**NAME: ARICHOKE FEKE DIVINE**

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**COURSE CODE:**

**COURSE TITLE: LAW OF CONTRACT II**

**A breach of contract is committed when a party without lawful excuse fail or refuses to perform what is due from him under the contract or performs defectively or incapacitates himself from performing. (Treitel 2007, para 17-049)**

**Discuss the following:**

1. **Breach of Contract**
2. **What are the remedies available for the breach of a contract?**

**BREACH OF CONTRACT**

A contract is a legally binding promise made between two parties. Each party to a contract promises to perform a certain duty or pay a certain amount for a specified item or service. The purpose of the contract being legally binding is so each party will have legal recourse in event of a breach.

A breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party’s performance. Breach occurs when a party to a contract fails to fulfil its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have been paid by the party breaching the contract to the aggrieved party. Breaching can occur when a party fails to deliver in the appropriate time frame, does not meet the terms of agreement, or fails to perform at all.

In a deposit account, what constitutes a breach is the failure of a bank to pay money due to the deposit account on demand by the operator of the account. Thus, in ***Nigerian Merchant Bank Plc. v. Aiyedun Investment ltd.[[1]](#footnote-1),*** the court held that such a breach would justify claims for compensation. It does not matter if the compensation claimed is described as interest or damages. In ***UBN Plc v. Jeric (Nig.)[[2]](#footnote-2)*** it was held that in a contract on goods imported the respondent did not pay the value of the goods and other expenses incurred by the appellant, the appellant did not breach any terms of its agreement by withholding on to the goods. The appellant must option rather than to hold on to the goods and this cannot be a breach of the contract.

**Fundamental Breach**: In this case the non- breaching party can sue the party that breached the contract for damages incurred as well as terminate the contract if they wish to do so.

Lord Diplock in ***Photo Productions ltd v. Securities Transport ltd[[3]](#footnote-3)***defined a fundamental breach of contract as an event resulting from the failure of one party to perform a primary obligation which has the effect of depriving the party of substantially the whole benefit of the contract which was the intention of the parties that he should obtain from the contract. Before 1966, it was the general belief that a party who is guilty of fundamental breach of contract could not avoid liability by reliance on an exemption clause inserted into the contract. The decision in ***Suisse Atlantique*** ***case[[4]](#footnote-4),*** however, reversed the general opinion. Fundamental breach is a breach which goes to the root of the contract and has the effect of depriving the innocent party of achieving the main purpose of the contract.

The breach discharges the innocent party from further performance and lead him to terminate the contract. A breach of an essential term in a contract can lead to a fundamental breach, the court is empowered to determine whether the term is major, minor or fundamentally important to constitute a breach. It is often observed that there is no difference between a breach of fundamental term and a breach of condition in a contract, the breach of a condition entitles the innocent party to a discharge or repudiation. A condition is a fundamental term of a contract which has the same effect of a fundamental term. In the Sales of Goods Edict, it was stated that a breach of condition will give rise to a claim of damages but as Sagay rightly observed, the right to repudiate does not apply to fundamental breach of fundamental terms.

**Repudiation/ Anticipatory Breach**: this occurs when there is a contract between two or more parties to be performed at a future date, and one party declares an intention not to perform his own side. In anticipation of the breach, Coker J once stated,

***‘It is open to a party to a contract to sue the other party for breach of contract, if it is manifested by his conduct and his acts that the defaulting party had made himself unable to fulfill his part of the contract at the agreed time’ Solomon Nassar v. Oladipo Moses Suit: No LD/222/58 High Court of Lagos delivered Coker Jon May 20, 1960.***

As Lord Esther explained the meaning of anticipatory breach in ***Johnstone v. Milling[[5]](#footnote-5).*** Where one party assumes to renounce the contract, that is by anticipation refuses to perform, declares his intention then and there to rescind the contract, the innocent party in most cases adopts the renunciation, which is another word repudiation, and brings the contract to an end.

The court has however formulated principles of law applicable when it involves anticipatory breach. Thus, in Agufor v. Arab ltd Suit No WN/205/69 delivered September 28, 1969 High Court of Western State Ibadan (unreported), Somolu J clearly stated the principle of law as follows:

***“it is an undisputable point of law that the breach of agreement entitles, the other party who is damnified by it to bring an action on it. Such a breach may take time before the time is fixed for performance or of completing the performance of the contract has arrived. Where a promisor by his own act or default disables himself from performing his promise, the other party is entitled to treat the contract as at an end and sue him for damages for breach without waiting for the time fixed for the performance and without further performing his own part of the contract”***

In the recent court decision, the court stated the effect of an unaccepted repudiation of contract. Thus, in NEPA v. Isievore[[6]](#footnote-6), the court stated an unacceptable repudiation of a contract is of no value to anybody, it confers no legal right of any kind. This is because repudiation of a contract by one party does not terminate the contract, it takes two to terminate a contract repudiation by one party and acceptance by the other party. Repudiation may be expressed or implied or it may be by words of conduct.

What constitutes a breach of contract? A contract case comes before the judge because one or both parties claim that the contract was breached. When a party claims a breach of contract, the judge must answer the following questions:

* Did a contract exist?
* If so, what did the contract require of each of the parties?
* Was the contract modified/changed at any point?
* Did the claimed breach of contract occur?
* If so, was the breach material to the contract?
* Does the breaching party have a legal defense to enforcement of the contract?
* What damages were caused by the breach?

**REMEDIES FOR BREACH OF CONTRACT:** When a contract is broken the injured party may have several courses of action open to him, namely:

1. To refuse further performance of the contract i.e. Rescission
2. To bring an action for damages
3. To sue on quantum meruit
4. To sue for specific performance
5. To sue for an injunction

**Rescission**

The right of Rescission is an equitable remedy and exists in several circumstances. Those circumstances are; First, the right is available to a party injured by breach of a fundamental term in a contract, e.g. a condition. Secondly, it is available to a party injured by the misrepresentation of the other party, Thirdly, it is available where a contract is vitiated by mistake.

The effect of rescission in the case of misrepresentation and mistake is to terminate the contract ***ab initio*** as if it never existed. As stated by Lord Atkinson, in ***Abram Steamship Co. v. Westville Steamship Co.[[7]](#footnote-7)***

***Such rescission terminates the contracts, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.***

On the other hand, rescission in this case of breach of a condition only terminates the contractor from the moment of rescission. Rights and obligations that have already matured are not affected.

**Damages**

Whenever a party to a contract is in breach of it, the other party has a right of action for damages. Therefore, an action for damages is the one remedy which is available in every breach of contract. In other words, the aim of damages is to compensate the innocent party to the contract and place him in the position that he would have been had the contract been performed. An action for damages is common law remedy. In the award or assessment of damages, the court may ensure that the loss was occasioned by the breach and that it was not too remote.

In an action for damages for breach of contract two questions often arise. First, the question as to which type of damage must be accorded (monetary compensation), Secondly the question as to what sum of money must be paid as damages (i.e. question of measure of damages). The first question is answered by rule laid down in the English case of ***Hadley v. Baxendale[[8]](#footnote-8).*** And the second question, the injured party will be paid a sum that will put him in his former financial post.

**Quantum Meruit**

This means ‘as much as he earned’. A claim for quantum meruit arises where there is an agreement for services or for supply of goods and no price or renumeration has been fixed for the goods or work done. The claim is contractual in nature and it implies the payment of a reasonable sum. In ***Warner & Warner International v. F.H. A[[9]](#footnote-9)*** the court held that a claim on quantum meruit means that no specific sums can be claimed or proved. If they can, then each item stands on fails on the basis of evidence.

In ***International Nigerbuild Construction Co. ltd v. Giwa[[10]](#footnote-10),*** the court held that where a plaintiff can proof the rendering of services under an unenforceable contract, the contract is admissible as evidence of the value of service rendered and he may receive on quantum meruit basis. Where work done is done or services rendered of which the defendant has had some benefit, the plaintiff can recover the value of work done on quantum meruit basis.

**Specific Performance**

Specific Performance is a decree, which is ordered by the court, which directs a contracting party to perform the contract which he has promised to do. It is an equitable relief and alternative remedy to damages in appropriate cases. It is an equitable act performed at the discretion of the court, it is granted as of right, but granted judiciously by the court. The court considers in all cases, whether specific performance will create specific hardship for the party. Thus, in ***Taylor v. H. B. Russet[[11]](#footnote-11),*** the court refused to grant specific performance for a contract for the sale of land because at the time the land has been sold to someone else, who had in turn sold it to another person and the buyers were not aware of their earlier agreement. In refusing the application the court observed:

1. That the title to the property had passed and it would be impossible for him to carry out the order
2. To grant specific performance would result in fostering two or more actions
3. The doctrine of specific performance is an equitable relief. It will not be granted where it will cause hardship to third parties unless it is shown that the third parties were aware of the evidence of the contract.
4. That the person seeking to enforce a contract must show that all conditions precedent has been fulfilled and that the party is ready and willing to perform all the terms which ought to be performed.

**Injunction**

An injunction is an equitable remedy and applicable under discretionary ground. It is not subject to the same restrictions that apply to a claim for specific performance. An injunction is appropriate where the contract is negative in nature or where the contract contains a negative stipulation. An injunction is an order by which one party to an agreement is required to do or refrain from doing a particular thing. An injunction is restrictive/preventive or mandatory/compulsive.

In ***Warner Bros Pictures Inc. v. Nelson[[12]](#footnote-12),*** a film actress signed an undertaking with the plaintiffs, her employers, not to act for any other organizations. She was restrained by an injunction from breaking her undertaking.

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