

## **DISCHARGE AND BREACH AND CONTRACTUAL REMEDIES**

### **Discharge by Performance**

- **Discharge by Performance** occurs when the parties have fulfilled their contractual obligations.
- Occasionally a party may be discharged from further contractual obligations once it has provided **substantial performance**: performance that is defective or incomplete in a minor way.
- Under substantial performance, the non-performing party is not required to pay for work that is not completed.

### **Discharge by Agreement**

- **Discharge by Agreement** occurs when either or both parties have the right to discharge the agreement without the agreement of the other.
- There can be a conditional subsequent that requires discharge after a certain event occurs.
- If the contract is executed on one side, rescission may not be possible due to a lack of consideration.
- **Release** is an agreement under seal to discharge a contract (the seal acting as a substitute for consideration).
- **Novation** is a process for the discharge of one contract and its replacement by another.

### **Discharge by Law**

- A contract automatically terminates at the moment of frustration.
- The limitation by statute requires any legal action for breach of contract to commence within a prescribed period of time (in Ontario, the time is two years).
- A bankrupt person is discharged from contractual obligations.

### **Discharge by Breach of Contract**

- A breach occurs when a party to the contract does not perform as required.
- However, not every breach results in discharge.
- A **breach of condition** occurs when an innocent party is substantially deprived of an expected contractual benefit.
  - The innocent party may terminate the contract and claim damages.
  - Alternatively, they could continue the contract and claim damages for the loss.

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- A **breach of warranty** occurs when an innocent party is not substantially deprived.
  - The innocent party must continue to perform its obligations.
  - It may also claim only for damages arising from the other party's breach.
- The distinction is determined by **practical effect**, asking whether the failure to perform the obligation deprived the other party substantially of the whole benefit it intended to obtain from the contract.
  - If the answer is yes, then it is a condition.
  - If the answer is no, then it is a warranty.
- The types of breach include:
  1. **Defective Performance**: Failure to perform a contractual obligation.
  2. **Deviation**: Failure to act precisely as required by the contract.
  3. **Anticipatory Breach**: Indication by a party that it does not intend to fulfill a contractual obligation.
  4. **Self-Induced Impossibility**: Performance of the contract is rendered impossible (frustrated) by the actions of one of the parties.

### Contractual Remedies

- Remedies for a breach of contract may be broadly categorized as **money** (compensatory damages) or **performance** (specific performance).

### Damages

- **Damages** are an award of money to the innocent party calculated to “cure” the breach of contract by the other party.
- **Expectation Damages** are calculated as the monetary value of the benefit the innocent party was to receive under the contract.
- Expectation damages are forward-looking, intended to place the innocent party in the position it expected to be in if the contract was performed.
- **Remoteness** occurs when the innocent party cannot claim damages that are too remote from the breach.
- Damages are remote if the party in breach did not know or should not have reasonably known that they may arise from its breach of contract.
- **Reliance Damages** restore the non-breaching party to its pre-contractual position and are used if a court cannot calculate expectation damages.
- **Account of Profits** are damages measured by the gain wrongfully obtained by the breaching party rather than the loss incurred by the innocent party.
- Under account of profits, the breaching party must discharge the benefit it obtained.

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- **Nominal Damages** are awarded when a breach of contract does not cause any provable loss to the innocent party and serves as a symbolic reward.
- **Liquidated Damages** are contracted-for damages that the parties agreed to in the contract that would be awarded in the event of a breach.
- **Punitive Damages** are awarded by the court to punish a breaching party, and are awarded in addition to any other damages.

### Specific Performance

- **Specific Performance** is an alternative to damages.
- The relevant factors are:
  1. The conduct of the innocent party (it must have “clean hands”)
  2. Fulfilling the contract must not cause unfair hardship to the breaching party
  3. Damages would not provide an adequate remedy
  4. It will not be awarded where it requires ongoing judicial supervision
  5. It will generally not be awarded to enforce personal service
- An **injunction** is an order by the court that a party not do something that is prohibited by a contract.