

BOOK REVIEW

CARTER'S BREACH OF CONTRACT

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Breach of Contract is a legal cause of action intrinsically connected with the performance of contract. The nature of performance determines whether there is breach or not – which may be the failure to perform any promise that forms all or part of the contract. The nature of breach is underpinned by the importance of the term(s) so breached. Theoretically, the terms can be categorized as a condition or a warranty. In effect, the challenge is to differentiate between these two types, based on the intention of the parties to the contract. On the whole, determination of breach of contract is a topic filled with debates and interpretations. Series of judicial decisions in prominent common law countries, such as the United Kingdom, Australia and the United States of America, have set the tone for the same.

The Carter's Breach of Contract is thus an important addition to the existing literature on the issue. Considering that India draws heavily from Common law in the implementation of its contracts, this book is topical. The book, in its latest version, has taken into account all the developments in the field. The cases relied upon are primarily from England but there are notable references to the developments in Australia, New Zealand and the United States of America. Statutes pertaining to Contract law from different jurisdictions are also referred to for better understanding of the readers. From an Indian perspective, there is also a passing reference to the Indian Contract Act, 1872.

The formatting of the book is reader friendly. Accordingly, one finds that based on the different issues concerning this topic, the book is divided into five parts. Each part deals with specific concerns and takes the reader gently through all the relevant areas. The book addresses the most basic questions regarding when and how is breach to be proven. It further explores the various shades of this question from different perspectives. The reader is given a detailed analysis of each step involved in the question of breach and its remedies. The book takes the reader through the various possibilities and nuances on this topic. It opens up new vistas of understanding for the reader. In the following paragraphs, I have provided with a thorough description of the different parts and chapters of the book, to enable the potential readers of the book understand the author's purpose and the book's content in explaining this area of law.

Part I of the book is aptly titled "Proof of Breach and Bases for a Right to Terminate". It deals with the theoretical premises relating to breach and

its consequences. The first chapter introduces the reader to the concept of breach and its consequences. It accordingly refers to breach arising from non-compliance with time clause. Issues like reasonability of time for performance are thus used as examples leading to breach. This chapter then goes on to refer to the consequences of breach including the right to claim damages. The chapter also delves into the question as to the applicability of a unitary theory to breach of contract. The last part of the chapter is entirely devoted to the nature of obligations. Accordingly, dependent/independent obligations are discussed. Further, concepts like condition precedent/conditions versus warranties are discussed in the light of recent developments within the common law world.

The reader thus gets an in-depth knowledge of all important issues that comes into play during breach of contract. From an Indian reader's perspective, the chapter might appear to be a revision of the Indian law. However, the chapter is important in terms of case analysis and in terms of highlighting the current debates. Importantly, the reader is made aware of the different terminologies used to describe breach. Further the distinction as well as the appropriateness of the use of different terms is something that the reader gets to know about in detail. On the whole, the first chapter is the most crucial chapter that maps out the theme of the rest of the book.

The second chapter deals with the proof of failure to perform contractual obligations. This is looked into from the perspective of scope of the duty and standard of the duty. This effectively is the distinction between acts not being done at all as against the acts being done with faults. Each will have its own nuances and burden of proof. The innocent party has obviously the burden to prove either, depending on the arguments put forth. The reader is further benefitted from numerous illustrations pertaining to different aspects of performance. The chapter covers the entire range of topic from exact performance to no-performance to *de minimis* rule. Indian readers will find the discussion helpful for it maps out the same concerns as is coded in §37 to §39 of the Indian Contract Act, 1872. The chapter accordingly explains the different types of breaches as well as issues of implied obligations. The chapter deals with express terms and rule of its interpretations in equal measure. Finally, the chapter is particularly helpful in providing information about the different types of contracts and their proof of breach.

The third chapter deals with the right to terminate as is conferred on the innocent person/the promisee. The chapter explains the various scenarios wherein the right to terminate arises. The scenarios are no stranger to a student of law in India since the same is equally covered by the Indian Contract Act, 1872. Accordingly, the chapter explains the scope of express right to terminate and the common law right to terminate. It compares the same with termination due to frustration and other unforeseen events. Additionally, termination without breach, again a familiar topic for Indian reader, is referred to in detail. From a comparative law perspective, the discussion on statutory rights to terminate is helpful.

It reveals the approaches of different common law jurisdiction. Importantly, the chapter distinguishes between rescission *ab initio* versus termination on breach. Many such other concepts like repudiatory breach/fundamental breach are also clarified. Chapter three thus is important for understanding the fine distinction between the different terminologies used to describe breach.

Chapter four on the other hand takes the reader to the next level of understanding. Its goal is to clarify the role and importance of the different types of contractual terms. This chapter is in Part II of the Book, which is titled "Breach of Contractual Terms". The chapter distinguishes between condition and warranties and explains the nuances through various case analysis. Interestingly however, the chapter also deals with a third category of terms called 'intermediate terms'. This is helpful from an Indian perspective as the same widens the understanding of an Indian reader vis-à-vis the contractual terms. Another important distinction that the chapter makes is between conditions and contingencies. This distinguishes between scenarios when there is breach and when performance is discharged without breach. Finally, there is a reference to the difference between conditions subsequent versus condition precedent.

The fifth chapter deals with the consequences of breach of condition. The author explains the ways in which a term is regarded as a condition of the contract. Having explained the concepts in the previous chapter, it is easy for the reader to relate with the discussion. The chapter then distinguishes between 'condition by express agreement' as against 'condition by implied agreement'. The difficulty in applying a specific test to determine a term as condition is also referred to. Although, as per the author, one key feature is the reasonable person test *viz.* a reasonable person's view as to a term being a condition. This view is formed, as per the author, based on several factors as listed in the chapter. The reasonable person test is discussed in the context of implied condition as opposed to express condition. Effectively, the chapter refers to the intention of the parties from a reasonable person's perspective. The rest of the chapter elaborates on this discussion. An Indian reader will find this part of the chapter familiar enabling her to revisit the established principles on this topic.

The sixth chapter clubs the discussion on warranties and intermediate terms. As mentioned earlier, the concept of intermediate term is not familiar to an Indian reader. Hence, this chapter is important for her as the author expressly defines intermediate terms. The factors helpful in characterizing a term as intermediate or warranty is explained subsequently. As per common law interpretation, implementation of contract is primarily driven by the intention of parties. Hence, the author ends up reiterating the same test. A substantial space within this chapter is devoted to analyzing the concept of intermediate terms. Both express as well as implied intermediate terms are detailed out. One is also confronted with the dilemma of distinguishing an intermediate term from a condition. Further, the author does devote enough space to the criticism of the doctrine of intermediate

term. The discussion on warranties is less complex, and from an Indian perspective, this part will enable one to revisit a familiar concept and related principles.

The sixth chapter also deals with related areas of entire contracts, substantial performance, unilateral contracts and partially performed contracts. Topics are discussed by highlighting the problematic areas and the land mark cases. This chapter thus beautifully sets up the background for discussing the next issue on Breach of Contract. The Part III of this Book is titled “Repudiatory and Anticipatory Breach” and all the chapters within this part focus on this topic from different angles. Chapter seven explains the principles underpinning these concepts. Accordingly, the chapter deals with history, evolution and definition of repudiation and anticipatory breach. It then maps out the distinguishing features of the two concepts. Further, the method of proving either or of the two concepts is also discussed in detail. In addition, the consequences of repudiation and anticipatory breach are also explained exhaustively. Finally, the scope of both the doctrines is discussed in the concluding part of this chapter.

Chapter eight gets into the details of repudiatory and anticipatory breach caused by words or conduct. Accordingly, both the acts of – express and implied refusal to perform, are discussed with the help of cases. The chapter then explains the consequences of erroneous assertion of rights leading to repudiation and anticipatory breach. The next issue detailed herein is wrongful termination of performance thereby leading to repudiatory and anticipatory breach. The chapter contextualises the discussion by referring to specific instances from Sale of Goods. Herein, the focus is the Sale of Goods Act 1979 of United Kingdom. However, the discussion is equally applicable to the Indian context.

Chapter nine analyses the aspect of repudiation and anticipatory breach due to one’s inability to perform contractual obligations. The distinction is then made between inabilities declared by the promisor and an act leading to inability. While the outcome is same in both the cases, the *modus operandi* is different. The next aspect that the chapter deals with is to distinguish between express and implied inability to perform. The chapter contextualises this discussion using important English cases that have contributed to existing debates, for identification of inability to perform is contentious from the perspective of the promisor. The promisee appears to be more powerful since it is her decision to treat the inability as ground for termination that matters. Another important point discussed is the assessment of damages in scenarios where termination is based on inability.

Proceeding with the choices available to the promisee, the book in Part IV deals with the topic of election. Chapter ten explains the process of how election to terminate is brought about by the promisee. It subsequently explains the various scenarios when this election to terminate is effective and when it is not. The chapter then lists the various impediments that hamper the act of election to terminate the contract. Concepts like waiver/estoppel, default on the part of

the promisee *et al.* are explained extensively along with case discussion. Chapter eleven discusses the scenario where the innocent party elects not to terminate. It also deals with the situation where the breach does not entitle the promisee to terminate. Ancillary topics like specific performance and ready and willingness to perform are discussed to add clarity on the issue.

The last part of the book *viz.* Part V deals with “Consequences of Termination”. Chapter twelve deals with issues of discharge on termination and rights accruing on termination. Hence, terms that are intended to survive the termination are discussed and explained with cases. A brief discussion is on pre-determined damages clause amongst other issues. Situated in the context of English law, this part deals with the difference between genuine pre-estimates and clauses by way of penalty. Chapter thirteen goes into the nuances of assessing unliquidated damages. Since this chapter largely deals with the Common law principle, it will be a familiar discussion for an Indian reader. Information on debatable issues pertaining to assessment of damages acts as an additional incentive to do an in-depth study of the same.

As a whole, this book is a worthy addition to one’s library, especially for those interested in the constant evolving jurisprudence on breach of contract. The book has a refreshing take on the topic of breach of contract. It treats breach of contract as a unitary concept; accordingly, the breach of contract is looked into as a single concept. Irrespective of the type of contract *viz.* Sale of Goods, Guarantee *et al.*, the focus is on the breach. From an Indian perspective, this approach is well suited within the narrative of the Indian Contract Act, 1872. This is because §73 and §74 of the Indian Contract Act, 1872, govern the topic of breach of contract irrespective of the type of contract. Hence, an Indian reader can definitely use this book to understand the law of breach of contract or at least as a valuable reference.

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