been informed about their likely occurrence: see *Victoria Laundry v Newman Industries*.



- The plaintiff must do what is reasonable to mitigate (lessen or reduce) losses.
- Generally at law, the plaintiff cannot recover non-economic losses arising from a breach of contract. These would include claims for humiliation, embarrassment, disappointment and distress. The courts make an exception in limited situations, such as travel cases: see *Jarvis v Swan Tours* and *Baltic Shipping Co Pty Ltd v Dillon*.

## 22. Types of damages that are recoverable.

**Liquidated damages:** where the parties have assessed and agreed on the amount of damages to be paid in the event of a breach: see *Wallis v Smith*. The contract normally has provision for the payment of a specified amount and provided it is a genuine pre-estimate of loss and not a penalty, it may be enforceable.

**Unliquidated damages:** those that a court must determine are due and payable by the defendant for breach of contract: see *Victoria Laundry v Newman Industries*.

**Expectation damages:** in *Hadley v Baxendale*, the plaintiffs sought to recover profits that they had expected to earn during the period their mill should have been operating with the new crankshaft. In *Victoria Laundry v Newman Industries*, the plaintiffs sought to recover profits expected from the ordinary laundry business had the boiler been properly installed as promised by the defendants.

**Reliance damages:** in *Commonwealth v Amann Aviation*, the plaintiff was able to recover large amounts of money spent in buying and fitting out planes in reliance on the contract with the Commonwealth.

**Indemnity damages:** to compensate for actual losses and not to make a profit.

**Restitution damages:** see *Acme Office v Ludstrom*.

**Non-economic losses (emotional injury):** see *Baltic Shipping Co Pty Ltd v Dillon*.

23. **Equitable remedies:** include specific performance, injunction rectification and restitution.

24. **Specific performance:** the court may order a party to specifically perform a contract, ie to carry out contractual promises. It is a common remedy in contracts for the sale of land or personal property that is rare or unique: see *Micos Constructions v Lamont* and *Dougan v Ley*.

The court will not grant specific performance:

- in a contract for the sale of personal property (chattels), unless they are



special, unique and essentially irreplaceable;

- in a contract for personal services (see *Lumley v Wagner*);
- where damages are regarded by the court as an adequate remedy;
- where the outcome would require continual supervision by the court (see *JC Williamson v Lukey*);
- if there is undue delay;
- where the plaintiff is not ready willing and able to complete; or
- if the plaintiff is blameworthy.

25. **Injunctions:** an order by a court for someone not to do something or to cease doing something. It is a remedy available in all civil actions; it can also be used to restrain a breach of a contract: see *Lumley v Wagner*. Although courts are reluctant to grant specific performance in contracts of personal service they may grant an injunction to prevent a party working elsewhere: see *Warner Bros v Ingolia* and *Curro v Beyond Productions*.

26. A special type of injunction called a “Mareva injunction” may be available to stop the removal or disposal of property involved in a legal dispute: see *Mareva Compania v International Bulk Carriers*.

27. An Anton Piller Order is an equitable remedy designed to protect/preserve evidence. It allows entry into premises of a potential defendant to carry out inspection of records and documents and collection of evidence, eg the seizure of copyrighted videos or DVDs to be used as evidence in later court cases.

28. **Rectification (equity):** where the parties have reached agreement and have agreed to put the agreement in writing, the court can rectify (correct) the written document if it records the agreement incorrectly or does not correctly identify what the parties actually agreed upon. Under common law and equity the powers of the court to rectify a contract are limited: see *Maralinga v Major Enterprises*.

**Restitution (equity):** to “give back” or “compensate”. The modern law of restitution is founded on the concept of “unjust enrichment”. The remedy tries to restore some equality between the parties by requiring the defendant to return the benefit or provide something of value.

29. The courts will allow restitution in a number of situations, including:

- to allow recovery of moneys paid where there has been a total failure of consideration;
- to provide relief against forfeiture, eg losing a deposit;
- in claims for quantum meruit (meaning payment in proportion to work done).



A good example of the use of quantum meruit can be seen in contracts involving supplying labour and materials (*Pavey & Matthews Pty Ltd v Paul*);

- to allow recovery of money paid under a mistake of fact or law (see *David Securities Pty Ltd v Commonwealth Bank of Australia*); or
- to permit the recovery of money/property paid under a contract unenforceable by statute law or under some mistake: see *Pavey & Matthews Pty Ltd v Paul*.

30. **Promissory estoppel:** to “stop” a “promise” from being broken. Equity may prevent a defendant from breaking a promise where it would result in significant hardships to the person relying on that promise and it would be unfair and against good conscience in all the circumstances: see *Central London Property Trust v High Trees House Ltd*.

In addition, it was accepted as a method of commencing legal action (a sword) and not simply as a device to defend a case (a shield). Promissory estoppel has been successfully used in *Commonwealth v Verwayen* and *Horsman v Commissioner of Main Roads*, but not every claim is successful: see *Sullivan v Sullivan*. The important case of *Waltons v Maher* established the elements required.

31. **Time limits on damages and other remedies:** under the *Limitations Act 1969* (NSW) and similar statutes in several other States:
- the plaintiff must sue for breach of a simple contract within six years of the breach or lose the remedy; or
  - the plaintiff must sue for breach of a formal contract within 12 years of the breach or lose the remedy.

32. There is no statutory period for equitable remedies but generally, equity requires legal proceedings to have been commenced within a reasonable period of time after the breach as laches (delay) will prevent equity granting relief.

33. **Damages in equity:** may be awarded in addition to or in substitution for any equitable remedy. Under the *Supreme Court Act 1970* (NSW), the NSW Supreme Court has authority to award damages to a party injured by breach of contract either in addition to or as a substitute for specific performance or injunction.