

NAME: UMEALOR SABRINA ANGEL

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COURSE TITLE: LAW OF CONTRACT II

ASSIGNMENT TITLE: BREACH OF CONTRACT

## QUESTION ONE (a)

### Discuss; Breach of Contract

Firstly, what is a contract? A contract is a legally binding agreement that recognizes and governs the rights and duties of the parties to the agreement. It can also be defined as an agreement which the law will enforce or recognize as affecting the legal rights and duties of the parties.<sup>1</sup> A breach, on the other hand, refers to an act of breaking or failing to observe a law, agreement, or code of conduct. It is also an act breaking a law, promise, agreement or relationship.<sup>2</sup>

Therefore, from the above definitions, a breach of contract is the act of breaking or failing to observe the terms stipulated in a legally binding agreement by one or both parties to that agreement. 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 honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. As stated in the assignment 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.<sup>3</sup> Similarly, a breach of contract occurs when the promise of the contract is not kept, because one party has failed to fulfill their agreed upon obligations, according to the term of contract.

A Breach of Contract may occur when a party to a contract; fails to perform its obligations under the contract, whether partially or wholly; behaves in a manner which shows an intention not to perform its obligations under the contract in the future or; otherwise appears not to be able to

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<sup>1</sup> Sagay, Nigerian Law of Contract (2<sup>nd</sup> ed. 2000), p.1

<sup>2</sup> Cambridge Dictionary (English)

<sup>3</sup> Trietel, The Law of Contract (2007), Para. 17-049

perform its obligation under the contract as a result of its (the defaulting party's) act. *In C.D. Ajufo v. Trans-Arab Ltd.*<sup>4</sup>, Solomu, C.J., framed the principles of law applicable in cases of breach of contract thus: it is an indisputable point of law, that the breach of an agreement entitles the other party who is damnified by it to bring an action on it. Such breach may take place before the time fixed for performance or of completing the performance of the contract has arrived. Thus, where a promisor by his own act or default 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.

Where there is a breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party. From the above circumstances in which a breach of contract can occur, the first refers to the actual breach while the last two which are set in the future fall under another class of breach. Most breaches of contract fall into one of the two classes of breach, therefore they can either be considered actual breaches or anticipatory breaches.

An actual breach, as stated earlier, occurs when a party to a contract fails to perform its obligations under the contract whether partly or wholly. Here, one party refuses to fulfill its side of the bargain on the due date or performs incompletely. Basically, when an actual breach of contract occurs the terms and conditions are being violated and one or both parties fail to perform his obligations as stipulated in the contract. Where there is a contract between two parties to be performed at a future date, and one party declares its intention not to perform his

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<sup>4</sup> (unreported) High Court of Western State, Ibadan Judicial Division, Somolu, C.J., Suit No. 1/205/69 delivered on September 28, 1969.

own side of it, this act is referred to as “renunciation” or “repudiation”. It is also popularly referred to as “anticipatory breach.”<sup>5</sup>

Anticipatory breach occurs where one party indicates, either by words or conduct that it will not perform all or some of its obligations under the contract, such that the result of its performance will be substantially different from the requirements of the contract. *In Hochster v De La Tour*,<sup>6</sup> the defendant actually wrote to the plaintiff stating that he was no longer going to perform his part of a contract where 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 and he succeeded.

Under English law, a breach of contract does not automatically entitle the non-breaching party to terminate the contract. A repudiatory breach however, is a breach of contract that allows the non-breaching party to treat the contract as being at an end. In the case of *Nigerian Supplies Manufacturing Co. Ltd. v. Nigerian Broadcasting Corporation*<sup>7</sup> 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: ...which could have been treated forthwith as an anticipatory breach of contract, or alternatively the plaintiffs could have waited till the date of performance was passed and then sued...<sup>8</sup>

Another term one comes across while discussing breach of contract is Fundamental Breach. A fundamental breach is a breach that goes to the root of the contract, thus the breach of a fundamental term will itself be a fundamental breach.

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<sup>5</sup> Sagay, Nigerian Law of Contract (2<sup>nd</sup> ed. 2000), p.547.

<sup>6</sup> (1853) 2 E&B 678

<sup>7</sup> (1967) 1 All N.L.R 35.

<sup>8</sup> Sagay, Nigerian Law of Contract (2<sup>nd</sup> ed. 2000), p.549

## QUESTION ONE (b)

### Remedies available for breach of contract

The court is not in a hurry to rescind a contract and as such where there has been a breach of contract, the non-breaching party has the right to certain remedies available for breach of contract. The remedies include;

### 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.<sup>9</sup> In the case of *Robinson v Harman*<sup>10</sup>, the plaintiff successfully recovered damages for his expenses and for the bargain... and it was held that the other party may recover damages which would so far as possible put him in the same position he would have been had the contract been performed.

The innocent party may only recover damages for loss suffered as a result of the breach provided it is not too remote. The case of *Hadley v. Baxendale*<sup>11</sup> establishes the principles of remoteness and provides that the following losses are recoverable; all loss which flows naturally from the breach, all loss which was in the contemplation of the parties at the time of the contract was made as a probable result of the breach. Hence, if the loss does not fall within those categories then it will be too remote and not be recoverable. The rule in *Hadley v Baxendale* has been interpreted to mean that only loss which is within the reasonable contemplation of the parties may be recovered.

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<sup>9</sup> Sagay, Nigerian Law of Contract (2<sup>nd</sup> ed. 2000), p.618.

<sup>10</sup> (1848) 1Ex. 850

<sup>11</sup> (1854) 9 Ex. 341

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, namely the date of the breach but this is not the absolute rule as was stated in *Johnson v. Agnew*.<sup>12</sup> The aim of damages is to recover him to the position he would have been had the contract been properly performed.

In Nigeria, one unique feature of contract cases decided is the proclivity of counsel as they have classified damages into “Special and General categories”. Where the losses claimed are for specific items with clear or known monetary values, it is referred to as special damages. Where however, the court itself has to estimate or assess the damages, it is termed general damages. However the Supreme Court has disregarded this classification. Similarly, in *Okeke v. Oche*<sup>13</sup>, the court declared that in action for breach of contract, there is no distinction between special and general damages.

### **SPECIFIC PERFORMANCE**

This is an equitable remedy granted at the Court’s discretion. Specific Performance is a decree by the court to compel a party to perform his contractual obligations. In situations where the remedy of damages is inadequate, such as a contract to convey land or sell antique or a famous painting, the courts of equity decreed specific performance, this was also declared by Kay, L.J. in *Ryan v. Mutual Tontine Association*.<sup>14</sup> Thus, the basis for granting this remedy is that the party seeking it cannot obtain an adequate remedy by the common law judgment for damages. The court will consider whether damages is an adequate compensation, and if not, whether specific performance will do more and complete justice than award of damages, as held by the court in

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<sup>12</sup> (1980) A.C. 367 at p.400

<sup>13</sup> (1994) 2 NWLR (Pt. 329) 688

<sup>14</sup> (1893) 1 Ch. 116 at p. 126

*Tito v. Waddell (No 2)*<sup>15</sup>. Unlike the remedy of damages in which damage for loss in a breach of contract claim are available as of right, in specific performance the plaintiff is not entitled to it as of right.

A contract in which a vendor refuses to convey land sold is one where specific performance is most readily granted by courts. In the case of *Paye v. Gaji*,<sup>16</sup> the vendor of o a piece of family property wrongfully refused to execute the conveyance of the property after the conclusion of the agreement and the payment of the purchase price by the buyer. Although the family representatives were prepared to refund the purchase price, the court of appeal rejected this and ordered specific performance. Similarly, in *Fakoya v. St. Paul's Church Shagamu*,<sup>17</sup> the Supreme Court dismissed the appeal and decreed specific performance. However, there are certain contracts to which specific performance does not apply such as a contract of personal service. Thus in *Ilodibia v. N.C.C. Ltd*,<sup>18</sup> the Supreme Court held that a court will not make an order of specific performance of a contract of personal service unless it is one with a statutory flavor. And with the contract not being one with statutory flavor, the application was refused.

## **INJUNCTION**

Like specific performance, an injunction is an equitable remedy and therefore only granted at the discretion of the court. 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 requiring one party to refrain from

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<sup>15</sup> (1977) Ch. 106 at p. 322

<sup>16</sup> (1966) 5 NALR (Pt. 450) 589 at 605

<sup>17</sup> (1966) 1 A.L.R. Comm. 459

<sup>18</sup> (1997) 7 NWLR (Pt. 512) 174 at 198

doing a particular thing. It is another way by which a court can order specific performance.

Injunctions can either be restrictive or mandatory.

On account of it being restrictive, in *African Songs Ltd. v. Sunday Adeniyi*,<sup>19</sup> a musician who undertook to perform and record solely for the plaintiff company, was restrained for the remaining period of the contract from recording for himself or for any other company. Similarly in *Warner Bros. Picture Inc. v. Nelson*<sup>20</sup>, an injunction was issued to restrain her from committing a breach of the contract when she attempted to enter the employment of a third party. Where the injunction is mandatory it directs the breaching party to undo what he has already done in breach of the contract.

As established, the courts will not grant Specific Performance to compel an unwilling party to remain in a contract for personal service. However, the court may grant an injunction restraining the servant from performing the same or similar service for anyone else, provided that it does not force him into a position where he will either have to remain in his master's service unwillingly or remain idle.

Other Remedies Include; Reformation, Rescission and Restitution. Reformation is also an equitable remedy that is applied when the written agreement does not correspond to the contract that was actually formed by the parties, as a result of fraud or mutual mistake.

In conclusion, these common law and equitable remedies are put in place to ensure that when one party has failed to fulfill their obligations under a contract, resulting in a loss on the part of the other party, the non-breaching party is compensated.

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<sup>19</sup> (unreported) High Court of Lagos State, Dosunmu, J., Suit No. LD/1300/74 delivered on February 14, 1975.

<sup>20</sup> (1937) 1 K.B. 209



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