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**COURSE: LAW OF CONTRACT**

**COURSE CODE: LPB 202**

**ASSIGNMENT: 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. (Tritel 2007, para 17-049)**

**Discuss the following:**

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

**(A). Breach of Contract.**

A breach of contract is a violation of any agreed-upon terms and conditions of a binding contract. The breach could be anything from a late payment to a more serious violation such as the failure to deliver a promised asset.

A contract is binding and will hold weight if taken to court. To successfully claim a breach of contract, it is imperative to be able to prove that the breach occurred.

Sometimes the process for dealing with a breach of contract is written in the original contract. For instance, a contract may state that in the event of late payment, the offender must pay N35,000 fee along with the missed payment. If the consequence for a specific violation are not included in the contract, then the parties involved may settle the situation among themselves, which could lead to a new contract, adjudication or another type of resolution.

General Requirement

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

* The contract must be valid. It must contain all essential contract elements by law. A contract isn’t valid unless all these essential elements are present. So without them, there can be no Lawsuit.
* 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 types of breach of contract

* Fundamental breach of Contract: In *Photo Productions ltd. .v. Securicor Transport Ltd.[[2]](#footnote-2),*Lord Diplock defined fundamental Breach of Contract as an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract. In *Karsales .v. Wallis* [1956] *ECWA Civ 4,* a buyer inspected a car dealer’s used Buick car and agreed to buy it. The car was later delivered at night, and has been towed. When the buyer inspected the car in the morning, it would not work and it was clear it had been involved in an accident, and there were other changes: Its tyres had been replaced by old ones, body parts were missing, and the engine’s cylinder head was detached, revealing burnt valves. This was a serious breach, but the dealer sought to rely on a clause in the contract: “No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein”.

Although the clause was clear and well drafted, the Court of Appeal declared that a “car” was a “vehicle capable of self-propulsion”, and was accordingly this Buick was not a proper car. The court held that the dealer was “in breach of a fundamental obligation” and so could not rely on any exclusion clause. This case soon became the leading case on “fundamental breach”. As a matter of law, under the doctrine of Fundamental Breach of contract, exclusion clauses were deemed not to be available to a party in Fundamental breach of the contract.

Until the decision of the House of Lords in the *Suisse Atlantique* case[[3]](#footnote-3) in 1966, it was generally believed that a party guilty of a fundamental breach of contract could not avoid liability by reliance on an exemption clause inserted into the contract for his benefit. The House of Lords boldly held that *Karsales .v. Wallis* had overstated the law, and that whether or not a fundamental breach extinguishes any protection that the defendant might rely on was a “question of construction” and not a “question of law”

* Partial breach of contract: A party involved in a contract may sometimes fail to uphold a portion of the contract, but still perform enough of their duties so that the main root of the agreement may still be fulfilled. This is known as partial breach of contract. As opposed to material breach, partial breaches are often negligible in nature and do not give parties the right to terminate their agreement. For instance, if a home owner hires a contractor to install new windows in a home and contractor uses windows that aren’t wind resistant the home owner will ask the contractor for damages incurred. Since there is no difference in value between the two windows then the homeowner would have been awarded damages that amount to the difference between the two windows.
* Material breach: A material breach has been held to mean “a breach of contract which is more than trivial, but not need to be repudiatory… which is substantial. The breach must be a serious matter, rather than a matter of little consequence”.[[4]](#footnote-4) A breach of contract will likely constitute a material breach if the term of the contract that has been breached if the term of the contract that has been breached is a **condition** of the contract. A variety of tests may be applied to terms of contracts to decide whether a term is a warranty or a condition of the Contract.

In respect to the EPC Agreements Material breach is defined as “shall mean a breach by either party of any its Obligations under this Agreement which has or is likely to have a Material Adverse Effect on the Project and which such party shall have failed to cure”.

* Anticipatory Breach: This is an unequivocal indication that the party will not perform when performance falls due, or a situation in which the future non compliance is inevitable. An anticipatory breach gives the innocent party the option to immediately terminate the contract and sue for damages, or wait for the time of performance: if the party required to perform does not perform when required by the contract, the innocent party can terminate then.[[5]](#footnote-5) 6

For example, A contracts with B on January 1 to sell 500 quintals of wheat and to deliver it on May 1. Subsequently, on April 15, A writes to B and says that he will not deliver the wheat. B may immediately consider the breach to have occurred and file a suit for damages for the scheduled performance, even though A has until May 1 to perform. However, a unique feature if anticipatory breach is that if an aggrieved party chooses not to accept a repudiation occurring before the time set for performance, not only will the contract continue on foot, but also there will be no right to damages unless and until an actual breach occurs.7

The innovation of the doctrine of anticipatory breach of contract in common law was introduced in 1853 by a famous English case, *Hochster .v. De La Tour8,* De La Tour concluded an agreement to employ Mr. Hochster to act as a courier and travel with him in Europe on 1 June 1852. On 11 May 1852, De La Tours wrote to Hochster informing them that they no longer require his services. On 22 May 1852, Hochster brought an action of damages for anticipatory breach of contract. De La Tours argued that he could not bring an action before the date on which the contract was due to commence. It was held that the action was properly and not prematurely brought. The reasoning behind the decision was that an unfortunate situation would have arisen if the employee, as a condition precedent to a right of action, would have to decline other employment and hold himself ready to perform his promise until the commencement date of the contract.

**(B). WHAT ARE THE REMEDIES AVAILABLE FOR BREACH OF CONTRACT**

The remedies available for a contract breach include:

* **Monetary damages:** The party who breached the contract can be held responsible for the losses caused by the breach. Both general or expectation damages and consequential damages refer to the loss directly caused by the breach.

Consequential damages refer to losses that occurred because of the breach but that were an indirect cause. For example, if u contacted and paid for a machine to be delivered and it never came, the general losses would include the value of the money you paid for the machine you needed to do your work.

* **Specific performance:** In some cases, the appropriate remedy for a breach of contract is to correct the breach by forcing the breaching party to complete the terms of the agreement. Specific performance is an appropriate remedy in situations where monetary damages could not possibly make the non-breaching party whole for the losses. For example, if there was a contract created for a buyer to purchase a rare piece of art, the buyer could not simply find the art elsewhere. The only remedy that would help the buyer in this circumstance is for the court to require the sale to go through so the buyer got the unique one-of-a-kind painting contracted for.
* **Rescission:** Rescission allows the non-breaching party to essentially be released from performance obligations. Rescission is a remedy for a breach of contract because it makes clear that the party is relieved of his duties due to the failure of the other party to perform.
* **Liquidation damages:** Sometimes, it is very difficult to determine how much a person was damaged by a breach of Contracts. To address this problem, some contracts contain liquidated damage clauses. Essentially, these clauses specify that the non-breaching party will be awarded a specific amount of money in the event a breach occurs. These clauses will be upheld as long as they are fair.

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2. [1980] A.C. 827S, I.E Sagay, ‘*Fundamental Breach of Contract’* in Spectrum Books Ltd, 2nd edition, Nigerian Law of Contract (2007), 178-201. [↑](#footnote-ref-2)
3. *Suisse Atlantique Societe d’ Armement Maritime S.A .v. Rotterdamsche Kolen Centrale [1967] 1. A.C. 361* [↑](#footnote-ref-3)
4. *Mid Essex Hospital Services NHS Trust .v. Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA civ 200, paragraph 126.* [↑](#footnote-ref-4)
5. *Progressive Mailing House v Tabali party [1985]*

   *6Foran v Wight [1989]*

   *7Paterson, Jeanie; Robertson, Andrew; Duke, Arlen (2012). Principles of contract law (Fourth ed.). Sydney Thomson Reuters (professional) Australia Limited. P.440.*

   *82 El. &Bl. 678. 118 Eng Rep 922 (Q.B 1856)* [↑](#footnote-ref-5)