

*Business Law: CIMA Year One*  
**Performance of the Contract**

The most common way of discharging a contract is to perform. For the contract to be discharged, both parties must perform all of the agreement, although courts will ignore minor discrepancies (*de minimis*).

**Cutter v Powell (1795)**

C was contracted to serve on a ship from Jamaica to Liverpool for 30 guineas payable on completion. When the ship was 19 days from Liverpool, C died. C's widow sued to obtain compensation for the work done by her husband prior to his death. The courts held that C was party to an entire contract, and as such was only entitled to payment when he had finished that contract. C's widow was therefore entitled to nothing.

**Peter Darlington Partners Ltd v Goshu Ltd (1964)**

G supplied seed described as "on a pure basis". PD purchased some seed and found it to be only 98% pure. The courts held that this was sufficient to meet the contract.

Liability in contract is strict. Failure to perform cannot be excused by a claim to have taken "all reasonable care".

Payment is the most frequent form of performance. It is the duty of the party owing money to offer payment at a reasonable time of day and in legal tender. The receiving party is not required to offer change. Payment by cheque is not legal tender, it is merely conditional payment until it is honoured. However, both debit and credit cards are legal tender, and transfer the debt to the card issuing company. If the creditor refuses payment when it is first offered, it is then their responsibility to find the debtor and claim payment from them.

If money is sent by post, it is the responsibility of the debtor until it is received. However, if the creditor has requested or authorised the use of the post, the responsibility becomes theirs, provided that reasonable precautions have been taken to protect money in transit.

Performance of a contract for the sale of goods is governed by the Sale of Goods Act 1979 and the Sale and Supply of Goods Act 1994. The seller has a duty to deliver the goods, and the buyer has a duty to pay for them. Unless otherwise agreed, delivery and payment must take place simultaneously.

**Exceptions to Performance**

Many contracts are divisible, mainly due to cashflow. However, the contract will be reliant on the entire arrangement. There is a difference between staged payments and staged delivery.

A baker takes delivery of 500kg of flour every week for a year under contract. One week no flour arrives. Can the baker refuse to pay for the whole contract? Only if failure is at the root of the contract will the courts find in the baker's favour; the baker can sue for the effect of the missed delivery only.

A builder is contracted to build a house. They will be paid £20,000 for preparing the ground, £20,000 for building the foundations, and so on. If they fail to complete the building they may be made to compensate the land owner, since the contract only covers the entire work.

If the contract is performed substantially (that is, the vast majority of the work has been done as agreed), the courts will rule that the contract has been performed, and may merely award damages to make the contract as it should be completed.

Hoenig v Isaacs (1952)

H was contracted to decorate I's flat for the price of £750. H carried out the work except for some minor defects, which would cost £56 to remedy. I refused to pay, H sued. The courts held that the contract had been performed substantially, and awarded damages of £750 less £56.

Bolton v Mahadeva (1972)

B was contracted to install a central heating system for £560. The work was unprofessional and caused damage worth £179. M refused to pay, B sued. The courts held that the contract had not been performed substantially and B was entitled to nothing.

One party may voluntarily accept partial performance. Under the Sale of Goods Act, section 30:

30: Delivery of wrong quantity

- (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
- (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.
- (3) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

- (4) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.
- (5) This section is subject to any usage of trade, special agreement, or of course of dealing between the parties.

For contracts other than the sale of goods, if X accepts partial performance, he must pay to Y on a *quantum meruit* basis – that is, paying to Y “as much as he deserves”.

Performance prevented by the other party means that the contractee is entitled to some money in compensation.

Planche v Colburn (1831)

P was contracted to write a book on costume and armour for £100. P collected materials and wrote part of the book. C then informed P that the book was no longer needed. The courts held that P was entitled to some money on a *quantum meruit* basis. Note that P could not have simply completed the book since his loss needed to be mitigated.

If the contract becomes frustrated, it is unenforceable. Frustration is examined in more depth below.

### **Valid reasons for Non-Performance**

There are three valid reasons for the non-performance of a contract.

- If a new agreement is made which supersedes the old one.
- If the contract is frustrated.
- If there is a serious breach by the other party.

For a new agreement, we must ensure that both parties have shown consideration for this to properly render the old contract invalid.

For a contract to be frustrated, there must have been some event exogenous to both parties which has destroyed the basis of the agreement. This may come in several forms:

- The contract has become impossible to perform. For example, in Taylor v Caldwell (1886), T hired a hall from C but before it could be used, it was burnt down by a decorator. The courts held that neither party had any obligations under the contract. Likewise, in Condor v Barron Knights (1996), a drummer (C) was contracted to play seven nights a week. However, C fell ill and his doctor forbade him to play more than four days a week. The contract was again frustrated.

- The contract may become illegal to perform. In *Avery v Bowden* (1855), trading with the enemy was declared illegal during the Crimean War. The courts held that a contract to trade was therefore frustrated.
- The contract may become pointless, due to a change in situation. In *Chandler v Webster* (1904), C hired rooms along the route of the procession of Edward VII to view it. However, the coronation was postponed, and C did not want to rent the rooms. The courts held that the contract was frustrated. Also, in *Metropolitan Water Board v Dick, Kerr & Co* (1918), M had contracted D to construct a reservoir before the war. After the war, circumstances had changed and the reservoir was no longer needed. Again, the courts held that the contract was frustrated.

Note that if a contract merely becomes more difficult to perform (and not impossible), it is not frustrated. In *Tsakiroglou & Co Ltd v Noblee & Thorl GmbH* (1962), T contracted N to bring a shipment from India to the UK. However, the Suez Canal was closed, making the journey much longer for the shipping company. This did not frustrate the contract.

Furthermore, note that the contract is considered to end at the point that it was frustrated. In *Chandler v Webster* (see above), payment was due when the contract was made (not when it was completed). Therefore, C had to pay W in full for the rental. The courts hold that the contract is frozen at the time of the frustrating event.

This was considered unfair, and is modified by the Law Reform (Frustrated Contracts) Act 1943. This means that any money already paid must be returned, and the party who would otherwise have received money can claim reasonable expense out of any advanced payments due (note that no money needs to have been collected, it must just be due). In addition, they may claim for any valuable benefit given to the other party.

For a contract to be considered ended due to a serious breach by the other party, the breach must be of a condition. Even this does not automatically end the contract; it merely gives the wronged party the right to end it. To end it, he must not carry out any further action within the contract (that is, he must not affirm it), and must end it reasonably quickly.

*Bernstein v Pamson Motors* (1987)

B bought a car from P, and drove it for the next three weeks over 140 miles. B then discovered a fault with the car (that is, P had breached a condition of the contract). The court held that due to the time that had passed and use of the car, the contract had been affirmed.

However, this case is no longer good law, due to recent appeal court judgements.