BREACH OF CONTRACT

The term 'Breach' has its origin from the Germainc root word 'Breche' which means 'To Break'. A contract as we know is an agreement between parties, enforacble by law. The phrase 'Breach of contract' therefore must simply refer to the break in the agreement between parties. This writer aims to discuss extensively the phrase 'breach of contract' making known the types of breach and situatons whereby a breach of contract may arise. In doing so, making use of statutory as well as judicial authorites to support each claim.

DEFINITION

According to the Blacks Law dictionary[1] A breach of contract is a Failure to live up to the terms of a contract. The failure which may provoke a lawsuit by the aggrieved party. One way of looking at a contract is to regard it as being an exchange of promises between the parties. The terms of the contract are the sum total of all these promises, expressed and implied. A failure to carry out a promise in the contract will constitute a breach of contract. 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.[2]

In Nigeria, the concept of Breach of contract is not new, and laws guiding though not explicitly provided in statutory authorities, is upheld through judicial precedent.

Judgement delievered by Anthony Ikechukwu Iguh. JSC in the case of *Sabru Motors Nigeria Ltd v Rajab Enterprises Nigeria Ltd*[3] attetsts to this as Both the appellant and the respondent had entered into a contract for the sale and delivery of two Trucks by the appellant to the respondent. On the appellant's failure to deliver the trucks, the respondent initiated proceedings at the High Court of Justice, Adamawa State against the appellant claiming as follows:

[1] Garner, Bryan A., and Henry Campbell Black. *Black's Law Dictionary.* 9th ed. St. Paul, MN: West, 2009. Print.
[2] Treitel 2007, para 17-049
[3] SC.116/1997

(a) The money originally paid by the plaintiff to the defendant for the delivery of the two trucks and an additional sum which the plaintiff will have to add to the sum originally paid to the defendant if the plaintiff where to buy the two trucks in the open market.

(b) An order of this Hon. Court compelling the defendant to pay interest on the sum of ₦1,692,519.00 at the current bank rate to the plaintiff from the month of March, 1993 until judgment is delivered."

At the conclusion of trial, the learned trial Judge, Oluoti, J. found that the appellant was in breach of this contract when it failed to deliver the two trucks to the respondent. By this reason, it is seen that certain requirements are to be put in place before an act may consitute a breach of contract.

REQUIREMENTS TO CONSTITUTE A BREACH OF CONTRACT

In order to truly deterine wheter or not a contract has been breached, a judge is required to throrughly examine the existence of a contract. The contract must be valid, posessing all the necessary elements of a valid contract. The terms must be explicity stated and understood by both parties, a judge must also examine these facts which are the requirements to the contract. Coupled with this, a judge must make sure of the modifictaions and alterations made to the contract if there is any. This, eventhough done judicuolsy is not enough to cinsitute breach of contract as Parties must be rightly informed beforehand of any breach of contract. Menaing that the plaintiff must have done and completed his part of the contract effectivelt and made considerable effort to notify the other party of their failure or inefficincy in completing their own specific part of the contract. The plaintiff therfore must show that the defendant wasindeed in a breach of the specified contract.

A breach of contract may take place when a party to the contract fails to fulfill the specified obligations under the contract in part or in whole or even behaves in a manner that could be imply that one has no plans to fulfill its obligations under the contract now or in the furture or if the contract will be impossible to execute due to the parties own actions.

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TYPES OF BREACH OF CONTRACT

MATERIAL BREACH

This has been defined as a breach of contract which is more than trivial, but need not be repudiatory... which is substantial. The breach must be a serious matter, rather than a matter of little consequence.[4] In respect to the EPC Agreements Material breach is defined as "shall mean a breach by either Party of any of 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." A materal breach is usually that which is in breach of a condition of the contract which warrants an aggrived party requesting a claim for damages by reason of the breach. The term ‘Material breach’ actually has no definite meaning in law, except that whichis given to it by the contract. An example of a material breach is when a buyer is purchasing a rare item but the seller does not give or ship it to them and instead hands it over to someone else, then this would be considered a material breach of contract.

ANITICIPATORY BREACH

This is also known as a Renunciatory breach. This is a situation whereby one party foresses the others failure to perfom their end of the contract and for that reason terminates the contract seeking damages before the proposed brech occurs. Furthermore, whether or not the obligee in this situation chooses to bring his action at the time of the repudiation, he may nevertheless discontinue his own performance under the contract without fear of prejudicing his right of action against the obligor[5]. An Anticipatory breach is often a time difficualt to prove in court, as the plaintiff is usually bent on a hunch that the other party intends to breach the contract and it is difficult to prove an intention in the court. The leading case in a long line of common law decisions recognizing the doctrine of immediate suit for an anticipatory breach is *Hochster v. De la Tour.*[6] In that case the defendant repudiated an employment contract and plaintiff brought suit prior to the time performance was to begin.

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[4] Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200, paragraph 126.

[5] David W. Robertson, The Doctrine of Anticipatory Breach of Contract, 20 La. L. Rev. (1959) Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol20/iss1/20> Date Accessed 04 May 2020

[6] 2 El. & BI. 678 (K. B. 1853).

FUNDAMENTAL BREACH

A fundamental breach is usually read as a reference to a repudiatory breach, a concept developed by Lord Denning to the disaproval of the house of lords. It is a situation wherby party fails to keep an integral part of the contract, breach of which allows the aggrived party to either repudiate the contract or claim damages as they so wish. The case of Tattersal v National Steamship co. laid the foundation for this rule as it was held here that "A party cannot exempt himself from a breach of a term so fundamnetal to the contract"

PARTIAL BREACH

This is when a party that has not violated the contract does not have the right to order to fulfill its obligations, but only to recover losses for which it is due. This is a breach that usually is not as significant as one to warrant the other partie's failure to perform his or her own duties. This may also be described as an immaterial breach Where one party freely agrees to accept partial performance then a sum is payable for the work completed. The main focus is on free acceptance. In the case of *Sumpter v Hedges*[7] The claimant agreed to build two houses and stables for the defendant payable on completion. The claimant was unable to complete. He had performed just over half of the contract. The defendant completed the work himself. The claimant sought to recover the value of the work he had completed. He argued that in completing the work himself, the defendant had thereby accepted partial performance and prevented the claimant from completing the contract. This was a partial breach.

[7] (1898)

REMEDIES AVAILABLE FOR BREACH OF CONTRACT

The Remedies available to an aggrived party for breach of contract are in-exhaustive and often time are at the discretion of the courts, subject to the unique facts of the case. Often a time, it varies from, Damages whereby the party is compensated for the breach of contract to specific performance or injunction whereby a judicial order is passed to ensure the party carries out their duty or contractual obligation. 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. One of the most common remedy available to an aggrived when one party is found to be in breach of a contract is a monetary payment.

DAMAGES

In the Courts of Common Law before 1875 this was the only possible remedy. In 1875, as the result of the Judicature Act 1875, the equitable remedies developed by the Court of Chancery became available in all parts of the High Court. We will consider these remedies in a later lecture, but these remedies are exceptional and only available in a rather narrow band of cases.

All breaches of contract give rise to a right in the innocent party to claim damages. The general principle of the law of damages in relation to breach of contract is that the court endeavours, so far as possible, to put the innocent party into the position which he would have been in had the contract been properly performed. This is usually referred to as damages for loss of expectation. But in some circumstances the innocent party may be able to recover only damages to the extent of his reliance upon the party's performance.

In Nigeria, the principles which govern the assesment of damges has its roots in the old English case of *Hadley v Baxendale*[8] In this case, the principle of the developed law is that the damages caused by the breach of contract may arise naturally and justifiably (i.e., in the normal course of events resulting from the breach of such an agreement); or the possible consequences of the breach, which may be in the minds of both parties at

[8] (1845) Exch 341.

the time of concluding the contract. The Nigerian Supreme Court has on several occasions used the doctrine to rehabilitate an innocent party, claiming damages for breach of office if it is not violated. As a result, compensation for damages is based on natural damage.

A breach of Contract constitutes one Cause of Action only; which cause of Action may give rise to different remedies[9] And where a breach of contract for the Sale of Goods gives rise to one remedy for return of money paid because of total failure of consideration, and another remedy for damages both remedies must be claimed in one action, and cannot be pursued by way of two separate actions; because, where there is one cause of action damages must be assessed once and for all.

EQUITABLE REMEDIES

The Court of Chancery before 1875 developed some remedies for breach of contract which were not available in the courts of common law. After the Judicature Act 1875 these remedies became available in all parts of the High Court, but litigation concerning them tends still to be concentrated in the Chancery Division. These remedies were developed in relation to transactions concerning the transfer of interests in land and this context affects the way in which the remedies are expressed in the cases. They were not developed in the context of modern commercial transactions, to which they are in some respects ill-adapted. All equitable remedies are discretionary

SPECIFIC PERFORMANCE

A decree of specific performance is an order of the court requiring a party to carry out his obligations under the contract. Failure to carry out the court's order is a contempt of court and is punishable with the penalties for civil contempt (in extreme cases, imprisonment) – hence the maxim equity acts in personam. The basic principle concerning the grant of decrees of specific performance is that they will not be granted where damages would be an adequate remedy. In practice this means that they are quite sparingly granted. In very rare

[9] *Alhaji Bature Gafai v. United Africa Company limited (SUIT NO. K/7/1961) [1961] 10 (05 DECEMBER 1961)*

circumstances a decree of specific performance may be granted in respect of an obligation to pay money.[10] The Sale of Goods Act 1979 s. 52[11] gives the court a power to order specific performance of a contract for the sale of goods, but in practice this power is very sparingly granted and is usually limited to cases where the goods are of unique value.

INJUNCTION

An injunction is an order of the court ordering the defendant not to do something which he is doing or threatening to do in breach of a contractual (or other) obligation. The penalty for disobedience of the court's order is again the penalties for a civil contempt of court. An injunction may be granted at trial (a final injunction), but injunctions are very often sought at the pre-trial stage in order to prevent the defendant from doing something which he is threatening to do in breach of contract. There is some controversy about the correct test to be applied when deciding what the claimant has to prove in order to get a pre-trial injunction.[12] A claimant who seeks a pre-trial injunction is normally required to give a cross-undertaking in damages, which means that they are required to promise to indemnify the defendant against any loss caused to the defendant by the operation of the pre-trial injunction if, at trial, they are not successful in getting a final injunction.
An injunction will not be granted if its enforcement would require constant supervision by the court.

RECTIFICATION

Rectification is an order of the court which amends the text of a document, such as a contract in writing. The power to order rectification is a very narrow one. It will generally only be granted if the court is convinced that the parties have reached an agreement on certain terms and reduced their agreement to writing, but the writing does not accurately reproduce the terms of their agreement. It does not go far beyond correcting clerical errors in contracts, and cannot be used to change, or insert, terms which a party may have wished they had included in a contract but failed to do so.

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[10] *Beswick v Beswick* [1968] A.C. 58
[11] *Sale of Goods Act 1979 s. 52*
[12] *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396

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