

Lesson Seven

Discharge of Contracts

7.1 Methods of Discharging Contracts

There are 4 methods of discharging contractual obligations namely:

1. Discharge by performance
2. Discharge by agreement
3. Discharge by impossibility or frustration
4. Discharge by breach.

7.2 Discharge by Performance

This is the commonest way of discharging a contractual obligation. It means that the parties have dutifully carried out all their contractual obligations. The basic rule here is that the parties must perform their obligations in exact accordance with the agreed terms of the contract. The contract must be performed at the time and place agreed to. If no time was agreed, then it must be performed within a reasonable time, and what is reasonable will obviously depend on the circumstances of each case. When a specific time or date is mentioned, then it is said that time is of essence in the contract, and completion in accordance with the time becomes a condition going to the very foundation of the contract.

7.3 Discharge by Agreement

Since a contract comes into being by agreement, the parties may if they wish discharge their agreement by another agreement. If the contract is executory, each party releases the other from performing. In that way each has given consideration for the other namely the release and the second agreement discharges the first agreement.

7.3.1 Waiver

Waiver means a voluntary intentional abandonment of a known right. Waiver is essentially unilateral resulting as a legal consequence from some act or conduct of a party against whom it operates and no act of the other party in whose favour it is to operate is needed to complete it.

7.3.2 Variation

A simple contract whether in writing or not may be varied by a subsequent agreement either oral or written. But a contract which is required in law to be in writing must be varied by writing, i.e. if there is a variation of the original intention of the parties, it creates a new and independent contract. Writing is not needed provided the new contract is not one which is by law required to be in writing.

7.4 Discharge by Impossibility or Frustration

If further fulfilment of the contract is brought to an abrupt end by some irresistible and extraneous cause for which either party is responsible the contract terminates forthwith and the parties are discharged from their obligations.

In other words frustration occurs when the law recognizes that without the fault of either party, a contractual obligation has become impossible of being performed because the circumstance in which performance is called for would render it radically different from that which was undertaken by the contract.

Frustration therefore is always brought about by an event which occurs subsequent to the formation of the contract. Therefore frustration only discharges the parties from the moment of the frustrating event and all the obligations which were due to be performed before the frustrating event are completely discharged.

Frustration could be due to the fact that the subject matter of the contract has been destroyed before performance falls due or because an event has failed to occur.

7.4.1 Government Intervention or Supervening Illegality

If government rules and obligations or enactments prevent one party from fulfilling his obligations the contract is frustrated. This is especially important in cases concerning imports and exports. Also, where performance of a contract would amount to dealing with an enemy, the contract is frustrated.

7.4.2 Effect of Frustration

Both parties are released from further obligations once the frustration event occurs. Any money paid out can be recovered from the party to whom it was paid. Any money yet to be paid ceases to be payable. This is the position in the former Eastern and Northern States of Nigeria. In Lagos, former Western and Mid Western states the position is that

1. Any money paid out can be recovered from the party to whom it was paid and that person need not be a party to the actual contract.
2. Any money to be paid ceases to be payable.
3. If the party to whom the money was paid to or to whom it was owed had incurred expenses before the date of discharge in furtherance of the performance of the contract then, such expenses can be paid for.
4. If one party has gained an advantage under the contract before the frustrating event for e.g. by way of part-performance, then the court can at its own discretion order payment to be made by the party under contract.

7.5 Discharge by Breach

Where one party fails to perform his obligations or performs them in such a way that does not correspond with agreement, the innocent party is entitled to a remedy and the remedy will obviously depend on the type of breach committed. As a general rule, in all cases, the innocent party is entitled to claim damages except in cases of fundamental breach or repudiation. In this situation, the innocent party can regard the contract as discharged and thereby he is freed from performing his own obligation.

7.5.1 Fundamental Breach

In order to decide whether there was a fundamental breach one has to decide whether it was a condition or a warranty that was breached. As a general rule, a breach of a condition allows the innocent party to treat the contract as discharged, whereas a warranty, if broken only attracts only an award of damages. The basic rule is that if a breach goes to the root or foundation of the contract and affects its commercial liability it is said to discharge the contract.

7.5.2 Repudiation or Renunciation

This occurs when one party either expressly or impliedly intimates or shows that he will not honour his obligations. This can happen at the time performance is due or before the time of performance. When prior warning is given that the obligation will not be performed, it is called *anticipatory breach*.

7.6 Exemption or Exclusion Clauses

These terms are used to describe an attempt by one party to a contract to insert terms excluding or limiting liability, which would otherwise be his. The justification for their use is that both parties are free to negotiate whatever conditions they like. If a condition is harsh or unfair, then the other party can reject it. It is quite obvious, therefore, that this is based on the fiction of freedom of contract.

7.6.1 Signed Documents

A person, who appends his signature to a document, in this case a contract, is presumed to have read it and is therefore bound by its contents. It is no defence to say that one did not read it or that it was not understood or that the print was too small. The party signing is equally liable if he signed a document in confirmation by reference to another document containing the exemption clause.

However, if the signing party can prove that the contents of the document were badly misrepresented to him, then such a clause would be struck out by the court.

See the Case of Curties v. Chemical Cleaning and Dyeing and Co. (1951).

The plaintiff took a wedding dress to the cleaners. She was asked to sign a document and on asking what it was all about, she was told that it excluded the company's liability for damage done to sequins and beads. In fact the clause excluded liability from any damage howsoever caused. She signed the document without reading it. The court held that she was not bound by her signature because the shop assistant had given her a verbal explanation amounting to a misrepresentation.

7.6.2 Unsigned Documents

Where the document is not signed, a different consideration would apply. In cases in which the contract is say a ticket or other unsigned documents, it is necessary to prove that an alleged party was aware or ought to have been aware of its terms and conditions. In other words, where the document is unsigned the question to be answered is whether or not the exclusionary terms are part of the contract. In order to decide this point, one has to determine whether sufficient notice was given to the other party regarding the

exclusionary terms or whether from the course of dealing he might to have known of the terms. Even where the Court decides that the exemption clause has been brought to the notice of the contracting parties, it may still nullify its effect when it comes to interpreting such a clause.

There are 2 methods of doing this; by applying the contract proferentum rule or the fundamental obligation theory.

7.6.3 The Contract Proferentum Rule

The Court interprets exclusion clauses restrictively against the person relying on it. For example, if he limits his liability for breach of a condition, the Courts will hold that such a limitation does not include a warranty and would thus hold the party liable for breach of warranty. The courts also do not easily accept the exclusion of liability for negligent acts unless the wordings clearly show that such was the intention. The party claiming protection of the clause must prove that it covers the situation about which the plaintiff is complaining. If there were any clauses which are ambiguous, the Court would interpret them against the party who inserted them.

7.6.4 The Fundamental Obligation Theory

The idea is that in every contract there is some central theme or basic obligation. If a party tries to exclude himself from performing what amounts to the core or the very existence or essence of the contract then he is attempting to avoid the fundamental duty. The courts will generally not allow him to do so.

In a case the plaintiff decided to take a second hand car on hire purchase. He signed a document which contained the following exclusion clause “no condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied therein”. On the day of delivery, the car would not move and many parts had even disappeared. The Court held that they had contracted to sell a car and at the same time have tried to exclude themselves should it turn out not to be a car. This could not be so and they were therefore held liable.

7.6.5 Contracts and Third Parties

The basic rule of contract is that a person who is not a party to a contract cannot derive a benefit or suffer any liability from it nor can he benefit from an exemption clause howsoever widely worded. This general rule is called Privity of Contract. Thus, a contract cannot be enforced by or against a stranger to that contract even if the contract is under seal.

7.7 Assignment

Where A agrees to repair B’s car for N10,000, A can assign the debt (N10,000) that will fall due to him to C, and subject to the formal requirements C can sue B for payment of the debt. Assignment is an invention of equity as under Common Law assignment was not permitted. Alternatively, it is possible for one party to give another powers of attorney and that other would be able to enforce contracts against third parties. Here, the authority being exercised by the donee is for and on behalf of the donor. Equity

recognized the right to transfer contractual rights but no particular formality is required. However, there must be an intention to assign and this can be gathered from the facts of the case.

The assignment could be absolute or conditional. It is absolute where the assignor divests himself completely of the whole interest. It is immaterial that an arrangement is made whereby in the future, the assignor will regain his interest back. And it is conditional where the assignment becomes operative or ceases to be operative upon the happening of some certain event. There is no formal requirement that the debtor should be informed of the assignment but it is desirable to give such notice.

Where an assignment is affected, effected, the assignee takes subject to equities i.e. any defence that the debtor would have had as against the assignor can also be raised as against the assignee. This is so even though the assignee has no knowledge of such defences or defects in the assignor's title. The assignee however only takes subject to equities that exist at the time the assignment was made.

7.7.1 Rights not Assignable

The following rights are not assignable:

1. A contract containing a personal element e.g. A agrees to work for B, A cannot assign the labour to C.
2. Public policy forbids assignment of certain rights
 - a. Salaries of public officers.
 - b. Wives cannot assign maintenance awarded to them by the Court.
 - c. Fruits of litigations where the assignment reflects financial help given to the assignor to bring his action with a view to being rewarded from the award of damages.

7.7.2 Exceptions

1. It is possible to bring a tort action in the name of deceased person. A tort in law is a wrongful act, other than breach of contract, for which a civil action for damages may be brought. Specific torts in building include negligence, trespass, nuisance and defamation.
2. The Doctrine of Subrogation. By this doctrine, the insurer who has agreed to indemnify the insured will on making good the loss be entitled to succeed to all the ways and means by which the insured might have protected himself or reimbursed himself for the loss.
3. It is possible for the original contract to prohibit any assignment under the contract.
4. Certain liabilities are not assignable e.g. obligations under a contract. However, by way of novation a new contract can be substituted for the original one.

7.7.3 Involuntary Assignment

There are 2 main ones:

- Bankruptcy and

- Death.

Both can bring about assignment either of rights or liabilities.

7.8 Agency

An agent can be said to be a person having the authority of another (his principal) to alter the legal relations of the principal with third parties. The relation between the agent and principal is called Agency.

7.8.1 Formation of Agency

There are various ways of creating an agency relationship.

1. By express agreement: Here the parties (agent and principal) expressly agree either in writing or orally to the creation of the agency.
2. By implied authority: The agent's authority is implied from the nature of the relationship between the parties. This is particularly so where the agent occupies a professional position.
3. By estoppel: This is the legal principle that precludes people from denying or disproving facts they have previously stated to be true. If the principal holds out that a person has authority to act on his behalf, he will be estopped from denying that such a person had the necessary authority to act on his behalf. This situation arises in most cases where an agency relationship is terminated without due notice given to third parties.
4. Agency of necessity: Here, within given circumstances, an agency relationship is forced onto the other person as where the Captain of a ship is regarded as an agent of the owners for purposes of procuring crew, carrying out repairs or disposing of cargo if it is in danger.
5. Agency by ratification: If A has no authority from B. but purports to conclude a contract on B's behalf, B may adopt or ratify the contract and thereby bind himself. Howsoever, certain conditions must be met.
 - a) B must be capable of making such a contract at the time it was made.
 - b) A must have specifically contracted on B's behalf.
 - c) B must be aware of all the relevant facts.
 - d) Void contracts cannot be ratified.