NAME: OSEZUAH SARAH OSEREMHEN

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WHAT IS BREACH?

Breach of contract is a civil wrong in which a binding agreement or bargained for exchange is not honored by one or more parties to the contract by non-performance ot interference with the other party's performance. Breach occurs when a party to a contract fails to fulfill 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 breach of contract, the damages will have to be paid by the party breaching the contract to the aggrieved party.

A breach of contract always entitles the injured 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 the innocent party has a right to rescind or terminate the contract. Rescission here 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 that the latter is also discharged from performing his own remaining obligations towards the innocent party but the guilty party remains liable for damages towards the innocent party.

The innocent party is not bound to treat the contract as discharged as a result of repudiation or fundamental breach by the other party. He has the discretion to keep the contract and thus his liability and that of the guilty party alive in certain circumstances.

WAYS OF BREACHING CONTRACT

A breach of contract may take place when a party to the contract:

- Fails to perform their obligations under the contract in whole or part in
- Behaves in a manner which shows an intention not to perform their obligations under the contract in the future or
- The contract becomes impossible to perform as a result of the defaulting party's own act.

The first type above is an actual breach of a contract. The second two types are breaches as to the future performance of the contract and technically known as renunciatory breaches. Renunciatory breach is more commonly known as anticipatory breach.

Before a breach of contract suit will be upheld in court the contract must be valid, the party who's suing for the breach must show that the defendant did breach the agreement's terms, the plaintiff must have done everything required of him in the contract and the plaintiff must have notified the defendant of the breach before proceeding with filing a law suit.

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 popularly referred to as 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.[1] However, what is important is that this term is understood to mean that the guilty party has shown either words or conduct that he has no intention of performing his own part of the contract whenever the time of performance arrives. As stated by Coker, J (as he then was) in *Solomon Nassar v. Oladipo Moses*:[2] 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 fulfill his part of the contract at the agreed time.

The true meaning and effect of an anticipatory breach were stated by Lord Esher, M.R, in *Johnson v Milling* thus:[3] When one party assumes to renounce the contract, that is by anticipation refuses to perform it, he thereby so far as he is concerned declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to the rescission of the contract because one party to it by himself cannot rescind it, but by unlawfully making such a renunciation of the contract he entitles the other party to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at end except for the purpose of

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[1] Cheshire and Fifoot, p. 484

[2] (Unreported) High Court Lagos, Coker J, Suit No LD/222/58 delivered on may 20, 1960. Casebook p 448

[3] (1886) 16 Q.B.D 460 at 467

bringing the action upon it for damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes and treat such renunciation as an immediate breach. If he adopts the renunciation the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does wish to do so, he must wait for the arrival of the time when in ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract.

Repudiation may be expressed or implied or be in words or by conduct. Thus, in *Hochester v De la Tour,*[4] 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.

The facts of *Nigerian Supplies Manufacturing Co. Ltd v Nigerian Broadcasting Corporation*[5] represent a classic case of express anticipatory breach. The plaintiff company leased certain property to the defendant corporation for a term of 5 years from January 15, 1962 at a rent 26 pounds a year with an option to renew for a further term of 5 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 a breach of contract. The trial judge held that the option had been validly exercised but for other reasons he refused to grant the injunction sought.

The plaintiff appealed to the Supreme Court. Upholding the appeal and granting the declaration and injunction sought by the plaintiffs, the court held that the 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:

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[4] (1853) 2 E & B 678
[5] (1967) 1 AII N.L.R 35

…which could have been treated forthwith as an anticipatory breach of contract, or alternatively the plaintiffs could have waited till the day of performance was passed and sued…[6]

On the other hand, repudiation may be explicit. Where there is 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 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.

Where the defendant's refusal to perform is the result of a bonafide, though erroneous belief that he was justified to withhold performance his act may not amount to repudiation. This would be the case, for example where there is a genuine dispute as to the construction of the contract.[7]

Where the refusal to perform is not express but 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 no longer intends to be bound by the provisions of the contract.

FUNDAMENTAL BREACH

Firstly, what is a fundamental term? In *Smeaton Hanscomb & Co. Ltd v. Sassoon I. Setty Son & Co. (No. 1[8])*, Delvin J defined fundamental term as something which underlies the whole contract so that if not complied with, the performance becomes totally different from that which the contract contemplates. It is a term which constitutes the main purpose of a contract and failure to comply is equivalent to not performing the contract.

The breach of a fundamental term (as against a fundamental breach) will also give rise to the innocent party's right to terminate the contract. The tendency, however, is that with a few exceptions, a breach of a fundamental term will itself be a fundamental breach.

It is said that for a term to be fundamental the parties must have regarded it as being of major importance when the contract was made, Bowen LJ *in Bentsen v Taylor & Sons & Co*.[9] But since the parties will not normally specify this in advance, in the end it is the court's view of what is of

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[6] Ibid at p. 39
[7] *Federal Commerce Navigation Co Ltd v Molena Alpha Inc [1979] A.C 757*
[8] (1953) 1 W.L.R. 1468 at p. 1470
[9] (1893) 2 Q.B. 274 at p 281

major importance that prevails. Thus, the parties presumed intention becomes what the judge thinks it ought to be.

REMEDIES FOR BREACH OF CONTRACT

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.

The underlying basis for the common law remedy of damages was laid down by Parke.B in *Robinson v. Harman*[10] as follows: the rule of common law is 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 in this passage from the judgement of Alderson B in Hadley v Baxendale:[11] 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 fairyly and reasonably be considered as either naturally, i.e, according to the natural course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most could

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[10] (1848) 1 Ex 850 at p 855; (1843-60) AII E R 383 at p 385
[11] (1854) 9 Ex 341; (1843-60) AII ER 461 at p 465

only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract.

The facts of the case are that 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 standstill. 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 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 mill working. The plaintiff claimed damages for breach o contract. The court had to decide whether the plaintiffs' damages should include loss of profits for the period of the defendants delay.

SPECIFIC PERFORMANCE

A decree of specific performance is one by 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.

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 LJ declared in Ryan v. Mutual Tontine Association:[12] 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. The jurisdiction to compel specific performance has always been treated as discretionary and confined within well known rules.

[12] (1893) 1 Ch 116 at p 126

Thus, the basis of granting this remedy is that the party seeking it cannot obtain an adequate remedy 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 an award of damages".[13]

The remedy of specific damages is a discretionary one and the plaintiff is not entitled to it as a matter of right. This discretion however, is one exercised judiciously by the courts. In all cases the courts will consider if the granting of the decree will be just and equitable under all circumstances of the case. It will therefore not be granted where it will be impossible to carry out or where it will create hardship.

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 on a particular thing. Injunctions are either restrictive (preventive) or mandatory (compulsive).

An injunction is another way by which a court can order specific performance. Where a party to a contract undertakes not to do something (restrictive or prohibitory injunction), a court order prohibiting him from doing that thing is a negative way of enforcing the contract. Thus, in *Warner Bros Pictures Inc v Nelson*,[14] a film actress signed an undertaking with the plaintiffs, her employer, not to act for any other organisation. An injunction was issued to restrain her from committing a breach of this stipulation when she attempted to enter the employment of a third party.

On the other hand, when the injunction is mandatory, it is restorative in its effects and not merely preventive. It directs the defendant to undo what he has already done in breach of contract. For example, he may be compelled to demolish a building which he has erected in contravention of the contract. It should however be stated that this type of injunction is very rarely granted. Thus, in *African Songs Ltd v Sunday Adeniyi*, the plaintiff, apart from seeking an injunction to restrain

[13] *Tito v Waddell (No 2) (1977) Ch 106 at p 322*
[14] (1937) 1 KB 209

the defendant from performing or recording music for anyone else also sought an injunction to restrain the distribution of gramophone records already containing music recorded by the defendant in breach of contract and an order that they should be withdrawn from the public. Dosumu J (as he then was), relying on *Holt v Holt*[15] held on this point that since these had already been distributed all over the country nothing could be done about it.

Bibliography

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[15] (1963) 1 AII NLR 379