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Law of Contract

Breach of Contract

A contract is a legally binding promise made between two parties. Each party to a contract promises to perform a certain duty, or pay a certain amount for a specified item or service. The aim or the main purpose of a contract being legally binding is so each party would have the right to sue incase a breach occurs. There are many ways to breach a contract, common failures to deliver goods or services, failure to fully complete the job, failure to pay on time, or providing inferior goods or services can be considered as a breach of contract.

Breach of Contract is the legal term that describes the violation of a contract or an agreement that occurs when one party fails to fulfill the provisions of the agreement. Sometimes it involves interfering with the ability of another party to fulfill his duties. A contract can be breached in whole and in part. A breach of contract can also be described as 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. Breach occurs when a party to contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party.

A contract is said to be breached when one party performs defectively, differently from the agreement, or not at all (actual breach), or indicates in advance that they will not be performing as agreed (anticipatory breach).[[1]](#footnote-2) A breach occurs when the promise of the contract is not kept, because one party has failed to fulfill their agreed upon obligations, according to the terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement, or fails to perform at all. A breach of a contract entitles the injured or innocent party to an action for damages against the guilty party.[[2]](#footnote-3)A contract of employment is a legally binding agreement between an employee and an employer and a breach of that contract happens when the employee or the employer breaks one of the terms, for example if the employer refuses to pay the salary of his employee. When a breach occurs, one of the parties or both may wish to have the contract enforced on its terms, or may try to recover for any financial harm caused by the alleged breach. When a dispute over a contract arises and parties are unable to settle such matters via arbitration or any other out of court settlement, it would lead to a lawsuit.

Actual Breach  
 A simple example of a breach of a contract occurred in *Platform Funding Ltd v Bank of Scotland plc (2008)[[3]](#footnote-4).*  The defendant was a professional valuer, who was asked by a client to estimate the value of ‘1 Baker’s Yard’. This house was on a new development with five plots, none of which was numbered. The valuer mistakenly looked at and valued number 5, thinking it was number 1. The client later claimed it had suffered loss as a result and the Court of Appeal accepted there had been a breach of contract. The court held that it did not matter whether or not the valuer had been negligent; all that mattered was that he had contracted to value number 1 and had actually valued number 5. In another case of *Modahl v British Athletic Federation Ltd.[[4]](#footnote-5) (1999),* the claim of breach of contract was not proven. The claimant was a well known British international athlete who was suspended from competition by the British Athletic Federation (BAF) because of an allegation that she had taken prohibited drugs to improve her performance. She successfully appealed against the doping allegation and brought an action for breach of contract and damages against BAF. She alleged that her suspension and the initiation of the disciplinary proceedings were in breach of her contract with the defendant. She claimed damages for the financial loss suffered because she was unable to compete in international athletics for nearly a year. BAF was a member of the International Amateur Athletic Federation (IAAF). The IAAF adopted its system of instant suspension followed by disciplinary proceedings in the belief that, although it might sometimes cause injustice in an individual case, it was necessary in the wider interest of sport. The contract between Modahl and BAF was therefore interpreted as allowing the same procedures and no damages were awarded.

Fundamental Breach  
A fundamental breach of contract is essentially the same as a material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. The difference is that a fundamental breach is considered to be much more egregious than a material breach.   
While fundamental breach of contract was once the test for a serious breach of contract to justify termination, it is no longer. The concept of fundamental breach as a free standing legal concept no longer has any legal force. It is now simply another term of a contract which needs to be construed like any other term of a 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,[[5]](#footnote-6) a breach of a fundamental term will itself be a fundamental breach.[[6]](#footnote-7) In determining whether a failure to render or to offer performance is material or not, the following circumstances are significant;

* The extent to which the injured party will be deprived of the benefit which he reasonably expected;
* The extent to which the injured party can be adequately dealt compensated for the part of that benefit of which he will be deprived;
* The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
* Likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
* The extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing.

Anticipatory Breach

Renunciatory breach usually referred to as anticipatory breach or breach by anticipatory repudiation is an unequivocal indication that the party will not perform when performance falls due, or a situation in which future non-performance is inevitable. An anticipatory breach gives the innocent party the option to immediately terminate the contract and sue for damages, or to 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.[[7]](#footnote-8) A unique feature of 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.[[8]](#footnote-9) This breach can be said to occur when one party lets the other party know, either verbally or in writing, that they will not be able to fulfill the terms of the contract. The other party is then able to claim a breach of contract and pursue a remedy, such as payment.

When an anticipatory breach occurs, the other party can sue for breach straight away; it is not necessary to wait until performance falls due. This was what happened in *Frost v Knight (1872).[[9]](#footnote-10)* The defendant had promised to marry the claimant once his father had died. He later broke off the engagement while his father was still alive, and when his ex-fiancee sued him for breach of promise (which was a claim valid in those days, though not any longer) he argues that she had no claim as the time for performance had not yet arrived. The argument was rejected and the claimant’s claim succeeded. In some cases, the innocent party elects to wait until performance falls due, but this can mean they end up worse off than if they sued immediately the anticipatory breach was known. In *Avery v Bowden (1856),[[10]](#footnote-11)* Bowden chartered Avery’s ship and agreed to load p his cargo at Odessa within 45 days. However, Bowden later told Avery that he had no cargo and advised him to take the ship away. This was an anticipatory breach, and Avery could have sued for breach of contract immediately. Instead he kept the ship available at the port, in the hope that Bowden would eventually fulfill his promise. Before the 45 days were up, the Crimean War broke out between England and Russia, so that performance became illegal and the contact was frustrated. The frustration then prevented Avery from suing for breach.

Lawful excuse

In some cases, an extraneous event which is not sufficiently serious to frustrate a contract will nevertheless provide an excuse for non-performance.[[11]](#footnote-12) For example, an employee who does not go to work because he is ill is not in breach, even though the illness is not serious enough to frustrate the contract.

Effect of breach

Any breach of contract will enable the innocent party to sue for damages, but not every breach allows the wronged party to choose to discharge the contract (in contrast with frustration where the discharge is automatic). If the contract is not discharged, it will still need to be performed. There are three main circumstances in which the innocent party may choose to discharge;

* Repudiation

This is where one party makes it clear that they no longer intend to be bound by the contract, either during its performance, or before performance is due (in practice it is usually the latter, and therefore an anticipatory breach).

* Breach of a condition

Breach of a condition allows the innocent party to terminate the contract; breaches of e breached warranty do not justify termination, although they may give rise to an award of damages. In *Pilbrow v Pearless de Rougment & Co[[12]](#footnote-13)* the firm of solicitors was treated as having breached a condition and the contract was discharged so that the appellant did not have to pay the firm’s fees.

* Serious breach of an innominate term

Where the relevant term is classified by the courts as innominate, it will be one which can be breached in both serious and trival ways; and whether the innocent party is entitled to terminate or not will depend on how serious the result of the breach are. If the results are so serious as to undermine the very foundation of the contract, the innocent party will have the right to terminate.

Choice to affirm or discharge

Even when one of these three types of breach occurs, the contract is not automatically discharged; the innocent party can usually choose whether or not to terminate.

Remedies for Breach of Contract

There are several remedies for breach of contract, such as award of damages, specific performance, rescission, and restitution. In courts of limited jurisdiction, the main remedy is an award of damages. Because specific performance and rescission are equitable remedies that do not fall within the jurisdiction of the magistrate court.

Damages: This is a remedy for a breach of warranty. These damages can come in form in different forms such as an award of monetary damages, liquidation damages, specific performances, rescission, and restitution.[[13]](#footnote-14)

Compensatory damages are rewarded in an attempt to make up for the losses incurred by the breached party. These damages are most often awarded as payments. Compensatory damages can also be seen as those that compensate the non-breaching party for their losses. This is the most common legal remedy, and a court can order the breaching party to pay the non-breaching party enough money to get what they promised by the terms of the contract. A Compensatory damage covers the loss the non breaching party incurred as a result of the breach of contract. The amount awarded is intended to make good or replace the loss caused by the breach.   
There are two kinds of compensatory damages that the non-breaching party may be entitled to recover.

* General Damages: General damages cover the loss directly and necessarily incurred by the breach of contract. General damages are the most common types of damages awarded for breaches of contract.
* Special Damages: Special damages are also called “consequential damages” cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. To obtain damages for this kind 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.

Punitive Damages are given to “Punish or make an example of a wrong doer who has acted willfully, maliciously or fraudulently.[[14]](#footnote-15) When punitive damages are awarded, which happens only in extreme cases, they are usually awarded along with compensatory damages. The purpose of a punitive damage is to punish the breaching party when they have engaged in particularly egregious behavior in order to breach the contract, such as being intentionally negligent. Punitive damages are hardly awarded for breach of contract. They arise more often in tort cases, to punish deliberate or reckless misconduct that results in personal harm.

Restitution   
If the non-breaching party is able to prove that their loss is due directly to the actions of the breaching party, a judge may order restitution which could include lost wages, medical bills, and property repair or replacement.

Special Performance

Special performance is utilized as a legal remedy for breach of contract and it requires the breaching party to perform their part of the contract. In certain cases, an aggrieved party may not be made whole through the award of monetary damages. He may instead request the court to order specific performance of the terms of the contract. Specific performance may be any court-ordered action, forcing the breaching party to perform or to provide exactly what was agreed to in the contract. Specific performance is most often ordered in a contract involving something for which a value is difficult to determine such as land. Specific performance is not always available.

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   2 I. E. Sagay, p. 547. [↑](#footnote-ref-2)
2. [↑](#footnote-ref-3)
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4. Modahl v British Athletic Federation Ltd [1999] The Times, 23 July. [↑](#footnote-ref-5)
5. Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co. [1970] 1 Q.B. 447. [↑](#footnote-ref-6)
6. Alexander v. Railway Executive [1951] 2 K.B 882; Karsales (Harrow) Ltd. v Wallis [1956]1 W.L.R. 936. [↑](#footnote-ref-7)
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8. Paterson, Jeanie; Robertson, Andrew; Duke, Arlen (2012). Principles of Contract Law (Fourth Ed.). Sydney: Thomas Reuters (Professional) Australia Limited. p. 440. [↑](#footnote-ref-9)
9. Frost v Knight [ 1871-72] LR 7 Ex 111 [↑](#footnote-ref-10)
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