**NAME: ADENIJI OLUWATOSIN OMOWUMI**

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**COURSE TITLE: LAW OF CONTRACT II**

**ASSIGNMENT TITLE: BREACH OF CONTRACT**

**Question I:** Breach of contract.

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 honoured by one or more 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 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”. **In *Solomon Nassar V. Oladipo Moses*[[1]](#footnote-1),** it was stated that “it is open to a party to a contract to sue the other party for breach of same even in anticipation 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 fulfil his part of the contract at the agreed time”. In ***C.D Ajufo V. Trans-Arab Ltd[[2]](#footnote-2)*,** it stated the principles of law applicable in cases of breach of contract.

Repudiation may be express or implied, or be in words or by conduct. Thus in ***Hochester V. De la Tour[[3]](#footnote-3)*,** the defendant actually wrote to the plaintiff stating that he was no longer going to perform his part of a 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. On the other hand, repudiation may be implicit. Where there is reasonable interference that the defendant no longer intends to perform his own part of the contract, the plaintiff is entitled to treat the contract as discharge, and to sue for breach. If for example, X agrees to sell goods to Y at a future date, but sells the goods to Z before the stipulated date, this would constitute implicit repudiation or repudiation by conduct. In ***Frost V. Knight[[4]](#footnote-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 the plaintiff was immediately entitled to sue for breach of contract. Where the refusal to perform is not express but it is by conduct, the test is to ascertain whether the action or omission of the party in default is such as to lead a reasonable person to conclude that he is 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”**(*C.A Tewogbade &Sons Ltd V. Funso Adeolu[[5]](#footnote-5)*).** In cases involving contracts for goods to be delivered or paid for by instalments, it is a question of whether failure to deliver one or more instalments, 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[[6]](#footnote-6)*,** 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

From this analysis, it is clear that breaches of the type in emphasis, will give rise to a right on the part of the innocent party or terminate the contract, whilst those of the type not in emphasis will only give rise to a claim in damages.

Apart from repudiation or renunciation, the second circumstances in which a party is entitled to treat himself as discharge from further obligations in the contract is where the co-contractor, without expressly or implicitly repudiating the contract, commits a fundamental breach of contract. It must be a breach which goes to the root of the contract, a breach which has the effect of depriving the injured party of achieving the main purpose for which he contracted. One problem about basing the discharge of a contract solely on the breach fundamental term is the rather subjective nature of that concept. It is said that for a term to be fundamental, the parties must have regarded it as being major importance when the contract was made. It should be noted that a breach of condition also entities the injured party to repudiate the contract. Thus, as far as the right to terminate for breach is concerned, there is no distinction between a breach of a fundamental term and a breach of a condition. However, in situations or circumstances in which ***Section 11(1)[C] of******the Sale of Goods Act 1893*** is applicable, a breach of condition will only give rise to a claim for damages, and the to repudiate will be lost. This restriction on the right to repudiate does not apply to fundamental breaches or breach of fundamental terms.

When as a repudiation or fundamental breach by one party, the other party is said to be entitled to treat himself as discharge from the contract, what is really meant is that such a party is discharged from the performance of all future obligations. Where however, the innocent party elects to treat the contract as still subsisting i.e. rejects the repudiation, then the obligations of the parties are kept alive until the last obligations are to be performed. The consequences of discharge differ in each case, depending on whether the innocent party elects to terminate the contract, or keep it alive.

**Where the innocent party treats the contract as still in force:**

Where the innocent party treats the contract as still in force, the *status quo ante* is maintained and the contract remains in being for the future on both sides. Each party is entitled to sue for both past and future breaches. In ***Udom V. E.Michelette & Sons Ltd[[7]](#footnote-7)****,*the Supreme Court adopted the following statement of the principle by the Court Of Appeal; “..An innocent party is not ordinarily bound to treat the contract as discharged. He may at his option, elect to treat the contract as a continuing contract or to say that the breach by the other party has discharged his liability. If he chooses the former course, he can still sue for damages for any loss sustained as a result of the breach. But the contract, with all its terms and conditions remain alive for benefit of the wrong doer as well as himself. Each party is entitled to hold the other to his bargain and to continue to tender due performance on his part”. In ***Modern Publications Ltd V. Academy Press Ltd[[8]](#footnote-8)*,** it was held that when one party is in breach of a condition contained in a contract, as it was in this case, the other party is not compelled to accept the breach as a repudiation of the agreement. He may waive the breach condition if he so wishes and elect to sue for damages for the damages. The court then proceeded to award damages in favour of the plaintiff. Where the plaintiff refuses to treat the contract as discharged, he can seek specific performance. Also in ***White & Carter (Council) V. McGregor[[9]](#footnote-9),*** the principle was also followed.

**Where the innocent party treats the contract the contract as discharged:**

Where the innocent party treats the contract as discharged, the party in default is liable for all breaches committed before the discharge, including the one leading to the discharge. But he is excused from further performance of the contract. However, the obligations falling due after the election to terminate the contract, are still relevant for purposes of damages **(*Moschi V. Lep Air Services Ltd[[10]](#footnote-10)).***Regarding the legal consequences of repudiation, the court stated that when a contract is brought to an end by repudiation accepted by the innocent party, all obligations in the contract come to an end and they are replaced by operation of law by an obligation to pay damages. It should be noted that once the injured party has decided to accept the repudiation as terminating the contract, he cannot later change his mind and treat it as still subsisting, and once he had decided to treat it as subsisting in spite of the breach, he cannot later decide to treat it as terminated, unless of course there are further breaches.

If a party to a contract terminates it for inadequate reasons, the action would nevertheless be valid if at the time it took place, facts existed which would have provided a good reason. The existence of such facts, must be contemporaneous with the repudiation. This principle was affirmed in the Supreme Court case of ***United Calabar Co V. Dempster Lines Ltd[[11]](#footnote-11).***However, any party who having repudiated for inadequate reasons, subsequently discovers good reasons for a valid repudiation, must raise a defence based on it at the earliest opportunity. If having become aware of his right to repudiate, he carries on with the contract as if he still regarded it as subsisting and valid, he would be met with the bar of waiver if he should subsequently attempt to rely on the breach in order terminate the contract. In the *United* ***Calabar Co.case,***the defendants*,* Dempster Lines Ltd were held to have waived their right to repudiate because they continued their transactions with the plaintiffs without complaining, for a considerable period of time after discovering the plaintiffs’ breach.

**Question II:** What are the remedies available for breach of contract?

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 certainty it is 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 underlying basis for the common law remedy of damages was laid down by **Parke, B., *Robinson V. Harman[[12]](#footnote-12);*** *“the rule of common law is that where a party sustains a loss by reason of 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”.* The rule established in the case of ***Hadley V. Baxendale[[13]](#footnote-13)*** has been divided into two parts or branches, the first dealing with the normal damages that occur in the usual course of things and the second with abnormal damage that arises because of special or exceptional circumstances.

Whenever it has to consider a claim for damages, a court must first resolve the issue whether the defendant is liable for any damages 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 only after having determined the nature and extent of damages that the court can qualify them in terms of money. This second stage is known as the assessment or measurement of damages. The question of remoteness of damages in contract was given detailed consideration by the House of Lords in ***Koufos V. C.Czarnikow Ltd[[14]](#footnote-14)*** known as *The Heron II.* In ***Union Merchants (overseas) Ltd V. Odeh Trading Company[[15]](#footnote-15),***the defendant entered into a contract to sell 25 tons of Nigerian rubber to the plaintiff. Unknown to the defendants, the plaintiffs intended to use the rubber to9 fulfil their obligations under a subcontract with third parties. When the defendants failed to supply the rubber, the plaintiffs had to buy rubber at a higher price in London to fulfil their obligations under the subcontract. The plaintiffs brought a claim for the extra amount they had to pay for the rubber in London market. It was held on the application of the rule in ***Hadley V. Baxendale,***that the subcontract was a special circumstance, and that since the defendant was not aware of it, they could not be held liable for the resulting loss. The issue of remoteness of damages was raised and treated in a most instructive manner in ***Nigeria Advertising and Publicity Ltd V. Nigeria Airways Ltd[[16]](#footnote-16)*.**

**Measurement of damages:**

The general rule with regard to the time of assessment is that damages should be assessed as at time when the cause of action arose, namely, the date of breach. But as was stated in ***Johnson V. Agnew[[17]](#footnote-17)*,** this is not an absolute rule, the court will fix any other appropriate day if the date of breach will work injustice. Situations in which the court will not apply the date breach include:

1. Where the innocent party refuses to treat the breach as terminating the contract ***White & Carter (Council) Ltd V. McGregor[[18]](#footnote-18).***
2. Where the plaintiff did not know until later that a breach had occurred ***Solomon V. Pickering[[19]](#footnote-19)* .**

Where there was no market for the subject-matter of the contract at the time of the breach, the court used as its date of assessment of damages, a subsequent date when it could be established that such a market had become available. In a contract for the sale of goods, if it is the seller who fails to perform, the buyer’s damages will be equivalent to the difference between the price the buyer had to pay for the goods elsewhere and the contract price with seller. The buyer must be placed in a position that he would have occupied had he received the goods at the time and place of delivery. He will be entitled to damages that will enable him buy the same quantity. **Section 50 and 51 of the Sale of Goods Act 1893 and Section 51 and 52 of the Sale 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 situation. In ***Chaplin V. Hicks[[20]](#footnote-20),***where a theatrical manager wrongfully deprived a young lady of the chance of obtaining employment as an actress by not giving her a reasonable opportunity to be interviewed for the post, substantial damages were awarded the plaintiff despite the impossibility of accurately estimating loss. 49 other applicants had been interviewed for five jobs and so her chances of being employed had been one in ten. Other types of losses for which an injured party can bring a claim are expenses reasonably incurred as a result of the defendant’s breach. These include expenses incurred prior to and in anticipation of making of the contract, provided these were within the reasonable contemplation of the parties at the time the contract was made, and legal costs paid by the plaintiff in legal proceedings with third party which were caused by the defendant’s breach.

**Damages for non-pecuniary losses**

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 breach. Thus, plaintiffs have been held entitled to damages where the defendant’s breach of contract led to substantial physical inconvenience ***(Burton V. Pinkerton[[21]](#footnote-21)),***pain and suffering ***(Grant V. Australia Knitting******Mills Ltd[[22]](#footnote-22)),*** though normally the plaintiff will also have a right of action in tort. But this was regarded as exceptional. It was previously believed that damages could not be awarded for injury to the plaintiff’s feelings, or for his mental distress, annoyance or loss of repudiation, except in action for breach of promise to marry ***(Uso V. Iketubosin[[23]](#footnote-23))*.** In ***Hamlin V. Great Northern Railways[[24]](#footnote-24),***it was held that damages could not be awarded for mental distress and vexation suffered by a plaintiff on account of a breach of contract. The modern trend is well-illustrated by ***Jarvis V. Swans Tours Ltd[[25]](#footnote-25),*** where the Court of Appeal unanimously held that, as a matter of principle and in a proper case, damages could be awarded for “mental distress and vexation” caused by a breach of contract.

**Mitigation of damages**

The law imposes an obligation on all parties to take reasonable steps to mitigate the losses caused by a 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 put it in ***British Westinghouse Electric and Manufacturing Co V. Underground Electric Rys Co. of London[[26]](#footnote-26)*** *“*the fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his neglect to take such steps”.

**Penalty and liquidated damages**

The parties to a contract may agree in advance to fix the sum payable as damages by either of both parties in the event of breach of contract. Whether such an agreement will be upheld and enforced by the courts, depends on whether it is regarded as a liquated damages clause or a penalty cause. It is a liquidated damages clause if its aim to make a genuine pre-estimate of the loss the plaintiff is likely to suffer in the case of a breach: the purpose of the parties being to facilitate the recovery of damages without the difficulty and expense of proving actual damage. The courts will uphold and enforce such a provision.

**Nominal Damages**

Whenever a party has committed a breach of contract, the injured party is entitled to nominal damages, even though he has suffered no actual damage. The violation of his right per se will entitle the plaintiff to nominal damages without proof of any loss incurred by him as a consequence of the breach. In ***Nigerian Advertising and Publicity Ltd V. Nigeria Airways Ltd[[27]](#footnote-27),*** the plaintiffs were unable to establish any loss suffered by them as a consequence of the defendants’ admitted breach of contract. Nevertheless, the court held that although no recoverable “special” damages had been proved, it awarded nominal damages in the sum of 100 pounds. Here again the court treated the term nominal as if it was interchangeable with “general”.

**Exemplary damages**

Exemplary damages are damages awarded against the defendant as a punishment, so that the assessment goes beyond mere compensation to the plaintiff. The right is more widely applied in the law of tort, although even in this area of the law it was severely restricted by the House of Lords in the case of ***Rookes V. Barnard[[28]](#footnote-28).***

1. (Unreported) High Court, Lagos, Coker, J.., Suit No. LD/222/58 delivered on May 20, 1960. Casebook. P.448 [↑](#footnote-ref-1)
2. Unreported) High Court of Western State, Ibadan Judicial Division, Somolu, C.J., Suit No. 1/205/69 delivered on September 28, 1969 [↑](#footnote-ref-2)
3. (1853) 2E. & B. 678. [↑](#footnote-ref-3)
4. (1872)L.R..7 Exch 111 [↑](#footnote-ref-4)
5. (Unreported) High Court of Oyo State, Ibadan, Adeyemi, J.., Suit No. 1/64/80 delivered on 25th June, 1981 [↑](#footnote-ref-5)
6. (Unreported) High Court of Midwestern State, Benin Judicial Division, Ogbobine, J.,Suit No. B/47/73 delivered on June 14. Casebook, p.436 [↑](#footnote-ref-6)
7. [1997] 8NWLR (Pt.516) 187 at 201 [↑](#footnote-ref-7)
8. [1968]2 A.L.R.336 [↑](#footnote-ref-8)
9. [1962] A.C. 413 [↑](#footnote-ref-9)
10. [1973]A.C 331 [↑](#footnote-ref-10)
11. (Unreported) Suit No. SC 420/66 delivered on August 18,1972 Casebook., p 431 [↑](#footnote-ref-11)
12. (1848) 1 Ex. 850 at p. 855: [1843-60] All E.R 383 at p. 385 [↑](#footnote-ref-12)
13. (1854) 9Ex. 341; [1843-60] All E.R .461 at. P.465 [↑](#footnote-ref-13)
14. [1969] 1 A.C 350; [1969] 3 All E.R.686 [↑](#footnote-ref-14)
15. [1962] W.R.N.L.R.229 [↑](#footnote-ref-15)
16. (Unreported) High Court of Lagos State. Suit No. IK/88/71 [↑](#footnote-ref-16)
17. [1980] A.C .367 at p.400 [↑](#footnote-ref-17)
18. [1962] A.C. 413 [↑](#footnote-ref-18)
19. (1926) 6 N.L.R.39. [↑](#footnote-ref-19)
20. [1911] 2 K.A.B. 786 [↑](#footnote-ref-20)
21. [1867] L.R.2Ex.340 [↑](#footnote-ref-21)
22. [1936] A.C. 85 [↑](#footnote-ref-22)
23. [1939] W.R.N.L.R. 187 [↑](#footnote-ref-23)
24. [1856] 1.H.& N. 408 [↑](#footnote-ref-24)
25. [1973] 1Q.B.233; [1973] 3 W.L.R. 954 [↑](#footnote-ref-25)
26. [1912] A.C 673 at p. 689 [↑](#footnote-ref-26)
27. (Supra) [↑](#footnote-ref-27)
28. [1964] A.C 1129 at pp. 1220-1221 [↑](#footnote-ref-28)