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COURSE: Law of Contract II

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1. 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.

Discuss the following

(a) Breach of contract

(b) What are the remedies available for breach of contract.

1(a). Breach of contract is defined breach of contract in the following terms: '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, performs defectively or incapacitates himself from performing'. It should be noted that in all cases the failure to provide the promised performance must be without lawful excuse'. Thus where the contract has been frustrated there is no liability for breach of contract because both parties have been provided with a 'lawful excuse' for their non-performance .

Similarly, where one party has breached the contract and the breach has given to the other party the right to terminate performance of the contract, that party is not in breach of contract in refusing to continue with performance because he is given a 'lawful excuse' for his non-performance. Although the breach can take the form of words (such as an express refusal to perform the terms of the contract), it need not do so and can be evidenced by the conduct of one party in disabling himself from performing his obligations under the contract or by performing defectively. Where it is alleged that one party has incapacitated himself from performing his obligations under the contract, his inability to perform must be established on a balance of probabilities. This is relatively easy to do where the party alleged to be in breach has sold the subject-matter of the contract to a third party, but greater difficulty arises where he enters into alternative obligations which it is alleged are inconsistent with his existing contractual

obligations. The fact that party has entered into inconsistent obligations 'does not in itself necessarily establish [an inability to perform], unless these obligations are of such a nature or have such an effect that it can truly be said that the party in question has put it out of his power to perform his obligations '

**When Does Breach Occur?**

The question whether or not a particular contract has been breached depends upon the precise construction of the terms of the contract. No universal legal principle can be established which displaces the need for a careful analysis of the terms of each individual contract. It is for the party alleging the existence of the breach of contract to prove that a breach has occurred. It is not generally necessary to prove that a party has been at fault before breach can be established. Many obligations created by a con-tract are strict; that is to say, liability does not depend upon proof of fault.

A good example of a strict contractual obligation is provided by Section 14(2) of the Sale of Goods Act 19791 which states that, where a seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality, except in relation to defects drawn to the buyer's attention before the contract was concluded or, in the case where the buyer examines the goods, as regards defects which that examination ought to have revealed. The purchaser is not required to prove that the seller was at fault in selling goods which were not of satisfactory quality; the seller may have taken all reasonable steps to ensure that the goods were of satisfactory quality but he will still be in breach of contract if they are not of such quality. The strict nature of liability for breach of contract is also illustrated by the fact that it is generally no defence to a claim for breach of contract to show that the breach was committed in all good faith: the innocent party need only show that there has been a breach. But the courts have in some cases been reluctant to conclude that a party who has acted in good faith but was mistaken has thereby repudiated the contract. The position would appear to be that it is not a repudiation for one party to put forward his genuine but bonafide interpretation of what the contract requires of him

*(Woodar Investment Development Ltd v.Wimpey Construction UK Ltd[1980] IWLR 2772 and Vaswani v. Italian Motors (Sales) Ltd[1996] I WLR 270)3*but that where party performs in a manner which is not consistent with the terms of the contract, it is no defence for that party to show that he acted in good faith*(Federal Commerce & Navigation Co Ltd v. Molena Alpha Inc [1979] AC 7574, see further Peel, 1996).*

On the other hand, a contractual term may impose a duty to take reasonable care, in which case a breach can only be established where it is proved that the party alleged to be in breach has failed to exercise reasonable care. An example in this category is provided by s.13 of the Supply of Goods and Services Act 19825 which provides that a person who supplies a service in the course of a business impliedly undertakes to carry out the service with reasonable care and skill' .

1(b). A contract is an agreement or promise made between two or more parties that the courts will enforce. In some cases, the agreements and promises made in a contract are not kept by a party or more parties. Therefore, this situation called **breach of contract** which means failure to keep the promises or agreements of a contract. Breach of contract is a legal cause of action in which a binding agreement is not honored by one or another more of the parties.

1 S.14(2) Sales of Goods Act 1979

2 Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd[1980]I WLR 277

3[1996] I WLR 270

4[1979] AC 757

5S.13 Supply of Goods Act 1982

There can be a variety of reasons for breaching a contract and the consequences of such a breach can be very serious, even if the breach was unavoidable.

The victim of a breach of contract may resort to one or more of four remedies: specific enforcement, compensation, refusal to perform, and termination. The availability of these remedies may depend on the fault of the party alleged to be in breach.

When a promise or agreement is broken by any of the parties we call it a breach of contract. So when either of the parties does not keep their end of the agreement or does not fulfil their obligation as per the terms of the contract, it is a breach of contract. There are a few remedies for breach of contract available to the wronged party.6

**1] Recession of Contract**

When one of the parties to a contract does not fulfil his obligations, then the other party can rescind the contract and refuse the performance of his obligations.

The party that rescinds the contract must restore any benefits he got under the said agreement. And the party that rescinds the contract is entitled to receive damages and/or compensation for such a [recession](https://www.toppr.com/guides/general-awareness/money-and-money-market/recession/).

Rescission allows the non-breaching party to essentially be released from performance obligations. Recession 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.

**2] Sue for Damages**

The party who has suffered, since the other party has broken promises, can claim compensation for loss or damages caused to them in the normal course of [business](https://www.toppr.com/guides/business-studies/nature-and-purpose-of-business/concept-and-characteristics-of-business/).

Such damages will not be payable if the loss is abnormal in nature, i.e. not in the ordinary course of business. There are various types of damages, which are as follows;

* [**Liquidated Damages**](https://www.toppr.com/guides/business-laws/indian-contract-act-1872-part-ii/liquidated-damages-and-penalty/):

The underlying basis for the common law remedy of damages was laid down by ParkeB., in *Robinson v. Harmar.7*

6Treitel,The Law of Contract(5th ed.) 1979

7Robinson v. Harmar

 Sometimes the parties to a contract will agree to the amount payable in case of a breach. This is known as liquidated damages.

Here the amount payable due to the breach of contract is assessed by the courts or any appropriate authorities

Damages mean losses or costs incurred due to another’s wrongful act. Damages are granted to a party as compensation for the damage, loss or injury he or she has suffered through a breach of contract. The language of a contract will usually call for a specific penalty if the contract terms are not completed on an agreed-upon date. Both of the contract and tort law damages are the courts calculation of what it would cost to put the plaintiff back into the position he or she would have been in but for the fraud. This amount of value that has been lost is due to the breach of the contract in any of the contracts.

 Tort law damages are much more difficult to evaluate but generally are taken to represent the monetary value of what the plaintiff has lost in terms of damages of property, personal injuries, and quality of life. For example, a building contractor has agreed to complete the theme park beside Zuma Rock hotel, penalties may be built into the contract itself if the job is not completed on time. The contractor may have offered the penalty option as an incentive to win the contract. Liquidated damages refer to these penalty payments. When a contract is breached, the liquidated damages could be imposed.8

* **General and Special damages**: are known as the out of pocket expenses that the defendant incurs as the effect of dealing with the injuries or property loss caused by the plaintiff. These damages normally include of repair costs, medical expenses, car rentals and loss of wages.

Special damages (also called “consequential damages”) cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. These are actual losses caused by the breach, but not in a direct and immediate way. To obtain damages for this type of loss, the non breaching party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was made.

Where, however the court itself has to estimate or access the damages even when this is based on the principles, the resultant figure is automatically termed “general damages”.

Thus, in Ghandi v. Pfizer9 after finding the defendant in breach of the dealership agreement, the court ordered the refund of the plaintiff’s deposit of 200 pounds and then awarded an amount of 200 pounds as “general damages”.

*8Treitel, The Law of Contract(5th ed.) 1979*

9Ghandi v. Pfizer

* **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 will entitle the plaintiff to nominal damages without proof of any loss incurred by him as a consequence of the breach. Thus, in Nigerian Advertising and publicity ltd. V. Nigeria Airways ltd10., 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.
* **Exemplary or vindictive damages:** These 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. Barnard11. The court of appeal explained what constitutes exemplary damages and when they should be awarded fpor tortuous conduct in *Alele-williams v. Sagay12*. According to the court (Ige J.C.A), exemplary damages are damages which are in nature awards made with secondary object of punishing the defendant for his conduct in inflicting harm on the plaintiff.

**3] Sue for Specific Performance**

This means the party in breach will actually have to carry out his duties according to the contract. In certain cases, the courts may insist that the party carry out the agreement.

So if any of the parties fails to perform the contract, the court may order them to do so. This is a decree of specific performance and is granted instead of damages.

For example, A decided to buy a parcel of land from B. B then refuses to sell. The courts can order B to perform his duties under the contract and sell the land to A.

Specific performance is applied in breach of contract actions where monetary damages are inadequate. Specific performance is being a discretionary remedy, may not be granted where damages will provide an adequate remedy or where terms of the contract are uncertain or where there has been delay in bringing the action or where there was fraud. Suit for specific performance is by compelling the parties to perform exactly what they had agreed in the agreement.13

10 Nigerian Advertizing and publicity ltd. v. Nigeria Airways ltd.

11 Rookes v. Barnard

12 Alele-williams v. Sagay

13Sagay, Nigerian Law of Contract(12th ed.)2000

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, L.J., declared in *Ryan v. Mutual Tontine Association.14*

### ****4] Injunction****

An injunction is basically like a decree for specific performance but for a negative contract. An injunction is a court order restraining a person from doing a particular act.

So a court may grant an injunction to stop a party of a contract from doing something he promised not to do. In a prohibitory injunction, the court stops the [commission](https://www.toppr.com/guides/maths/compairing-quantities/discount-and-commission/) of an act and in a mandatory injunction, it will stop the continuance of an act that is unlawful.

An injunction may be defined as an order passed by a competent court restraining a person from doing some act. It is a mode of securing the specific performance of the negative terms of a contract.15

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. Nelson16*. A film actress signed an undertaking with the plaintiffs, her employers, 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.

### ****5] Quantum Meruit****

Quantum meruit literally translates to “as much is earned”. At times when one party of the contract is prevented from finishing his performance of the contract by the other party, he can claim quantum meruit.

So he must be paid a reasonable remuneration for the part of the contract he has already performed. This could be the remuneration of the services he has provided or the value of the work he has already done.

When a person has started the work and before he could complete it, if the other party discharges the contract or does something which makes it impossible for the other party to accomplish the contract, he can claim for the work under the contract, value of the work can be recovered from the cases where further performance is not possible.

14 Ryan v. Mutual Tontine Association

15Treitel,The Law of Contract(5th ed.)1979

16Warner Bros. Pictures Inc. v. Nelson

In *Warner & Warner v. F.H.A*.17 where the respondent wrongfully terminated a building contract which was already partly completed, the Supreme Court held that the injured contractor had the option of either suing for damages where the measure of damages is normally the loss of profits for the unfinished balance, plus the value of work done at contract prices, or ignoring the contract and claiming a reasonable price for work and labour done in quantum meruit. Quantum meruit will normally be chosen if a reasonable price is higher than contract prices.

The claim on quantum meruit must be brought by the party who is not in default. Following are the cases in which the claim may arise:-

(i) A contract which is subsequently discovered to be void has been performed and accepted then the person who has performed the contract is entitled to claim the amount for the work done and the party who receives, and accepts the benefit under the contract, must make compensation to other party.

(ii) Where a party to the contract does some act or delivers something to another party with the intention of receiving the payment for the same, in such a case, the other party is bound to make the payment, if he accepts such services or goods or enjoys their benefit .

(iii) Where the contract is divisible and a party performs part of the contract and refuses to perform the remaining part, in such a case, the party in default may sue the other party who has enjoyed the benefit of performance and can claim the compensation.18

In conclusion, a contract is an agreement or promise made between two or more parties that the courts will enforce. In some cases, the agreements and promises made in a contract are not kept by a party or more parties. Therefore, this situation called breach of contract which means failure to keep the promises or agreements of a contract. Breach of contract is a legal cause of action in which a binding agreement is not honored by one or another more of the parties. There can be a variety of reasons for breaching a contract and the consequences of such a breach can be very serious, even if the breach was unavoidable.

17Warner & Warner v. F.H.A

18 Sagay, Nigerian Law of Contract(12th ed.)2000

Bibliography:

* [Treitel, “The Law of Contract | Academic Law](https://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=30800178&recordid=6429)” (1979).
* Sagay, “Law of contract” (2000).
* <[https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198255000.001.0001/acprof-9780198255000](https://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780198255000.001.0001/acprof-9780198255000)> accessed 5th December 2017.
* <<https://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=30800178&recordid=6429>> accessed 18th January 2019.
* <<https://www.concordnow.com/blog/legal-remedies-breach-contract/>> accessed 25th July 2018.