Discharge may occur by agreement, performance and breach and frustration. Most common way to discharge a contract is by ‘performance’. ‘Agreement’ may suit both parties but consideration or a deed is required. Breach occurs in a small percentage of cases.

**AGREEMENT**

1. By a new contract ie. Where agreement to discharge is supported by consideration.
   *An agreement to discharge may be effective if supported by consideration. If wholly executory then bilateral/mutual waiver of rights is consideration – The Hannah Blumenthal.
   *Wholly executory means still requires performance to be executed – so both parties can agree not to perform and that will be binding provided there is some consideration for that. The waiver of rights constitutes consideration for the release of their obligations – ie requirement to perform.
   *Where the contract is partially executed it may be discharged by deed or accord and satisfaction – Pinell’s case. WHERE one party has performed but other has not, the party who has not can be released from their performance if the other is happy to have something different instead = accord (new agreement) & satisfaction (new consideration).

2. By operation of a term in the contract itself – a condition precedent or subsequent.

   A contract may contain a condition subsequent, upon the occurrence of which obligations are discharged – Robson v Drummond; White & Carter v McGregor.

3. Also discharge by equitable waiver (promissory estoppel) - Brikom Investments Ltd v Carr.

**PERFORMANCE**

Entire obligations rule – complete performance ie entire or ‘lump sum’ contracts – Cutter v Powell.

Entire obligations rule may be avoided though:

1. **Partial performance**
   *No obligation to pay unless partial performance voluntarily accepted - Vigers v Cook
   *'A ‘quantum meruit’ payment then owed (how much the thing deserves)– Sumpter v Hedges

2. **Substantial performance**
   *Obligation to pay full contract price LESS cost ofremedying defects – Hoenig v Isaacs; Bolton v Mahadeva

3. **Divisible contracts.**
   *Where contract itself allows for performance of one or more obligations separately from others – Rose & Frank v Crompton Bros. It has to be written in the contract.

4. **Performance by 3rd party**
   *Acceptable UP TO the contract of performance (i.e. Dobson v Drummond) – if by Toggon Co v Lea (it was acceptable here as they had no requirement to personally paint it)

**BREACH**

Where a party, without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing then that gives the party right to determine.

**Anticipatory breach** - Before the time of performance of a contractual obligation one party may inform the other that they no longer intend to perform – Hochster v De La Tour.

**Terms and breach**

*Breach of condition – innocent party has right of election – terminate or affirm contract.

*Breach of innominate term – innocent party’s rights depend upon ‘seriousness of the consequences of the breach’ – Hong Kong Fir v Kawasaki Kisen Kaisha

*Breach of warranty – innocent party can sue for damages only

**Right of Election – affirmation** (waiting for due date for performance – if they do not perform by the due date can then consider the contract repudiated and terminate)

*If innocent party elects affirm the contract, the party in default must continue to perform.

*The innocent party is permitted a period of time to decide – Stocznia Gdanska v Latvian Shipping Co (No.2)

**Limitations to affirmation**

1. Innocent party must not need cooperation of party in breach – Houslow v Twickenham & Garden Development

2. Innocent party must have ‘legitimate interest’ in affirming – White & Carter v McGregor

**Legitimate interest**

*No legitimate interest where affirmation ‘wholly unreasonable’ – Clea Shipping v Bulk Oil (The Alaskan Trader)

*Legitimate interest only applies in ‘extreme cases’ where: damages would be adequate remedy; affirmation would be ‘unreasonable’ – Ocean Marine Navigation Ltd v Koch Carbon (The Dynamic)

**Dangers of affirmation**

*Innocent party’s obligations remain; the risk of their own breach should be considered – The Simona

*A frustrating event may deny a right to damages – Avery v Bowden

**Right of Election – Termination**

*Notification of election to terminate required – Vitol SA v Norelf Ltd. An unaccepted repudiation is a thing ‘writ in water’ – Howard v Pickford Tool. But note Peyman v Lanjani (if made decision to affirm/terminate, they can go back).

*If the breach is anticipatory, the innocent party gains an immediate right of action – Hochster v De La Tour.

*C will claim damages occasioned by the breach.

*C must mitigate loss.