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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

Answer

1. a. Introduction

 A contract is a legally binding promise made between two parties. The purpose of a contract being legally binding is so each party will have legal recourse in the event of a breach. 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 terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame; fails to deliver in the appropriate time frame; does not meet the terms of the agreement; or fails to perform at all. In a situation where one party fails to perform and the other party has fulfilled their obligations, the performing party is entitled to legal remedies for breach of contract.[[1]](#footnote-1) In *Robert Nigeria Limited v. Shell Nigeria Gas Limited*,[[2]](#footnote-2) the Court of Appeal emphasized that parties to a contract are mutually bound by the terms contained in the agreement and that the courts intervention can be called upon in the event of breach.

General Requirements

 A breach of contract suit must meet four requirements before it will be upheld by a court: the contract must be valid and contain all the essential elements of a contract; the party who is suing for breach of contract must show that the defendant did indeed breach the agreement; the plaintiff must have done everything required of them in the contract; and the plaintiff must have notified the defendant of the breach before proceeding with filing a lawsuit.[[3]](#footnote-3)

Types of Contract

* Minor Breach:

 A minor breach of contract occurs when a party fails to perform a part of the contract but does not violate the whole part of the contract. To be regarded as a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining contractual obligations. A minor breach is sometimes referred to as an impartial breach.

* Material Breach:

 A material breach of contract is a breach that is so substantial, it seriously impairs the contract as a whole; additionally, the purpose of the agreement must be rendered completely defeated by the breach. This is sometimes referred to as a total breach. It allows for the performing party to disregard their contractual obligations, and to go to court in order to collect damages from the breaching party.

* 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; and

* Anticipatory Breach:

 An anticipatory breach occurs 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 immediately claim a breach of contract and pursue a remedy, such as payment. Anticipatory breach may also be referred to as anticipatory repudiation. In *Hochester v. De la Tour[[4]](#footnote-4)*, the defendant actually wrote to the plaintiff stating that he was no longer going to perform his part of a contract under which 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, even though the date of performance was still nearly a month ahead and he succeeded.[[5]](#footnote-5)

1b. Remedies Available for Breach of Contract.

 In contract law, a “remedy” is a court ordered resolution to one party’s breach of contract. When a contract is breached, the injured party has several remedies available to him against the defaulting party. Some of these remedies are:

* Damages
* Injunction
* Specific Performance
* Rescission
* Restitution, etc.
* Damages: The Supreme Court in *Beta Glass PLC v. Epaco Holdings Ltd.[[6]](#footnote-6)* defined damages as “Pecuniary compensation obtainable by a successful party in an action for a wrong which is either of tort or a breach of a contract.” Award of damages is the most common remedy for breach of contract. The main purpose of awarding damages for breach of contract is to put the injured party, i.e., innocent party, as far as money can do it, in the same position as if the contract had been performed. The injured party is not expected to get more in damages than the loss which he actually suffered.[[7]](#footnote-7) Therefore, where he has suffered no loss he may still maintain his action because there has been a breach, but he will get only nominal damages, i.e., a small amount. In *G. K.F.I (Nig.) Ltd. v NITEL Plc.[[8]](#footnote-8)*, the Supreme Court stated that award of damages is at the discretion of a judge and such discretion must not only be exercised judicially but judiciously as well. The five types of damages are: general damages, special damages, exemplary, and nominal damages. General damages are those losses that flow naturally from the adversary and it is generally presumed by law, as it need not be pleaded or proved, as defined in *Cameroon Airlines v Otutuizu[[9]](#footnote-9)*. In *Arisons Trading & Engr. Co. Ltd v Mil. Gov. Ogun State & Ors.[[10]](#footnote-10)*, the court held that special damages are damages of the type that do not flow in the ordinary course; they are exceptional in their character and therefore, they must be claimed specially and proved strictly. In the law of contract, there is no dichotomy between special and general damages as it is the position in tort. Damages which are partly punitive and partly compensatory in character are called exemplary damages. Nominal damages will normally be awarded where the defendant’s breach has caused no loss to the plaintiff, or where, although he has suffered a loss, he is unable to prove any loss flowing from breach of the contract. A party who is a victim of breach of contract is obliged under the law to mitigate his damages. The burden of proving that the plaintiff has failed in his duty of mitigation is on the defendant. The principle of mitigation of damages operates beyond the scope of contract and extends to tortous actions in negligence.[[11]](#footnote-11) In *Oando Nigeria Plc v Adijere West Africa Limited*,[[12]](#footnote-12) the Supreme Court applied the principle to a case of accident caused by negligence.
* Injunction: The word ‘injunction’ has its origin in the Latin word *injungere* which means to enter “join, attach, or impose”. Injunction was to feature frequently in court forms in the 19th century. **Karibi Whyte, J.S.C** in *Babatunde Adenuga and Ors v K. Odenewu[[13]](#footnote-13)*, defined an injunction as “an equitable order restraining the person to whom it is directed from doing the things specified in the order or requiring in exceptional situations the performance of a specified act.” Injunction can be used to restrain a party from committing a breach of contract. Also, it may seek to order a party to a contract to undo what he has already done in the breach of contract. An injunction is another way by which a court can order specific performance. Granting an injunction is at the discretion of the court. There are four main types of injunction namely: ex parte injunction; interlocutory injunction; mareva injunction; and perpetual injunction. An ex parte application is one which is made to the court in litigation without the other party/parties in the litigation being put on notice. Interlocutory injunction means an injunction ordered after a full contest between the parties to last until the determination of the main suit and the evidence is by affidavit. A Mareva injunction is an interlocutory injunction or even ex parte injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgement proof. A perpetual injunction is usually granted after a full trial of the case on the merits excepts when the parties have consented to the court granting a perpetual injunction by way of accord judgement in which case no trial would take place.
* An Order of Specific Performance: Specific performance is a remedy contrived in England by Courts of Equity. A decree of specific performance is a court ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. It is an order by the court directing and compelling the defendant to perform the contract which he has made in accordance with its terms. At common law, a victim of breach of contract is only entitled to damages; damages may be inappropriate and inadequate in most cases. It is because of this that equity intervened by way of a decree of specific performance. The remedy of specific performance is granted at the discretion of the court which must exercise this discretion judicially and judiciously. This discretion will be exercised if the award of damages will not adequately compensate the injured party for the loss suffered as a result of the breach. In *Dr. I.O.C. Abara v Nwaeze Igbo[[14]](#footnote-14)*, the Court of Appeal held that the jurisdiction to order specific performance is based on the existence of a valid enforceable contract. Specific performance is particularly appropriate in the case of contracts for the sale and/or leasing of land, or contract for the sale of rare or unique goods. The Nigerian legal systems confine the remedy of specific performance in case of personal contracts. 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 agreement. In *Best (Nig) Ltd v Blackwood Hodge (Nig) Ltd[[15]](#footnote-15)*, the Supreme Court reinstated this point. There are certain contracts to which the doctrine of specific performance does not apply. A typical example of such contract is contract of personal service like agreements for the purpose of pleasure. In *Chukwu v NITEL[[16]](#footnote-16)*, **Orah J.C.A.**, held that the courts in Nigeria will not grant specific performance in respect of a breach of a contract of a service. However, specific performance may be ordered if the contract of service is one with a statutory flavor. The Supreme Court reinstated this point in *Illodibia v N.C.C. Ltd[[17]](#footnote-17)*. An infant cannot obtain specific performance in respect of a contract voidable at his instance only.[[18]](#footnote-18)
* Rescission: Rescission of the contract is a remedy that allows the non-breaching party to cancel his or her responsibilities under the contract. This remedy might be available when the contract was based on fraud or a mistake by one or both of the parties. It is also available if both parties prefer to cancel the contract and return any money that had been advanced as part of the contract.[[19]](#footnote-19)
* Restitution: Restitution is a remedy designed to restore the injured party to its position before the contract was created. It is meant to return any money or property given to the defendant under the contract back to the plaintiff.

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