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**COURSE CODE:**

**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. (Treitel 2007, para 17-049)

 Discuss the following:

1. Breach of contract
2. What are the remedies available for breach of contract?
   * 1. **BREACH OF CONTTRACT**

A breach of contract occurs where a party fails to perform or shows an intention not to perform one or more of the obligations lay upon him by the contract. When any party to a contract, whether oral or written, fails to perform any of the contract’s term, they may be found in breach of contract. It always entitles the innocent party to an action for damages against the guilty party and where the guilty party has repudiated the contract or committed a fundamental breach, it gives an additional right to the innocent party to rescind or terminate the contract. A breach which is serious enough to give the innocent party this option of treating the contract as discharged can occur in one of two ways: Either one party may show by express words or by implications from his conduct at some time before performance is due that he does not intend to observe his obligations under the contract (anticipatory breach) or he may in fact breach a condition or otherwise breach the contract in such a way that it amounts to a substantial failure of consideration (actual fundamental breach).

The effect of this always make the injured party entitled to an action for damages against the guilty party and also in addition, where the guilty party has repudiated the contract or commits a fundamental breach, the injured party as well has a right to rescind or terminate the contract. We have anticipatory breach and actual (fundamental) breach.

**ANTICIPATORY BREACH**: anticipatory breach is 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 is also known as ‘renunciation’ or’ repudiation’. What is important is that this term is understood to mean that the guilty party has shown either by words or conducts that he has no intention of performing his own part of the contract whenever the time of performance arrives. As stated by Coker, j in the case of ***Solomon Nassar v. Oladipo Moses*:[[1]](#footnote-1)** it is open to a party to a contract to sue the other party for reach 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 fulfil his part of the contract at the agreed time. Such repudiated may be express or implied, or be in words or be in words or by product, which means that we have express repudiation and implied repudiation. A case were the repudiation was express was the case of ***Hochester v. De la Tour*[[2]](#footnote-2)**, which was also a leading case on the subject. The facts stated that: in April, De La Tour agreed to employ Hochester as his courier for three months from 1 June 1852, to go on trip around the European continent. On 11 May, De La Tour wrote to say that Hochester was no longer needed. On 22 May, Hochester sued. De La Tour argued that Hochester was still under an obligation to stay ready and willing to perform till the day when performance was due, and therefore could commence no action before. It was held that even though the date of performance was still nearly a month ahead, he has the right to sue for anticipatory breach On the other hand, repudiated may be implicit, where there is reasonable inference that the defendant no longer intends to perform his discharged and to sue for breach. In ***Frost v. Knight****[[3]](#footnote-3)* in this case, the defendant having agreed to marry the plaintiff on the death of his father, broke off the engagement during the father’s lifetime. It was held that the plaintiff was immediately entitled to sue for breach of contract.

When 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 reasonable person to conclude that he no longer intends to be bound by the provisions of the contract. Thus, a man must be both ready and willing to perform and if he is willing, but not ready, i.e., not able to perform, at least according to the terms of the contract, then he has repudiated as much as a man who actually refuses to perform. It is important to note that the repudiation may be expressly through words of mouth or impliedly by conduct made by the guilty party to the innocent party.

**FUNDAMENTAL BREACH:** fundamental breach is when a previously agreed contract is cancelled by one of the party’s actions or in actions in some cases. The breach should be so cardinal that it goes to the root of the contract. It should have the effect of depriving the injured party of achieving the main purpose for which he contracted. In connection, a breach of a fundamental term or condition will amount to a fundamental breach. For a breach of contract to amount to a fundamental breach, it must entitle the innocent party to: treat himself as discharged from further obligations in the contract which should have the consequence of ending the contract and claim damages for breach of contract. In the recent decision in ***R.P.M. investment Corp v. Lange[[4]](#footnote-4)***, the Alberta court of Queen’s Bench held that a party to a contract may terminate a contract on the basis of a ‘fundamental breach’ of the contract in addition to the right to terminate the contract for repudiation.

* + 1. **REMEDIES AVAILABLE FOR BREACH OF CONTRACT**

There are some remedies available to a party which is affected due to the breach of a contract. The remedies are: damages recognized under common law (the only relief available for breach of contract was damages, and in many cases this proved adequate and indeed the best remedy), but now we have other remedies under equity, which are: injunction, specific performance and quantum meruit.

**1. DAMAGES:** an action for damages is the one remedy which is available in every breach of contract. The object of awarding damages for the breach of contract is to put the injured party, so far as money can do it, in the same position as if the contract had been performed. The leading case of ***Hadley v. Baxendale[[5]](#footnote-5)*** laid the common law foundation for the assessment of damages arising from a contractual breach. In an action for damages for breach of contract, two questions often arise. The first question as to which type of damage must be accorded monetary compensation (i.e. question on remoteness of damage) and the question as to what sum must be paid as damages (i.e. question of measure of damages), the first question, the rule is that only kind of damage which results naturally from the breach or which could reasonably be said to have been in the contemplation of both parties at the time of the contract must be compensated for. In the case of ***Hadley v. Baxendale (supra).*** The facts of the case was: the plaintiffs were millers in Gloucestershire and the defendants were common carries of goods. The crankshaft of the plaintiffs’ steam engine was broken with the result that work on the mill had come to a stand-still. 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 Gloucestershire 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 plaintiff had no spare shaft and that the mill could not operate until the new shaft was instilled. 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 plaintiffs claimed for damages for breach of contract it was held that, in the great multitude of cases of parties in a similar situation, the consequences arising in this case would not in all probably occur and the plain tiffs special circumstances were never communicated to the defendants. The amount of damages for which compensation is claimed is determined in principle by the two branches of the rule: the damage awarded must arise as a natural result of the breach, i.e., the loss must flow naturally or directly from the breach of the contract. And if there are special circumstance, causing a greater, them damages will only be awarded for this loss, if it was reasonably foreseeable at the time the parties entered into the contract.

**Remoteness of damage**: Whenever it has to consider a claim for damages, a court must first resolve the issue whether the defendant is liable for any damage at all, and if so the nature and extent of such damages or losses. The amount of damages for which compensation is claimed is determined in principle by the two branches of the rule: the damage awarded must arise as a natural result of the breach, i.e., the loss must flow naturally or directly from the breach of the contract. And if there are special circumstance, causing a greater, them damages will only be awarded for this loss, if it was reasonably foreseeable at the time the parties entered into the contract. The question of remoteness of damages in contract was given detailed consideration by the House of Lords in ***Koufos v. C. Czarnikow Ltd[[6]](#footnote-6)***

**Measurement of damages:**  the general rule with regard to the time of assessment is that damages should be assessed as at time when the cause of action arose, namely, the date of the breach. Situations in which the court will not apply the date of the breach are: where the innocent party refuses to treat the breach as terminating the contract and where the plaintiff did not know until later that a breach occurred. The Supreme Court very clearly demonstrated how damages should be assessed or measured in a case of breach of contract of employment in the case of ***Mobil Oil (Nigeria) Ltd. v. Abraham Akinfosile[[7]](#footnote-7)***

**We have other areas under damages which include: damages for non-pecuniary losses, mitigation of damages, penalty and liquidated damages, general and specific damages, exemplary damages and nominal damages**

**Damages for non-pecuniary losses:** the plaintiff who has suffered a non-pecuniary loss as a result of a breach of contract would be entitled to damages if it can be shown that the distress or unhappiness was the natural and probable consequence of the breach complained of. This is well illustrated in the case of ***Jarvis v. Swans Tours Ltd[[8]](#footnote-8).***

**Mitigation of damages**: the law imposes an obligation on all parties to take reasonable steps to mitigate the losses caused by a breach of contract. The plaintiff cannot therefore recover loss which could have avoided by taking reasonable steps. In the case of ***PAYZU Ltd v. Saunders[[9]](#footnote-9).***

**2. SPECIAL PERFORMANCE:** specific performance is a decree, which is ordered by the court, which directs a contracting party to perform the contract which he has promised to do.it is not granted as of right but granted judiciously by the court. In the case of ***Ryan v. Mutual Tontine Association[[10]](#footnote-10);*** 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, confined within well-known rules. In the case of ***Taylor v. H.B.******Russel[[11]](#footnote-11)*,** the court gave some reasons why applications for specific performance are refused: the title to the property had passed from the respondent and it would, therefore , be impossible for him to carry out the order of the court, the grant specific performance in these circumstance could only have the result of fostering two or more actions, whereas the law provides a remedy in damages, it will never be granted where it will cause hardships to the third party unless it is shown that the third party was aware of the existence of the contract. A plaintiff in an action for specific performance of an agreement cannot succeed if there is failure on his part to discharge his obligations under the said agreements. Situations which readily attract the remedy, the remedy of specific performance is most readily granted by courts is a contract in which a vendor refuses to convey land sold, we can see this in the case of ***Paye v. Gaji[[12]](#footnote-12)***, which the court specific performance. Also, specific performance is granted where damages are considered to be an inadequate remedy because of the difficulty of quantifying them, or because the plaintiff’s loss is difficult to prove, example contracts to sell or buy annuity and sale of debts proved in bankruptcy. Contracts not specifically enforceable, there are certain contracts to which the doctrine of specific performance does not apply. These contracts are contracts of personal service (between masters and servants), contracts of mutuality and contract that require the constant supervision of courts, i.e. contract to build or to keep a building in repair.

**3. INJUNCTION**: an injunction is an order or decree by which one party to an action required to do or refrain from doing a particular thing. If a contract contains an express negative stipulation obliging one of the parties not to act inconsistently with his positive, an injunction may be granted against a breach of the negative stipulation. Injunction are either restrictive (preventive) or mandatory (compulsive). An injunction is another way by which a court can order specific performance. We can see cases were injunction was used as a remedy for breach of contract this are ***Warner Bros. Pictures Inc. v. Nelson[[13]](#footnote-13) and In African Songs Ltd. v. Sunday Adeniyi[[14]](#footnote-14),where Dosumu, j.,*** came to the conclusion that it was right in the circumstance to grant an injunction restraining the defendant from making records or tapes for himself or any other organization***.***

**4. QUANTUM MERUIT:** this is where one person has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstance of the request imply that the service is to be paid for, there is implied a promise to pay *quantum meruit*, i.e., so much as he earned. It is clear that the court cannot grant or even contemplate granting quantum meruit if there were no contract between the two parties in the first place. This was established in the case of ***Olaopa v. Obafemi Awolowo University[[15]](#footnote-15).*** Other cases which this remedy was applied are: ***Bernardy v. Harding[[16]](#footnote-16) and Ekpe v. Midwestern Nigerian Development Corporation[[17]](#footnote-17)***

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