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18/Law01/207

Assignment Title: Breach of Contract

Course Title: Law of Contract II

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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:**

**Breach of contract**

**What are the remedies available for breach of contract.**

**A.)WHAT IS 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 purpose of a contract being legally binding is so each party will have legal recourse in the event of a breach.

A contract is said to be breached when one party performs defectively, differently from the agreement, or not at all (actual break), or indicates in advance that they will not be performing as agreed (anticipatory breach.[[1]](#footnote-1) When one party fails to perform while the other party fulfills their obligations, the performing party is entitled to legal remedies for breach of contract.

 **Types of breach of a contract**.

**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 renunciation or repudiation. A simple example of of an anticipatory breach occurred in *Nigerian Supplies Manufacturing Co. Ltd v. Nigerian Broadcasting Corporation.[[2]](#footnote-2)* In *Frost v Knight[[3]](#footnote-3)* 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 fiancée 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 performa had not yet arrived. This argument was rejected and the claimant’s claim succeeded.

Where the repudiation does not have such a profound effect, such as depriving the innocent party of mainly all the benefits which he intended to enjoy under the contract, the latter will only be entitled to only damages, but not treat himself as discharged. Where the defendant, though willing to perform, is clearly incapable of doing so, except in a manner substantially inconsistent with his obligations, this will also constitute repudiation. A man must be both ready and willing to perform and if he is willing but not ready, that is, 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.

**Fundamental Breach**: Delvin J in *Smeaton Hanscomb &Co. Ltd. v Sasson I. Setty Son & Co.[[4]](#footnote-4)* defines a fundamental term as “something which underlies the whole contract at that if not complied with, the performance becomes totally different from that which the contract contemplates”. It is a term of greater importance, it is a term which constitutes the main purpose of the contract and breach of such a term is equivalent to not performing the contract. It should be noted that the breach of a condition also entitled the innocent party to repudiate the contract however, circumstances pointed out in section *(11)(1)(c) of the Sale of Goods Act 1893* will only give rise to a claim for damages and the right to repudiate will be lost under breach of a condition. The above restrictions do not apply to Fundamental breaches. In a contract for guarding of the premises, deliberate burning down of the premises by those employed is an example of a fundamental breach , such as was seen in the case of *Photo Production v. Securicor Transport Ltd[[5]](#footnote-5)*

**Consequences of Discharge**

The effect of repudiation of contract or a fundamental breach is that such a party is discharged from the performance of all future obligations. The rationale for an award of damages is restitution in intergrum that is, so far as the damages claim are too remote, the plaintiff shall be restored to his pre contractual position. Damages is measured by the loss flowing naturally from the breach and incurred in direct consequence of the violation. In *Kauri Construction Ltd. v. Agbana[[6]](#footnote-6)*, there was ample evidence showing that the respondent would have been entitled to N41,000.00 for the construction of the one house and out of this amount, N1,000 was advanced t him. He is therefore entitled to a balance of N13,000.00 only, the contract is not rescinded ab initio, it only discharges the party from obligations that are not due at the time of discharge. According to Lord Diplock in *Photo Productions Ltd. v. Securities[[7]](#footnote-7)*, where the innocent party elects to terminate the contract, the court said:

“*there is substituted by implication of law for the primary obligations which remained unperformed, a secondary obligation to pay money, compensates to the other party for the loss sustained by, in consequence of their non-performance in the future and the unperformed primary obligations of that other party are discharged*”.

The consequence of discharge differs

1. Where the innocent party treats the contract as still in force.

2. Where the innocent party treats the contract as discharged.

**CONTRACT STILL IN FORCE**

Where the innocent party treats the contract as still in force, the status quo is retained, the contract remains in force and the party maintains all their rights and obligations. As in *Modem Publications Ltd. v. Academy Press Publications Ltd [[8]](#footnote-8)* the plaintiff and defendant undertook to print magazines to specified measurements for the plaintiff. When the magazines were printed they were not of specified size. Standard of production was inferior, nevertheless, the plaintiff took the delivery and distributed for sale without objection. The plaintiff instituted action for breach of contract. The court held that when one party is in breach of a condition contained in a contract, the other party is not compelled to accept the breach as repudiation. He may waive the breach as he so wishes and elect to sue for damages. The court awarded damages in favour of the plaintiff.

In *Bayo Kuku v. Permroof Contractor Ltd[[9]](#footnote-9)*, the appellant was engaged to do some repair work on the roof and after the sued for respondents had done part of the work, the respondent terminated the contract, nevertheless the respondent completed the job and sued for the full contract sum. In the High Court, it was argued that the respondents were only entitled for damages for the work they had done. The court rejected the argument and restated the position of the law that repudiation of the contract by one party does not of itself discharge the contract. It leaves the innocent party with an option to either treat the contract as still alive or to accept the repudiation as putting an end to the court. In essence, the letter of termination did not operate to discharge the contract.

It must also be stated that refusal to accept repudiation may be an advantage to the plaintiff in certain circumstances as in sale of goods, where instance the date of delivery is in December and the contract was repudiated in August, and the value of the goods

**INNOCENT PARTY TREAT THE CONTRACT AS DISCHARGED**

In such a situation, the party who is at fault is liable for all the breaches committed. In *Mosche v. Lep Air Services Ltd [[10]](#footnote-10)* the court stated the legal consequences of repudiation. It said;

“*When a contract is brought to an end by repudiation accepted by the innocent party, all the obligation in the contract come to an end and they are replaced by operation of law by an obligations to pay damages. The damages are assessed by reference to the old obligations but the old obligations no longer exist as an obligation. Were it otherwise, there would be in existence simultaneously two obligations, one to perform the contract, and the other to an award of damages. But that could not be right. The only legal nexus remaining is the obligation to pay damages*.”

A party to a breach of contract cannot approbate and reprobate. According to *Bayo Kuku v. Permroof Contractors Ltd[[11]](#footnote-11)*. Once the injured party has decided to accept repudiation, he cannot later change his mind and treat the contract as subsisting. One he has decided to treat the contract subsisting, he cannot treat the contract as terminated unless there are further breaches.

The innocent party always has the choice to choose or terminate the contract whenever a breach occurs . A breach doesn’t mean that the contract will automatically be discharged.

**B). WHAT ARE THE REMEDIES AVAILABLE FOR BREACH OF CONTRACT**

DAMAGES

Whenever a party to a contract is in breach of it, the other party has a right of action for damages. Therefore, an action for damages is the one remedy which is available in every breach of contract. The object of awarding damages for breach of contract id to put the injured party, so far as money can do it, in the same position as if the contract had been performed. In other words, the aim of damages is to compensate the innocent party to the contract and place him in the position that he would have been had contract been performed.

Damages in Contract

The leading case of *Hadley v Baxendale[[12]](#footnote-12)* laid the common law basis for the assessment of damages arising from a contractual breach.The principle arising from this case is now the basis for the concept of remoteness in damages, it lays down two categories of compensation which can be recovered, and which are often described as the 'first' and 'second' limbs of the *Hadley v Baxendale* rule:

1. Losses which arise in the normal course of things and are a natural consequence of the breach;

2. Losses which arise as the result of special circumstances (not being natural consequences) which were either known to the parties or may reasonably be supposed to have been in the contemplation of the parties when the contract was made.

Remoteness of Damage

In an action for damages for breach of contract two questions often arise. First, the question as to which type of damage must be accorded monetary compensation (i.e., question of remoteness of damage). Secondly, the question as to what sum must be paid as damages (i.e., question of measure of damages). As to the first question, the rule is that only the 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. This is the rule laid down by Alderson, B. in the leading English case of *Hadley v. Baxendale(Supra)*

Measure of Damages

The general rule is that the plaintiff recovers his actual loss in respect of damages which is not too remote. Therefore, subject to the question of remoteness of damages, the injured party is entitled to recover such sums as will, so far as money can do so, put him in the same financial position as if the breach had not occurred

SPECIFIC PERFORMANCE

In the Supreme Court decision of *Incar (Nig.) Plc. V. Bolex Ent (Nig.)*[[13]](#footnote-13)on the nature of contract enforceable by specific performance, the court restated that only a valid contract, which has given right to a legal or equitable interest is capable of being enforced by an order of specific performance.

INJUNCTION

An injunction is an equitable remedy and applicable under discretionary ground. It is not subject to the same restrictions that apply to a claim for specific performance. An injunction is appropriate where the contract is negative in nature or where the contract contains a negative stipulation. An injunction is an order by which one party to an agreement is required to do or refrain from doing a particular thing. An injunction is restrictive/preventive or mandatory/compulsive.

However, such an order is subject to a balance of convenience ‘Test and may be refused if the prejudice suffered heavily outweighs the advantage that will be demised from such restoration. *Kennaway v. Thompson*[[14]](#footnote-14). An injunction will not be granted where it will compel or indirectly the defendant to do an act which he could not have been ordered to do by specific performance. For instance, in a contract of service, an employee cannot be restrained from committing a breach of his positive obligation to work for this would amount to enforcing a contract of service. Contract commonly enforced by an injunction are contracts in restraint of trade.

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1. Catherine Elliot and Frances Quinn Contract Law [↑](#footnote-ref-1)
2. (1967) 1 All N.L.R 35 [↑](#footnote-ref-2)
3. (1872) L.R. 7 Exch. 111 [↑](#footnote-ref-3)
4. (1953) 1 WLR 1468 at p. 1470 [↑](#footnote-ref-4)
5. (1980). A.C.827; (1980) 1 All E.R 556. [↑](#footnote-ref-5)
6. (1998) 9 NWLR (pt. 539) 581 [↑](#footnote-ref-6)
7. (1980) AC 827 (1978) 1 WLR 856 [↑](#footnote-ref-7)
8. (1968) 2 ALR 336, [↑](#footnote-ref-8)
9. (1971) 1 UILR 161 [↑](#footnote-ref-9)
10. (1973) AC 331, [↑](#footnote-ref-10)
11. (1971) 1 UILR 161 [↑](#footnote-ref-11)
12. (1854) 9 Ex. 341. [↑](#footnote-ref-12)
13. (2001) 12 NWLR (pt.728) 646 [↑](#footnote-ref-13)
14. (1981) QB 88

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<https://nou.edu.ng/sites/default/files/2017-03/LAW%20234.pdf>

<https://www.scribd.com/document/94950339/BUL-202-Law-of-Contract-II> [↑](#footnote-ref-14)