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QUESTION: A breach of contract is committed when 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. Discuss the following:

a) Breach of contract
b) What are the remedies available for breach of contract?

a) Breach of contract

A breach of contract entitles the injured party or innocent party to an action for damages against the guilty party. However, where the guilty party has repudiated the contract or has committed a fundamental breach, then additionally the innocent party has the right to rescind or terminate the contract. Rescission in this sense means that as a consequence of the guilty party's breach, the innocent party is entitled to treat himself as discharged from further liability to perform his yet unperformed obligations towards the guilty party and the latter is also discharged from performing his own remaining obligations towards the innocent party, but he remains liable for damages towards the innocent party.

✓ **Repudiation**

Where there is a contract between two parties to be performed at a future date, and one party declares his intention not to perform his own side of it, this act is known as renunciation or repudiation. It is also called anticipatory breach, although this last term has often been described as "misleading" on the ground that a contract cannot be capable of breach before the time for its performance has arrived. The guilty party has shown either by words or conduct that he has no intention of performing his own part of the contract whenever the time of performance arrives. In

Solomon Nassar v Oladipo Moses, Coker, J stated that "it is open to a party to a contract to sue the other party for breach of same even in the participation of the time agreed upon for performance, if it is manifest 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. The true meaning and effect of anticipatory breach was stated in John Stone v Milling. It was held in AJuro v Trans-Arab Ltd that where a promisor by his own act or fault disables himself from performing his promise, the other party is entitled to treat the contract as at an end and to sue him for damages for a breach of it without waiting for the time fixed for performance, and without further performing his part of the contract[1]. Such repudiation may be express or implied, or be in words or by conduct. In *Hochester v De la Tour*[2]*,* the defendant actually wrote to the plaintiff stating that he was no longer going to perform his part of the contract under which he agreed to employ the plaintiff as a courier during a foreign tour commencing at a future date. The plaintiff immediately sued for breach of contract, even though the date of performance was still nearly a month ahead and he succeeded.

The facts of *Nigerian Supplies Manufacturing CO. Ltd v Nigerian Broadcasting Corporation*[3] represent a classic case of express anticipatory breach. The plaintiff company leased certain property to the defendant corporation for a term of five years from January 15, 1962, at a rent 26 pounds a year, with an option to renew for a further term of five years, which was to be exercised by notice in writing two years before the determination of the original term. On October 30, 1964, the director-general of the corporation wrote to the company exercising the option, but on December 31, 1964, he wrote again, saying that the board of governors had refused to ratify the exercise of the option. In response, the plaintiffs issued a writ claiming a declaration that the option to renew had been validly exercised and an injunction to restrain the corporation from committing breach of contract. The trial judge held that the opinion had been validly exercised, but for other reasons he refused to grant the injunction sought. The plaintiffs appealed to the Supreme Court. Upholding the appeal and granting the declaration and injunction sought by the plaintiffs, the court held that action of the defendants by their letter of December 31, 1964, after the contract had been concluded, was an attempted repudiation or renunciation of the contract.

[1] High court of western state, Ibadan judicial Division, somolu, CJ suit No 1/205/69 delivered on September 28, 1969.
[2] (1853) 2 E &B 678
[3] (1967) 1 ALL NLR 35

On the other hand, repudiation may be implicit. Where there is a reasonable inference that the defendant no longer intends to perform his own part of the contract, the plaintiff is entitled to treat the contract as discharged, and sue for damages. In *Frost v Knight*[4] the defendant having agreed to marry the plaintiff on the death of his father, broke off the engagement during the father's lifetime. It was held that the plaintiff was immediately entitled to sue for breach of contract. Where the defendant's refusal to perform is as a result of a bonafide, erroneous belief that he was justified to withhold performance, his act may not amount to repudiation. In *Merry Steel and Iron Co. v Naylor Benzon & co*[5], the respondents sold 5,000 tons of steel to the appellants to be delivered at the rate of 1,000 tons a month. In the first month, half that rate was delivered. Though some more were delivered the second month, winding-up proceedings were commenced against the respondents. Due to wrong legal advice, the appellants refused to pay for the deliveries pending final determination of the winding up process. The respondents alleged that the refusal to pay constituted repudiation of the contract. The court held that the mere failure by the buyer to pay for one delivery could not of itself go to the root of the contract. Where the refusal to perform is not express but is by conduct, the test to ascertain whether the action or omission of the party in default is such as to lead a reasonable person to conclude that he no longer intends to be bound by the provisions of the contract. This would be the case where one party in default, though intending some form of performance, determined to do so "only in a manner substantially inconsistent with his obligations.'' Thus, where the repudiation does not have such profound effect, such as depriving the innocent party of substantially the whole benefit that he was intended to enjoy under the contract, the latter will only be entitled to claim damages, but not to treat as discharged. But where the defendant, though willing to perform, is clearly incapable of doing so, except in a manner substantially inconsistent with his obligations, this will also constitute repudiation. In *C.A Tewogbade & Sons ltd v Funso Adeolu*[6], the defendant agreed to supply pressed steel water tanks with trestle and pipe work to the plaintiffs. It was a condition of the agreement that the goods were to be procured by the defendant from United Greenfield Ltd of London. They were to be delivered within ten weeks of the signing of the agreement. The total cost of the contract was N200, 147.88k. The plaintiff paid 50 percent of this (N100, 073.94k) as stipulated by the agreement. The balance was payable on delivery of goods. Eleven

[4] (1872) L.R Exch 111
[5] (1884) 9 A.C 434
[6] High Court of Oyo state, suit No. 1/64/80 delivered on 25th June, 1981.

weeks after the contract had been signed, the defendant informed the plaintiffs that he would not be able to procure the materials from Greenfield but could from another company. The plaintiffs rejected and demanded refund of money. When the defendant failed, the plaintiffs sued them. The defendants argued that it was the plaintiffs who were in breach, since they terminated the contract.

In cases involving contract for goods to be delivered or paid for by installments, it is a question of fact whether failure to deliver one or more installments, or pay for one or more deliveries, constitutes repudiation. Whether a default of either kind is to be treated as a repudiation, depends in each case upon its particular circumstances. In *Johnson Bekederemo v Colgate-palmolive Nig ltd*[7] , Ogbobine, J listed the factors which every court should consider in attempting to resolve this issue as follows:

1. The breach may extend to all or some of the promises of the party at fault.
2. The breach may affect an important or an unimportant clause of the contract;
3. The breach of any particular undertaking may be substantial or trivial.

A breach of condition also entitles the injured party to repudiate the contract. As far as the right to terminate for breach is concerned is concerned, there is no distinction between a breach of fundamental term and a breach of condition. However, in situations or circumstances which **section 11(1) (c) of the Sales of Goods Act** is applicable , a breach of condition will only give rise to a claim for damages, and the right to repudiate will be lost. This restriction on the right to repudiate does not apply to fundamental breaches or breaches.

b) What are the remedies available for breach of contract?

1. Damages

Once a party to a contract establishes to the satisfaction of the court that the other party has committed a breach of contract, the most common claim is that for damages, and certainly it is the most readily granted type of remedy by courts. Only in special circumstances will the equitable remedies of specific performance and injunction be granted by courts. The common

[7] (Unreported) high court of Midwestern state, Benin Judicial Division, Ogbobine J, suit No. B/47/73 delivered on June 14. Casebook, p. 436

Law remedy of damages was laid down in the case of *Robinson v Harman*[8] where it was held that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

However, since an unqualified application of such a wide principle would prove too harsh "on a contract breaker in making him liable for a chain of unforeseen and fortuitous circumstances," it was progressively qualified and limited in several ways, until the modern rule was finally crystallized from the judgement of Alderson in the case of *Hadley v Baxendale*[9], where it was held that 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… The facts of this case are that the plaintiffs were millers 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 standstill. They had ordered a new shaft. From an engineer in Greenwich and arranged with the defendants to carry the broken shaft from their windmill to the engineer to be used by the latter as a model for the new shaft. The defendants did not know that the plaintiffs 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 working. The plaintiffs claimed damages for breach of contract. The court had to decide whether the plaintiffs' damages should include loss of profits for the period of the defendant's delay.

Whenever the court has to consider claim for damages, it must first resolve the issue whether the defendant is liable for any issue at all, and if so, the nature and extent of such damages or losses. This is known as the issue of remoteness of damages. It is after having determined the nature and extent of damages that the court can quantify them in terms of money. This second stage is known as assessment or measurement of damages. The question of remoteness of damages in contract was given detailed consideration by the House of Lords in the

[8] (1848) 1 EX 850 at pg 855
[9] (1854) 9 EX 341 ALL ER pg 465

case of *Koufos v C. Czarnikow ltd*[10], known as *The Heron II.* The respondents chartered the appellant's ship on October 15, 1960, to proceed from Piraeus to constanza, and there take on a consignment of the respondents' sugar. The ship left constanza with the cargo on November 1. The option was not exercised and the vessel did not arrive until December 2, i.e. nine days later than it ought to have arrived. This delay was caused by deviations made in breach of contract. The respondent had intended to sell sugar promptly on arrival at Basrah, but the appellant did not know this although, he was aware that there existed a sugar market there. Shortly before the sugar was sold in Basrah, the market price fell, partly by reason of the arrival of another cargo of sugar. If the appellant's vessel had not been in delay for nine days, the sugar would have fetched 32 pounds 10 shillings per ton. The price realized on market was 31 pounds 2 shillings 9 pence per ton. The respondent charterers brought this action to recover the difference (4,153 pounds 16 shillings 8 pence) for breach of contract. The appellant ship owner, while admitting liability to pay interest on the value of the sugar for the delay period of nine days, delayed that the fall in market should be taken into account in assessing damages. The court of appeal held that *The Parana*[11] laid down no such rule, and applying the rule in *Hadley v Baxendale,* explained in *Victoria v Newman Industries ltd,* held that the loss due to the fall in market price was not too remote to be recoverable as damages.

The general rule with regard to the time of assessment is that damages should be assessed as at the time when the cause of action arose. But as was stated in *Johnson v Agnew*[12], this is not an absolute rule, and the court will fix any other appropriate day if the date of breach will work injustice. Situations in which court will not apply the date of breach include:

- ✓ Where the innocent party refuses to treat the breach as terminating the contract[13].
- ✓ Where the plaintiff did not know until later that a breach had occurred[14].

sections 50 and 51 Sales of goods Act 1893 and 51 , 52 of Sales of Goods Law (west 1958), makes provision for the liabilities of buyers and sellers, in case of failure to accept delivery or to effect delivery, and stipulate the basis for the measurement of damages in both situations thus

[10] (1969) 1 AC 350 ALL ER 689
[11] (1877) 2 p 118
[12] Also, wigsell v school for indigent blind (1882) 8 QBD 357.
[13] White & carter ltd v Mc Gregor (1962) AC 413
[14] Solomon v Pickering (1926) 6 NLR 39

Damages for non-acceptance

Section 50: (i) where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages of non-acceptance.

(ii) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of contract.

(ii) where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptances, then at the time of the refusal to accept.

Damages for non-delivery

Section 51: (i) where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery.

(ii) The measure of damages is the estimated loss directly and naturally, in the ordinary course of events, from the seller's breach of contract.

(iii) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between contract price and the market or current price of the goods at the or times when they ought to have been delivered.

The law imposes an obligation on all parties to take reasonable steps to mitigate the losses caused by breach of contract. The plaintiff cannot therefore recover loss which he could have avoided by taking reasonable steps. The position of the plaintiff who fails to take reasonable steps to mitigate his losses is similar to that of a plaintiff whose damages are reduced because of contributory negligence. As Lord Haldane said in *British Westinghouse Electric and Manufacturing Co v Underground Electric Rys Co of London*[15] "…the fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second, who imposes on the plaintiff the duty of taking all reasonable steps…"

2. **Specific performance and injunction**

[15] (1912) AC 673 at p 689

A decree of specific performance is one in which the court directs the defendant to perform the contract which he has made in accordance with its terms. It is a relief in equity and is one of the earliest examples of the maxim that equity acts *in personam.* At common law, the only relief available for breach of contract was damages, and in many cases, this proved adequate and indeed the best remedy. Thus, in most contracts for the sale of goods, money compensation remains the most suitable remedy for a breach.

However, in some cases, for instance, in a contract to convey land or to sell an antique or a famous painting, the remedy of damages proved inadequate. In such situations, the courts of equity decreed specific performance. As Kay, L.J., declared in *Ryan v Mutual Tontine Association*[16] "this remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by action in damages is not an adequate compensation for breach of contract…" Thus, the basis for the granting of this remedy is that the party seeking it cannot obtain an adequate by the common law judgement for damages. The court considers in each case whether damages would in fact be an adequate compensation, and if not, whether specific performance "will do more and complete justice than award of damages."[17] The remedy of specific performance is a discretionary one and the plaintiff is not entitled to it as a matter of right. In *Taylor v H.B Russel,*[18] The West African Court of Appeal refused to grant specific performance with regard to a contract for the sale of a piece of land because by the time the action was brought, the defendant had sold it to someone else, who in turn sold it to a fourth person.

Injunction

If a contract contains an express negative stipulation obliging one of the parties not to act inconsistently with his positive contract, an injunction may be granted against a breach of that negative stipulation. An injunction is an order or decree by which one party to an action is required to do or refrain from doing a particular thing. Injunctions are either restrictive (preventive) or mandatory (compulsive).[19]

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[16] (1893) 1 Ch. 116 at P. 126.
[17] Tito v Waddell (No 2) (1977) Ch, 106 at p.322
[18] (1947) 12 W,A.C.A 179
[19] Osborn, A concise law dictionary (5th ed) p 169.

REFERENCE

Sagay, I, E. (2007). NIGERIAN LAW OF CONTRACT. Ibadan: Spectrum Books Limited