**BREACH OF CONTRACT**

In enforcing every valid contract, parties have certain obligations or promises towards each other which must be fulfilled. However, in a situation where either of the parties is unable to perform such obligation or act in line with his promises, such a situation is referred to as **Breach of Contract.** 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 contract, being the fountainhead of a correlative set of rights and obligations for the parties would be of no value, if there were no remedies to enforce the rights arising thereunder. This is in line with the Latin maxim *ubi jus, ubi remedium* which means that ‘where there is a right, there is a remedy’.[[2]](#footnote-3)

A breach may be classified as either Actual breach or Anticipatory breach depending on the time the breach occurs.

**Actual Breach** is when a party declares his intention of not performing the contract on the due date of the performance or during the course of performance. An illustration of an actual breach was made in the case of ***Pilbrow v. Pearless de Rougemont & Co. (1999)[[3]](#footnote-4)*** where the appellant had telephoned a firm of solicitors and asked to make an appointment with a solicitor. The appointment was arranged with an employee who was not a qualified solicitor. He was not informed that the employee was not a solicitor. The appellant was dissatisfied with the quality of legal services he received and refused to pay the outstanding fees and the firm sued for their fees. The Court of Appeal agreed that the standard of legal services had been that of a competent solicitor. However, it ruled that there had been an agreement to provide legal services, but also to provide legal services by a solicitor. Based on this, the firm did not perform the contact at all because the services were not provided by a solicitor. Therefore the firm had no right of payment.

On the other hand, an **Anticipatory breach** is when a party declares his intention of not performing the contract before the performance is due. When such breach occurs, the aggrieved party can sue for breach straight away instead of waiting until performance is due. In the case of ***Frost v. Knight (1872)[[4]](#footnote-5),*** the defendant had promised to marry the plaintiff once his father had died. He later broke off the engagement while his father was still alive, and when his ex-fiance sued him for breach of promise (which was a valid claim in those days, though not any longer), he argued that she had no claim as the time for performance had not yet arrived. This argument was rejected and the plaintiff’s claim succeeded. However, 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 had sued immediately.

Two Contract Law authors, ***Elliot and Quinn,*** categorized Rescission, Quantum meruit and Damages as Common Law remedies and on the other hand, Injunction and Specific Performance were classified as equitable remedies.

**DAMAGES**

An award of damages is the usual remedy for a breach of contract. It is an award of money that aims to compensate the innocent party for the financial losses they have suffered as a result of the breach. Damages for breach of contract are available as of right where the contract has been breached. The general rule is that innocent parties are entitled to such damages as will put them in the position they would have been in if the contract had been performed. When a contract is breached, a party may suffer pecuniary loss (that is to say financial loss) or non-pecuniary loss.

**Limitations on Award of Damages**

The general rule is that innocent parties are entitled to such damages as will put them in the position they would have been in if the contract had been performed, but there are three limitations: causation, remoteness and mitigation.

**Causation**

A person will only be liable for losses caused by their breach of contract. The defendant’s breach need not be the sole cause of the claimant’s losses, but it must be an effective cause of their loss. The general rule is that where breach can be shown to be an actual cause of the loss, the fact that there is another contributing cause will not prevent the existence of causation. In ***County Ltd v Girozentrale Securities (1996),*** there was a contract for sale of shares and due to the fault of the defendants, the price value of the shared dropped and caused loss for the claimants. The Court of Appeal held that the defendants’ breach of contract remained the effective cause of the plaintiffs’ loss; the breach did not need to be the only cause. The defendants were therefore liable to pay damages.

**Remoteness**

There are some losses which clearly result from the defendant’s breach of contract, but are considered too remote from the breach for it to be fair to expect the defendant to compensate the claimant for them.[[5]](#footnote-6) The rules concerning remoteness were originally laid down in ***Hadley v Baxendale (1854)*** where the court laid down two situations where the defendant should be liable for loss caused by a breach of contract:

1. Loss which would arise naturally, ‘according to the usual course of things’, from their breach.
2. Loss ‘as may reasonably be supposed to have been in the contemplation of the parties at the time when they made the contract, as the probable result of the breach of it’.

The approach in ***Hadley v Baxendale*** was reaffirmed in ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949)*** and then discussed again by the House of Lords in The Heron II (1969). These two cases addressed particularly the problem of abnormal losses – those which could not be said to occur ‘in the normal course of things’, but which, on the other hand, the defendant might well have been able to contemplate when making the contract.

**Mitigation**

Claimants cannot simply sit back and allow losses to pile up and expect the defendant to pay compensation for the whole amount if there is something they could reasonably do to reduce the loss. Claimants are under a duty to mitigate their loss, and cannot recover damages for losses which could have been avoided by taking reasonable steps. The claimant does not have to prove that reasonable steps have been taken; it is up to the defendant to prove that the loss could have been mitigated, or better mitigated.

**Types of Damages**

1. **Ordinary Damages:** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach.
2. **Special Damages:** Where a party to a contract receives a notice of special circumstances affecting the contract, he will be liable not only for damages arising naturally and directly from the breach but also for special damages.
3. **Exemplary Damages:** At time breach of contract by one party not only results in monetary loss to the injured party but also subjects him to disappointment and mental agony. In such cases monetary compensation alone cannot provide an appropriate remedy to the sufferings of the injured party. Thus there is a need for vindictive damages.
4. **Nominal Damages:** if the breach causes no loss to the aggrieved party, no damages need to awarded to him. However, in order to record the breach by the guilty party, the court may award nominal or token damages.
5. **Pre-fixed Damages:** Sometimes, parties to a contract stipulate at the time of its formation that on a breach of contract by any of them, a certain amount will be payable as damage. It may amount to;

* **Liquidated Damages**
* **Penalty**

**LIQUIDATED DAMAGES:** Liquidated damages is the term used where a contract specifies the amount of damages to be paid in the event of breach, and this amount represents a genuine attempt to work out what the loss would be in the event of such a breach. In such a case, the court will allow the claimant to recover this amount without proof of actual loss, even if the actual loss is larger or smaller than the sum laid down in the contract.

**PENALTY:** If a contract states that a particular sum is to be paid on breach of the contract, and that sum is not a genuine pre-estimate of the loss that would be suffered in the event of breach, but is designed instead to threaten to penalize a party in breach, this is a penalty clause. Guidelines for determining when specified damages should be considered penal were laid down in ***Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd (1915)***. The plaintiffs supplied tyres to the defendants, under a contract providing that the defendants would not resell them at less than the list price. If they breached this provision, they were to pay £5 for every tyre sold at less than list price (an arrangement which would now be illegal). The House of Lords held that the provision was not penal and was in the nature of liquidated damages.

**QUANTUM MERUIT**

Where work has been done or goods supplied but no payment has been received and cannot be obtained under a contract, an action is available called a quantum meruit (Latin for ‘as much as is deserved’), under which claimants can claim a reasonable price for their performance. Payment cannot be obtained under a contract where there is no contract, or where the price has not been specified in the contract. A quantum meruit is based on restitutionary principles and is different from damages, since it merely aims to pay for performance, not to compensate for loss. So long as there is a contract between the parties, under which the claimant was intended to be paid, the court will order payment Where work has been done or goods supplied but no payment has been received and cannot be obtained under a contract, an action is available called a quantum meruit (Latin for ‘as much as is deserved’), under which claimants can claim a reasonable price for their performance. Payment cannot be obtained under a contract where there is no contract, or where the price has not been specified in the contract. A quantum meruit is based on restitutionary principles and is different from damages, since it merely aims to pay for performance, not to compensate for loss. So long as there is a contract between the parties, under which the claimant was intended to be paid, the court will order payment.

A quantum meruit based on extra work done or goods supplied will only be allowed if the defendant had the choice of accepting or rejecting the extra benefit.[[6]](#footnote-7) For example, in the case of ***British Steel Corp v Cleveland Bridge & Engineering Co Ltd (1984)***.[[7]](#footnote-8) Work had begun at the request of the defendants, on the provision of some steel before all the elements of the contract for the steel had been agreed. Both sides confidently expected to reach agreement without difficulty. In fact, final agreement was never reached. The plaintiffs successfully claimed a quantum meruit for the work they had done.

The Cleveland Bridge case was distinguished in ***Regalian Properties plc v London Dockland Development Corp (1995)***.[[8]](#footnote-9) In that case the plaintiffs had not carried out the work at the request of the defendants, but had done it in order to win the contract from the defendants. The negotiations had been conducted on a subject-to-contract basis, so that such expenditure was at their own risk. It was not recoverable when they failed to obtain the anticipated contract.

**Note:** Where there is precise provision for remuneration, a quantum meruit cannot usually be used to alter the price, even if extra work is done. However, the following are the circumstances where courts can allow a quantum meruit claim even though price is fixed:

* Where necessaries are sold and delivered to a minor, they need only pay a reasonable price for them, even though there may have been an agreement to pay more (Incapacity)
* If one party begins performance but is prevented from finishing by the other party’s breach, the innocent party can claim a quantum meruit at the agreed rate for the work done (wrongful prevention of performance).
* where performance is rendered under a contract which, unknown to both parties, is void (void contracts).
* Where a party performs only part of their contractual obligation, but this part-performance is voluntarily accepted by the other party (agreed partial performance).

**SPECIFIC PERFORMANCE**

An order of specific performance is a court order compelling someone to perform their obligations under a contract. As we have seen, the common law will not force a party in breach to perform (except where the performance is simply paying money), even though this may seem a fairly obvious solution to many contract problems. The equitable remedy of specific performance compels the party in breach to perform.

Specific performance is usually ordered where the remedies available to claimant are inadequate (though damages may be ordered as well as specific performance). It is not, therefore, applied where the claimant could easily purchase replacement goods or performance. Where the goods that are the subject of the contract are in some way unique, then specific performance can be available. For this reason, specific performance is mainly applied in contracts to sell land (which includes land with buildings), since each piece of land is thought to be unique, and impossible to replace exactly. In ***Beswick v Beswick (1968),*** the plaintiff’s husband sold his business to his nephew in return for an annual allowance to be paid to himself and, after his death, to his widow. Once the husband died, the nephew refused to make payments to the widow. Despite the fact that the husband had clearly intended her to benefit from the contract, it was held that the widow could not sue the nephew on her own behalf, because she was not a party to the contract. However, the widow was allowed to sue as the executor of her husband’s estate. The circumstances were such that the husband suffered no loss, because he had died before the nephew stopped paying the annuity, so damages would only have been nominal. It was clearly unjust for the defendant to keep the entire benefit of the contract without himself performing much at all. As a result, specific performance was ordered.

The court has wide discretionary power to award specific performance and in exercising this discretion, the following factors are taken into account:

i. Delay in asking for the order.

ii. Whether the person seeking performance is ready to perform his part of the Contract.

iii. The difference between the benefit (the order would give to one party) and the cost of performance to the other.

iv. Whether the person against whom the order is sought would suffer hardship in performing.

v. Whether any third party rights would be affected.

vi. Whether the contract lacks adequate consideration (the rule “equity will not assist a volunteer” applies so that specific performance will not be ordered if the contract is for nominal consideration even if it is under seal).[[9]](#footnote-10)

**INJUNCTION**

An injunction normally orders the defendant not to do a particular thing. For example, Ken, a horse owner, rents a field from Julie, and it is a term of their agreement that no buildings should be put up on the land. If Julie discovers that Ken is about to build a stable, she could apply to the court for an injunction to prevent him doing so. This is called a negative (or prohibitory) injunction. Where the action has already taken place (if Ken has already built the stable, for example) the court may make a mandatory injunction, which orders the defendant to take action to restore the situation to that which existed before the defendant’s breach – so Ken would have to demolish the stable.

As we have seen, specific performance will not be granted for a contract concerning personal services, such as an employment contract. However, there are borderline cases where an injunction has the potential to be used, for all intents and purposes, to bring about the effect of specific performance. Even a negative injunction can have this effect, if the party subject to this injunction cannot effectively offer their services elsewhere once this injunction is in place. In ***Warner Bros Pictures Inc v Nelson (1937)*** the actress Bette Davis had signed a contract with Warner Brothers, under which she agreed not to work for any other film company for a year. During this period, she contracted with another company, in breach of the Warner Brothers contract, and Warner Brothers sought an injunction to stop her actually working for the rival company. Although the practical effect was to make Ms Davis work for Warner Brothers, because she could not work for anyone else, the order could be distinguished from specific performance on the grounds that it was an encouragement to work for the plaintiffs, and not a compulsion, because in theory she could have simply made her living in some other way, and not acted in anyone’s films.

In deciding whether an injunction is to be ordered, the nature of the breach and the weight of the remedy it will bring must be considered.

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