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**INTRODUCTION**

## **WHAT IS A CONTRACT?**

A contract is defined as an agreement which the Law will enforce or recognize as affecting the legal rights and duties of the parties. [[1]](#footnote-1) **Tobi J.C.A**, has defined a contract as an agreement between two or more parties which creates reciprocal legal obligations to do or not to do particular things. This may be enforced by an action for breach of contract and is either classified as a contract by deed, or a simple contract. Breach on the other hand is an act of breaking a law, agreement or code of conduct[[2]](#footnote-2). Breach of contract" is a legal term that describes the violation of a contract or an agreement that occurs when one party fails to fulfill its promises according to 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 or in part.

**BREACH OF CONTRACT**

**Professor Treitel (2007)** has defined a breach of contract in the following terms: ‘*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, performs defectively or incapacitates himself from performing’. It should be noted that in all cases the failure to provide the promised performance must be ‘without lawful excuse’*. Thus where the contract has been frustrated there is no liability for breach of contract because both parties have been provided with a ‘lawful excuse’ for their non-performance. Similarly, where one party has breached the contract and the breach has given to the other party the right to terminate performance of the contract, that party is not in breach of contract in refusing to continue with performance because he is given a ‘lawful excuse’ for his non-performance.,

Although the breach can take the form of words (such as an express refusal to perform the terms of the contract), it need not do so and can be evidenced by the conduct of one party in disabling himself from performing his obligations under the contract or by performing defectively. Where it is alleged that one party has incapacitated himself from performing his obligations under the contract, his inability to perform must be established on a balance of probabilities. This is relatively easy to do where the party alleged to be in breach has sold the subject-matter of the contract to a third party, but greater difficulty arises where he enters into alternative obligations which it is alleged are inconsistent with his existing contractual obligations. The fact that a party has entered into inconsistent obligations does not in itself necessarily establish [an inability to perform], unless these obligations are of such a nature or have such an effect that it can truly be said that the party in question has put it out of his power to perform his obligations' ***(Alfred C Toepfer International GmbH v. Itex Hagrani Export SA[[3]](#footnote-3)).*** In short it must be proved that the inconsistent obligation or disablement has rendered the breach inevitable. It does not suffice to demonstrate that there is uncertainty about the ability of a contracting party to perform its contractual obligations ***Geden Operations limited ltd v Dry Bulk Handy Holdings Inc.[[4]](#footnote-4)***

**When Does Breach Occur?**

The question whether or not a particular contract has been breached depends upon the precise construction of the terms of the contract. No universal legal principle can be established which displaces the need for a careful analysis of the terms of each individual contract. It is for the party alleging the existence of the breach of contract to prove that a breach has occurred. It is not generally necessary to prove that a party has been at fault before breach can be established. The purchaser is not required to prove that the seller was at fault in selling goods which were not of satisfactory quality; the seller may have taken all reasonable steps to ensure that the goods were of satisfactory quality but he will still be in breach of contract if they are not of such quality.

The strict nature of liability for breach of contract is also illustrated by the fact that it is generally no defense to a claim for breach of contract to show that the breach was committed in all good faith: the innocent party need only show that there has been a breach. But the courts have in some cases been reluctant to conclude that a party who has acted in good faith but was mistaken has thereby repudiated the contract. The position would appear to be that it is not a repudiation for one party to put forward his genuine but bona fide interpretation of what the contract requires of him ***(Woodar Investment Development Ltd v. Wimpey Construction UK Ltd [[5]](#footnote-5)and Vaswani v. Italian Motors (Sales) Ltd[[6]](#footnote-6))*** but that where that party performs in a manner which is not consistent with the terms of the contract, it is no defense for that party to show that he acted in good faith ***(Federal Commerce & Navigation Co Ltd v. Molena Alpha Inc[[7]](#footnote-7)).*** On the other hand, a contractual term may impose a duty to take reasonable care, in which case a breach can only be established where it is proved that the party alleged to be in breach has failed to exercise reasonable care. An example in this category is provided by ***Section 13 of the Supply of Goods and Services Act 1982*** which provides *that a person who supplies a service in the course of a business impliedly undertakes to 'carry out the service with reasonable care and skill'.*

Further, if one party fails to perform while the other party fulfills their obligations, the performing party is entitled to legal remedies for breach of contract.

**REMEDIES OF BREACH OF CONTRACT**

1. **DAMAGES**

Once a party to a contract establishes to the satisfaction of the court that the other party has committed a breach of contract, the most common claim is that of damages certainly it is the most readily granted type of remedy by courts. In only special circumstances will the equitable remedies of specific performance and injunction be granted by courts. The underlying bases for the common law remedy was laid down by Parke, B., in ***Robison v. Harman[[8]](#footnote-8)***

*The rule of the common law is that where a party sustains a loss by reason of breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.*

However, since an unqualified application of such a wide principle would prove too harsh “on a contract breaker in making him feel liable for a chain of unforeseen and fortuitous circumstances,” it was progressively qualified and limited in several ways, until the modern rule was finally crystallized in the classic passage from that judgment of Alderson, B., ***in Hadley v. Baxendale [[9]](#footnote-9)***

*Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the natural cost of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made contract as the probable result of the breach of it…*

Further elaboration and clarification of the rule in **Hadley n. Baxendale** was given by Asquith, L.J., in ***Victoria Laundry v. Newman Industries[[10]](#footnote-10)***  which came up in **1949**, almost a hundred years later.

## **REMOTNESS OF DAMAGES**

The innocent party may only recover damages for loss suffered as a result of the breach provided it is not too remote. The aim of damages is to put him in the position he would have been had the contract been properly performed. The principles of remoteness are given in **Hadley v Baxendale** and provide that the following losses are recoverable:

* All loss which flows naturally from the breach.
* All loss which was in the contemplation of the parties at the time the contract was made as a probable result of the breach.

If the loss does not fall within the above categories, then I twill be too remote and will not be recoverable. The rule in **Hadley v Baxendale** and its restatement in the **Victoria Laundry case** have guided Nigerian courts in considering the issue of damages in contracts and has been interpreted to mean that only loss which is within the reasonable contemplation of the parties may be recovered (**The Heron II *[[11]](#footnote-11)*)**

## **MEASUREMENT OF DAMAGES**

This is the method for calculating the damages to which the innocent party is entitled. It covers loss of bargain or expectation loss. The usual aim of the court is to put the innocent party in the position he would have been in had the contract been properly performed **(Robinson v Harman**)[[12]](#footnote-12). The two usual methods of assessing this are difference in value or cost of cure. The court will generally use the more appropriate.

Sometimes reliance loss may be sought where loss of expectation is difficult to prove. The aim of reliance loss is to put the innocent party into the position he would have been in had the contract never been made, that is, an indemnity for his out of pocket expenses incurred in reliance on the contract **(Anglia TV v Reed*[[13]](#footnote-13)*).** There are many other types of loss that have been claimed by innocent parties. Damages for disappointment or mental distress are not generally awarded **(Addis v Gramophone Co. Ltd*[[14]](#footnote-14)*)** unless the contract is, for example, a holiday contract **(Jarvis v Swans Tours Ltd*[[15]](#footnote-15)*).**

## **MITIGATION OF DAMAGES**

An innocent party cannot recover for loss that he could have avoided by taking reasonable steps. This is sometimes expressed as the duty to mitigate. This does not apply to actions for the price of goods delivered. Such an action is an action for an agreed sum and not an action for damages. Although there is no duty to mitigate before actual breach occurs the innocent party should not aggravate his loss. It is for the defendant to prove that the plaintiff has failed to mitigate his loss **(Pilkington v Wood*[[16]](#footnote-16)*).**

**PENALTY AND LUIQUIDATED DAMAGES**

The parties to a contract may agree in advance to fix the sum payable as damages by either of both parties in the event of breaches of the contract. Whether such an agreement will be upheld and enforced by the courts, depends on whether it is regarded as a liquidated damaged clause or a penalty clause. For example, a building contractor has agreed to complete the theme park beside Hard Rock hotel, penalties may be built into the contract itself if the job is not completed on time. The contractor may have offered the penalty option as an incentive to win the contract. Liquidated damages refer to these penalty payments. When a contract is breached, the liquidated damages could be imposed.

**GENERAL AND SPECIAL DAMAGES**

One unique feature of contract cases decided in Nigerian courts, is the proclivity of counsel; for classifying damages into special and general categories. Special damages are known as the out of pocket expenses that the defendant incurs as the effect of dealing with the injuries or property loss caused by the plaintiff. These damages normally include of repair costs, medical expenses, car rentals and loss of wages.

**NOMINAL DAMAGES**

Nominal damages are awarded where the innocent party has suffered no loss as a result of the other's breach and substantial damages are awarded as monetary compensation for loss suffered as a result of the other party's breach. Not all nominal damages are small and not all small damages are nominal. For an innocent party to obtain substantial damages he must show that he has suffered loss as a result of the breach (remoteness) and the amount of his loss (measure). It is up to the party in breach to argue that the innocent party has failed to mitigate his loss.

**EXAMPLIARY DAMAGES**

Exemplary damages are damages awarded against the defendants as a punishment, so that the assessment goes beyond mere compensation to the plaintiff. The right is more widely applied in the Law of tort, although even in this area of the law it was severely restricted by the House of Lords in the case of ***Rookes v. Barnard [[17]](#footnote-17)***

## **SPECIFIC PEFORMANCE**

This is an equitable remedy granted at the court's discretion. Specific performance is a decree by the court to compel a party to perform his contractual obligations. It is usually only ordered where damages are not an adequate remedy (for example where the subject matter of the contract is unique for example, Chinese vases in **Falcke v Gray*[[18]](#footnote-18)*** but not if a replacement of the subject matter could be obtained even after a long delay (**Societe des Industries Metallurgiques SA v Bronx Engineering Co Ltd.*[[19]](#footnote-19)***

It is a general rule that specific performance will not be ordered if the contract requires performance or constant supervision over a period of time and the obligations in the contract are not clearly defined. For example, specific performance of a covenant to keep a shop open during normal business hours was refused by the House of Lords in **Co-op Insurance v Argyll Stores*[[20]](#footnote-20)*** on the grounds that enforcement of a covenant to carry on a business would require constant supervision of the courts with the courtre sorting to criminal punishment for contempt of court if the order was not complied with. However, a recent case has reversed this rule in relation to a tenant's repair covenants (**Rainbow Estates Limited V Token hold Limited and another)[[21]](#footnote-21).**

Specific performance is often ordered in relation to building contracts because the contract deals with results rather than the carrying on of an activity over a period of time and it usually defines the work to be completed with certainty (**Jeune v Queens Cross Properties Ltd*[[22]](#footnote-22)*).** Specific performance is not available for contracts requiring personal services such as employment contracts because such an order would restrict an individual's freedom (**Chappell v Times Newspapers Ltd)**.The court has broad discretion to award specific performance and in exercising this discretion it takes into account factors such as:

Delay in asking for the order **(Lazard Brothers & Co Ltd v Fairfield Properties co (Mayfair) Ltd*[[23]](#footnote-23)*)**.; Whether the person seeking performance is prepared to perform his side of the contract **(Chappell v Times Newspapers Ltd*[[24]](#footnote-24)*),** Whether the person against whom the order is sought would suffer hardship in performing (**Patel v Ali*[[25]](#footnote-25)*),** The difference between the benefit the order would give to one party and the cost of performance to the other (**Tito v Waddell*[[26]](#footnote-26)***), Whether any third party rights would be affected, 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 (**Jeffrys** **v Jeffrys)[[27]](#footnote-27).**

## **INJUNCTION**

Like specific performance, an injunction is an equitable remedy and therefore only granted at the discretion of the court. It is awarded in circumstances where damages would not be an adequate remedy to compensate the claimant because the claimant needs to restrain the defendant from starting or continuing a breach of a negative contractual undertaking (prohibitory injunction) or needs to compel performance of a positive contractual obligation (mandatory injunction).

In exercising its discretion, the court will consider the same factors as above for specific performance and will use the balance of convenience test (weighing the benefit to the injured party and the detriment to the other party). An injunction will not be granted if its effect would be to compel a party to do something which he could not have been ordered to do by a decree of specific performance (**Lumley v Wagner*[[28]](#footnote-28)***). Example of a prohibitory Injunction can be seen in **Warner Bros. Pictures Inc. V. Nelson*[[29]](#footnote-29)*,** a film actress signed an undertaking with the plaintiffs, her employers, not to act for any other organization. On the other hand, where the injunction is mandatory, it is restorative in its effect and not merely preventive. It directs the defendant to undo what he has already done in breach of contract. For example, he may be compelled to demolish a building which he has erected in contravention of the contract. It should, however, be stated that this type of injunction is very rarely granted. An injunction was issues to restrain her from committing a breach of this stipulation when she attempted to enter the employment of a third party.In urgent cases a plaintiff may be able to obtain an interim injunction to restrain an act. Special types of injunction may be granted to preserve property and assets pending trial (Mareva injunctions and Anton Piller orders).

## **QUASI CONTRACT: OTHER REMEDIES**

Quasi-contract creates obligations at common law, distinct from obligations under a contract. It is an area of law in its own right. Quasi-contractual remedies are sometimes available either as an alternative to a remedy for breach of contract or where there is no remedy for breach of contract. For example, a claim for *quantum meruit* (a reasonable remuneration for work done of goods supplied under a contract which is later discovered to be void).

## **LIMITATION OF ACTIONS**

An innocent party will lose his right to bring a claim for breach of contract if he delays for a certain length of time. **The Limitation Act 1980** provides statutory limitation periods. These do not apply to equitable remedies, however, in practice, equity usually applies the statutory rules. The **Limitation Act 1980** distinguishes between simple contracts and deeds. It provides the following limitation periods:

* For simple contracts, six years from when the cause of action accrued.
* For deeds, twelve years from when the cause of action accrued.

If there has been fraud or mistake, the limitation period does not begin to run until the innocent party has discovered this or should have discovered this. There is a three-year time limit in respect of damages for personal injuries arising from breach of contract.

## **SELF-HELP REMEDIES**

Rather than bringing an action for breach of contract, parties can make use on some self-help remedies such as retention of title clauses, enforcement of security, withholding payments and set off and rights against the goods themselves.

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