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BREACH OF CONTRACT

LAW OF CONTRACT II (LPB202)

QUESTION

A breach of contract is committed when a party without a lawful excuse fails or refuse 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;(a)Breach of contract (b)What are the remedies available for breach of contract

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 a contract being legally binding is so each party will have legal recourse in the event of a breach.

A BREACH OF CONTRACT; A breach of contract occurs when the promise of the contract is not kept, because one party has failed to fulfil their agreed upon obligations, according to the terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement, or fails perform at all. Breach of contract" is a legal term that describes the violation of a contract or an agreement that occurs when one party fails to fulfil its promises according to the provisions of the agreement. Sometimes it involves interfering with the ability of another party to fulfil his duties. A contract can be breached in whole or in part.

Further, if one party fails to perform while the other party fulfils their obligations, the performing party is entitled to legal remedies for breach of contract.

GENERAL REQUIREMENTS

A breach of contract suit must meet four requirements before it will be upheld by a court.

- **The contract must be valid.** To claim breach of contract, there must be an actual, valid contract in place. It is not necessary for a contract to be put in writing, as oral contracts are enforceable by the court system. To prove the existence of a valid contract, however, three elements must be established:

Offer – Some discussion and an agreement to the provision of goods or

services in

exchange for something of value must have been made. There must have been the intention to enter into an agreement or contract.

Acceptance – An agreement to the essential terms for the exchange of goods or services for something of value must be entered into. Written contracts make proving such terms easier, as they document specific terms to which the parties have agreed.

Consideration; Each party to an oral or written contract must have received something of value. A promise by one party to provide a good or service without receiving anything in return looks a great deal like a gift, which is not enforceable.

- The plaintiff or the party who's suing for breach of contract must show that the defendant did indeed breach the agreement's terms.
- The plaintiff must have done everything required of them in the contract.
- The plaintiff must have notified the defendant of the breach before proceeding with filing a lawsuit. A notification made in writing is better than a verbal notification because it offers more substantial proof.

TYPES OF BREACH OF CONTRACT

There are four main types of contract breaches: Breach of contract can be material, partial, or anticipatory.

1. **Minor Breach:** A minor breach of contract occurs when a party fails to perform a part of the contract, but does not violate the whole contract. To be considered a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining contractual obligations. A minor breach is sometimes referred to as an impartial breach. A partial breach, or failure to perform or provide some immaterial provision of the contract, may allow the aggrieved party to sue, though only for “actual damages.” *For example*: A homeowner hires a contractor to put a pond in his backyard, showing the contractor the black liner her would like installed under the sand. The contractor instead installs a blue liner of the same design and thickness, which is totally hidden from view. The contractor may have breached the precise terms of the contract, but the homeowner cannot ask that the contractor be ordered to take out the pond and start over with the black liner. The homeowner could ask that the contractor be ordered to refund the difference in price between the requested black liner and the installed blue liner. In this case, because the colour of the liner has no affect on functionality, and the price was basically the same, the difference in value, or “actual damages,” is zero.
2. **Material Breach:** A material breach of contract is a breach that is so substantial, it seriously impairs the contract as a whole; additionally, the purpose of the agreement must be rendered completely defeated by the breach. This is

sometimes referred to as a total breach. It allows for the performing party to disregard their contractual obligations, and to go to court in order to collect damages from the breaching party

3. **Fundamental Breach:** A fundamental breach of contract is essentially the same as a material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. The difference is that a fundamental breach is considered to be much more egregious than a material breach; and
4. **Anticipatory Breach:** An anticipatory breach occurs when one party lets the other party know, either verbally or in writing that they will not be able to fulfil the terms of the contract. The other party is then able to immediately claim a breach of contract and pursue a remedy, such as payment. Anticipatory breach may also be referred to as anticipatory repudiation. Anticipatory breaches can be very difficult to prove in court. Anticipatory breach, also known as "anticipatory repudiation," occurs when one party to a contract stops acting in accordance with the contract, leading the other party to believe he has no intention of fulfilling his part of the agreement.

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[1] delivered Coker Jon May 20, 1960. In fact and in truth, repudiation is anticipatory, the innocent party prevents further damages by taking an action for breach of contract. As Lord Esther explained the meaning of anticipatory breach in ***Johnstone v. Milling***[2]. 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 as repudiation, and bring the contract to an end. The court, however, has formulated principles of law applicable when it involves anticipatory breach. Thus, in ***Agufor v. Arab Ltd*** [3]Somolu J clearly stated the principle of law as follows: "It is an indisputable 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 place before the time fixed for performance or of completing the performance of the contract has arrived. In ***NEPA v. Isieveore*** (1997)[4], 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 by one party standing alone does terminate the contract. It takes two to end it by repudiation of the one side and acceptance of the repudiation on the other. Further the court stated, where there is a

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[1] Suit: No LD/222/58 High Court of Lagos
[2] (186) 16 QBD 460 at 467
[3] Suit No WN/205/69 delivered September 28, 1969 High Court of Western State Ibadan (unreported),
[4] 7 NWLR (pt. 511) 135

unilateral repudiation of a contract, this is treated as an offer by the guilty party to the innocent party of the termination of the contract. It is the acceptance to the offer by the innocent party which acts as a discharge of contract. It is open to innocent party to sue for damages since the acceptance of the repudiation; the contract comes to an end. There the innocent party refuses to accept the repudiation, the contract remains in existence.

DEFENSES TO A BREACH OF CONTRACT

The most common defences to enforcement of a contract or liability for damages are:

• Enforcement of the contract would violate public policy.
• Performance of the contract has become impossible or the purpose of the contract has become frustrated.
• The contract is illegal.
• The contract lacks consideration.
• The contract was obtained by fraud.
• The contract limits the amount of damages that can be recovered.
• The contract contains a mutual mistake, stating something different from what either party intended.
• The contract contains a unilateral mistake that was material to the agreement and the other party knew or should have known of the mistake.
• The parties have accepted the contract performance, or a substitution for the performance, as adequate. This is called accord and satisfaction..
• One (or both) of the parties lacked capacity to make the contract.

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.

DAMAGES

Damages are amounts of money that compensate the victim for any actual loss he suffered. Punitive damages involve extra money a court might tack on as a form of

punishment if the breach of contract was particularly egregious and intentional.

The leading case of ***Hadley v Baxendale (1854)*** [5]laid the common law foundation for the assessment of damages arising from a contractual breach. Hadley was a mill operator who contracted with Baxendale to have the latter deliver a broken mill shaft to the manufacturer for repair. The term of the contract was that Baxendale was to transport the shaft the next day. He delayed several days, so Hadley's mill remained closed for a longer period of time. Hadley claimed damages for the profit the mill would have made had it been delivered on time. The only information Baxendale received was related to carrying the shaft on the Plaintiff's behalf. He had not been told that the mill would be closed until the shaft was returned. Furthermore, Hadley may well have had a spare shaft, as is common practice in the business. Hadley's action failed and Baxendale was not liable for the loss of profit. The principle arising from that decision is now the basis for the concept of remoteness in damages, which lays down two categories of compensation which can be recovered, and which are often described as the 'first' and 'second' limbs of the ***Hadley v Baxendale*** rule:

1. Losses which arise in the normal course of things and are a natural consequence of the breach;

2. Losses which arise as the result of special circumstances (not being natural consequences) which were either known to the parties or may reasonably be supposed to have been in the contemplation of the parties when the contract was made.

The concept of foresee ability in tort, which you have already encountered, is equally applicable here as both categories of damages shown above are foreseeable: the first because they flow naturally from the breach, and, secondly, if the other party (Baxendale in this case) had been told what would result from the breach as a result of the late arrival of the mill shaft. Applying the above principles to the case, the court found on the facts that the only way Hadley could succeed in his claim for damages was to show that Baxendale would reasonably foresee that the mill would be _ closed because there was no shaft, and that some special circumstances had been made known to him

It is important to note that the non-breaching party has a duty to mitigate. This means that it has to do what is possible and reasonable to minimize or avoid the losses which were incurred because of the breach of contract.

There are two general categories of damages that may be awarded if a breach of contract claim is proved. They are:

1. **Compensatory Damages**. Compensatory damages (also called “actual damages”)

[5] 1854 EWHC J70, 156 ER 145, 9ExCh 341

cover the loss the nonbreaching party incurred as a result of the breach of contract. The amount awarded is intended to make good or replace the loss caused by the breach.
There are two kinds of compensatory damages that the nonbreaching party may be entitled to recover:

A. General Damages. General damages cover the loss directly and necessarily incurred by the breach of contract. General damages are the most common type of damages awarded for breaches of contract.

B. Special Damages. Special damages ("consequential damages") cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. These are actual losses caused by the breach, but not in a direct and immediate way. To obtain damages for this type of loss, the nonbreaching party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was made.

2. **Punitive Damages**. Punitive damages (also called "exemplary damages") are awarded to punish or make an example of a wrongdoer who has acted wilfully, maliciously or fraudulently. Unlike compensatory damages that are intended to cover actual loss, punitive damages are intended to punish the wrongdoer for egregious behaviour and to deter others from acting in a similar manner. Punitive damages are awarded in addition to compensatory damages. This is rarely awarded for breach of contract cases.

Remoteness of Damage 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 (i.e., question of remoteness of damage). Secondly, the question as to what sum must be paid as damages (i.e., question of measure of damages). This is the rule laid down by Alderson, B. in the leading English case of ***Hadley v. Baxendale*** [6] The facts of the case were as follows: The plaintiffs were millers in Gloucestershire and the defendants were common carriers of goods. The crankshaft of the plaintiffs' steam engine was broken with the result that work on the mill had come to a stand-still. They had ordered a new shaft from an engineer in Greenwich and arranged with the defendants to carry the broken shaft from their mill in Gloucester to the engineer in Greenwich to be used by the latter as a model for the new shaft. The defendants did not know that the plaintiff had no spare shaft and that the mill could not operate until the new shaft was installed. The defendants delayed the delivery of the broken shaft to the engineer for several days, with resulting delay to the plaintiffs in getting their steam mill working. The plaintiffs claimed damages for breach of contract. The court held that to decide whether the plaintiffs' damages should include loss of profits for the period of the defendants'

[6] (1854) 9 Ex. 341.

delay. It was held that, in the great multitude of cases of parties in a similar situation, the consequences arising in this case would not in all probability occur and the plaintiffs' special circumstances were never communicated to the defendants.

In the words of Alderson; Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the natural course of things, from such breach of contract of both parties at the time they made the contract as the probable result of the breach of it.

Measure of Damages The general rule is that the plaintiff recovers his actual loss in respect of damages which is not too remote. Although damages for breach of contract are based on financial loss, in certain circumstances damages may be recovered from the defendant for non-pecuniary losses, if they were within the contemplation of the parties as not unlikely to result from the breach. ***Hamlin v. Great Northern Railways (Supra)***[7] it was held that, damages could not be awarded for mental distress and vexation suffered by the plaintiff on account of a breach of contract. Also in ***Groom v. Gocker***[8] where the plaintiff was awarded £1,000 damages by a jury for injury to his reputation r feelings as a result of a breach of contracted by the defendant, it was held, on appeal, that no damages could be recovered for such nonfinancial or non-jury were reduced to 40s. In recent years, however, there has been a change of judicial attitude with regard to nonfinancial losses arising out of contracts. There is an indication from recent decisions that a plaintiff who has suffered a non-pecuniary loss as a result of a breach of contract would be entitled to damages if it can be shown that the distress or unhappiness was the natural and probable consequence of the breach complained of.

The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get. Edmund Davies, L.J., said that under modern conditions, and having regard to developments which have taken place in the law of contract since the decision in ***Hobbs v. London and South Western Railway Co***.[9].The learned judge stated that in the particular circumstances of the present case, 'vexation', and being disappointed in a particular thing you have set you mind upon' were relevant considerations which afforded the court a guide in arriving at the proper figure of damages. According to the learned judge: When a man has paid for and properly expects an invigorating and amusing holiday, and through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that this disappointment must find no reflection in the damages to be awarded.

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[7] (1856) 26 L.J. Ex. 20
[8] (1939) 1 KB 194,
[9] (1875) LR 10 QB 111, at pp 122-124

SPECIFIC PERFORMANCE

In certain cases, an aggrieved party may not be made whole through the award of monetary damages. He may instead request the court to order "specific performance" of the terms of the contract. Specific performance may be any court-ordered action, forcing the breaching party to perform or provide exactly what was agreed to in the contract. Specific performance is most often ordered in a contract involving something for which a value is difficult to determine, such as land or an unusual or rare item of personal property.

Under specific performance, the breaching party has to perform their duties as specified by the contract and it is used when money damages are not adequate to compensate the plaintiff. Specific performance is used in cases which involve giving a piece of land or a valuable item to the plaintiff.

RESTITUTION AND REFORMATION

Restitution is a remedy which is used to restore the injured party to the position occupied before the contract. Under the principle of restitution, the defendant is supposed to give back any money or property received from the plaintiff under the contract and restitution is not used to compensate the plaintiff for lost profits or other earnings because of the breach of contract. Restitution is typically used in cases where the contract is voided by the court because the defendant lacked the competence or capacity necessary to enter into a contract. This remedy is used in certain cases such as when the parties enter into a contract because of mistake, fraud, undue influence or duress and the only way to do justice is to terminate the contract.

The remedy of reformation may be used which is when a court reforms or changes a contract to correct any inequities. In these cases, instead of setting aside the entire contract, the terms of the contract may be rewritten to do justice.

RESCISSION

The right of rescission is an equitable and exists in a number of circumstances. By way of illustration, we mention three of those circumstances: First, the right is available to a party injured by breach of a fundamental term in a contract. 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***.[10]. Such rescission terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood

[10] (1923) A.C 773, at p.781

before the contract was entered into. On the other hand, rescission in the case of breach of a condition only terminates the contractor from the moment of rescission.

INJUCTION

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. However, such an order is subject to a balance of convenience 'Test and may be refused if the prejudice suffered heavily outweighs the advantage that will be demised from such restoration. ***Kennaway v. Thompson*** [11]An injunction will not be granted where it will compel or indirectly the defendant to do an act which he could not have been ordered to do by specific performance.

CONCLUSION

The breach of contract is a very broad legal subject that tackles how to identify and the types of breach of contract. The breach of contract has so many remedies which are identified above.

REFERENCE

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[11] (1981) QB 88.