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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

**Assignment answers;**

1. A breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained – for exchange is not honoured by one or more parties to the contract by non-performance or interference with the other party’s performance. It also describes the violation of a contract or an agreement that occurs when one party fails to fulfil its promises according to the provisions of the agreement.

It is not in every case there is a breach of contract so the judge will determine if there is a breach of contract. In order to do this some requirements have to be met which are**1**:

* The contract must be valid. It must contain all essential contract elements by law. A contract is not valid unless all these essential elements are present, so[[1]](#footnote-1) without them, there can be no law suit.
* The plaintiff or the party who is suing for a breach of contract must show that the defendant did indeed breach the agreement’s terms.
* The plaintiff must have done everything required of them in the contract to show that he is also not of breach.
* The plaintiff [[2]](#footnote-2)must have notified the defendant of the breach before proceeding to file a law suit. This means that the defendant has to be aware that he breached the contract before a law suit is filed.

It can be said that a breach of contract can be in different forms: (i)Where the party in default has repudiated the contract before performance is due or before it has fully been performed that is *anticipatory breach*. (ii) Where the party in default has committed what in modern judicial parlance is called *fundamental breach*- the contract term violated is of major importance.

1. **Anticipatory breach(repudiation)**: There are circumstances where there is a contract between two parties to be performed at a future date and one party declares an intention not to perform it, at times it is referred to as repudiation. A repudiation may be implicit where the reasonable interference from the defendant’s conduct is that he no longer intends to perform his side of the contract therefore if a man contracts to sell and deliver specific goods on a future day, and before the day sells and delivers them to another he is liable to be sued for breach by the first person he contracted with**2.** In *Johnstone v Milling***3**, when a party unlawfully renounces a contract he entitles the other party to bring an action to court in respect of the wrongful rescission. He can bring an action for damages sustained by him in consequence of such renunciation. In *C.D Ajufo v Trans-Arab Ltd***4**, **Somolu C.J** said that a breach of contract can take place before the time fixed for performance or of completing the performance of the contract has arrived therefore upholding anticipatory breach. *Nigerian Supplies Manufacturing Co Ltd v Nigerian Broadcasting Corporation***5**: Here on appeal to the Supreme Court it was held that the plaintiff is entitled to sue for breach of contract even when time for performance has not reached and the plaintiff in this case was granted declaration and injunction he sought. In *Frost v Knight***6**, here the defendant having agreed to marry the plaintiff on the death of his father, broke off the engagement during the father’s lifetime and the plaintiff was entitled to immediately sue for breach of contract. It is important to note that where the repudiation does not have a profound effect, such as depriving the innocent of substantially the whole benefit that he was intended to enjoy under the contract, the party claiming a breach will only be entitled to damages and no other special remedies for a breach of contract. If a party though willing to perform is incapable of doing so it will still constitute an anticipatory breach irrespective of how he became disabled. There are issues on whether in contracts involving delivery of goods, failure to deliver or pay for one or more goods constitutes an anticipatory breach. To consider the[[3]](#footnote-3) above it depends on the circumstances in the given case. In *Robert A Munro & Co. Ltd v Meyer***7** where there was a contract for the sale of 1,500 tons of bone meal, 611 tons were delivering which were seriously adulterated. The buyers having discovered that the delivery did not conform to the contract they sued for anticipatory breach of contract which was upheld by the court on the basis that where there is a persistent breach for example in this case continuing for nearly one half of the contract quantity the buyer is entitled to sue for breach.
2. **Fundamental Breach**: A fundamental breach refers to one of the parties in the agreement not keeping their part of the deal by failing to complete a contractual term that was essential to the agreement so much so that another party could not complete their own responsibilities in the contract**8**. A fundamental breach has to go into the root of a contract that is a breach of a fundamental term of a contract is a fundamental breach. In the Australian case, *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd***9** , **Jordan CJ** said’’ the test of essentiality is whether it appears from the general nature of the contract considered as a whole or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered the contract unless he was sure of a strict performance of the promise.
3. Remedies for a breach of contract

When we say remedies what do we mean? In the legal sense, a remedy refers to a judicial relief or a means by which a court of law enforces a right or compensates a person that has been legally wronged. It is simply the legal means to recover a right or to prevent or obtain redress for a wrong**10**. In contract it is a court ordered resolution to one party’s breach of the contract. [[4]](#footnote-4) There are various remedies for a breach of contract such as:

1. **Award of Damages:** Damages is a sum of money claimed or awarded in compensation for a loss or an injury. The modern rule for damages was established in *Hadley v Baxendale***11**, the damages available to the other party who suffered a breach of contract should be [[5]](#footnote-5)considered arising naturally. It emphasized that there are two types of damages: abnormal and normal. Remoteness of damages refers to the nature and extent of damages. In *Victoria v Newman Industries***12** the court held that the loss due to the fall in market price was not too remote to be recoverable as damages. Damages could be for non-pecuniary losses, in *Jarvis v Swans Tours Ltd***13**, the court held that in proper case damages could be awarded for mental distress and vexation. Damages could be in various forms: (i) Penalty and Liquidated Damages: It is a liquidated damages clause if its aim is to make a genuine pre-estimate of the loss the plaintiff is likely to suffer while a penalty damage is one where the provision in advance of a sum payable in a case of breach is in the nature of threat held over the other party. In *Dunlop Pneumatic Tyre Co Ltd v New Garage*..**14**, in the above case the defendants, New Garage agreed to pay Dunlop the sum of 5 pounds for anything sold in breach of the agreement as a way of liquidated damages. (ii) Special damages are in cases where the losses are claimed for specific items with clear or monetary values.(iii) General damages is where the court itself has to estimate or assess the damages ,in *Ghandi v Pfizer***15**, after finding the defendant in breach the court ordered the refund of the plaintiffs money as general damages. (iv) Nominal damages: Where a party has been injured by a breach of contract then he is entitled to nominal damages. In *Nigerian Advertising v Nigerian Airways***16,** damages were proved so there were nominal damages. (v) Exemplary damages: They are damages awarded against the defendant as a punishment so that the assessment goes beyond mere compensation to the plaintiff. It is usually awarded in the law of tort. In *Alele-Williams v Sagay***17**, exemplary damages are damages which are in nature made with the object of punishing the defendant for his conduct to the plaintiff.
2. **Injunction:** An injunction is a court order that coerces the defendant to take specific acts or refrain him or her from engaging in certain actions i.e breaching a contract. If a contract[[6]](#footnote-6) contains an express negative stipulation obliging one of the parties not to act inconsistently with his positive contract, an injunction may be granted against the breach of that negative stipulation. An injunction may be mandatory(compulsive) or prohibitory(restrictive)**18**. A prohibitory injunction is granted only in the case of a negative promise that is the court refraining someone from what he expressly stated he won’t do. A mandatory injunction is restorative not merely preventive. It directs the defendant to take certain positive steps to undo what he has already done in breach of contract. Looking at a prohibitory injunction cases like in *Warner Bros. Pictures Inc. v Nelson***19**, a film actress signed an undertaking with the plaintiffs, her employees, not to act for any other organization. An injunction was issued to restrain her from committing a breach of this stipulation when she attempted to enter a contract with a third party. In the mandatory sense cases like, in the *African Songs Ltd v Sunny Adeniyi***20** case, the plaintiff did not only seek an injunction to restrain the defendant from performing or recording music for anyone else but also sought an injunction to restrain the distribution of gramophone records containing already recorded music. [[7]](#footnote-7)
3. **Specific performance:** Specific performance is a remedy for breach of contract in which the court forces the breaching party to perform services or deliver the goods as promised per the contract. Specific performance is only available when money damages are inadequate to compensate the plaintiff for a breach. This remedy is usually used when goods or services are so unique that no other remedy could suffice for example in a contract to convey a land or to sell an antique or famous painting. In such cases the remedy of damages proved inadequate so the courts of equity declared specific performance. In *Ryan v Mutual Tontine Association***21**, **Kay LJ** declared that the remedy of specific performance was invented and cautiously applies to where the ordinary remedy by action in damages is not an adequate compensation for breach of contract. A plaintiff cannot make a claim for specific performance if he is at breach of the contract himself that is if he has not completed his obligation as emphasized in *Coker v Ajewole***22** where the court refused a plaintiff’s claims because she failed to perform her own part of the contract.

Contracts that the court will readily use the remedy of special performances are:

(i ) where a vendor refuses to convey land sold: In *Paye v Gaji***23**, the vendor of a piece of land refused to execute conveyance of the property after the conclusion of the agreement and payment by the buyer. The court ordered specific performance of the agreement by the vendor.

(ii) where damages are considered to be an inadequate remedy because of difficulty in qualifying them or because the plaintiff’s loss is too difficult to prove: In *Beswick v Beswick***24**, the House of Lords granted specific performance in a situation where damages would have been merely nominal and it would have been inadequate and unjust to award damages. [[8]](#footnote-8)

1. **Quantum Meruit** (…as much as he as earned is the literal meaning): A person might expressly request a person to render him service without settling on any renumeration but the circumstance of the request implies that the service is to be paid for so the implied promise to pay is quantum meruit**25**. Also if someone partly completes work he may claim quantum meruit. In *Warner & Warner v F.H.A***26**, the respondent wrongfully terminated a contract which was already partly completed, the court declared that the injured contractor could either sue for damages or ignore [[9]](#footnote-9)the contract and claim quantum meruit. Quantum meruit cannot be claimed in a situation where there was no contract to start with. In *Olaopa v Obafemi Awolowo University***27**, here the plaintiff’s claim was rejected by the court because the existence of an offer from the defendant was not established and there was therefore no contract. **Adio J.S.C** said in the above case that where there is no request or contract a claim of quantum meruit cannot arise or be sustained. It should also be noted that where work has been done by one party under a void contract, the party who did the work can claim quantum meruit to recover his renumeration provided that he did the work in good faith and without knowledge of its being void. In *Craven-Ellis Ltd v Canons Ltd***28**, the plaintiff was appointed managing director by agreement under the company’s seal and renumeration was fixed but the contract under which he was appointed was void unknown to him. The court held that since he had done his work in good faith without having knowledge that the contract was void he could recover his renumeration by claiming quantum meruit.
2. **Restitution:** Restitution is the remedy designed to restore the injured party to its position or state before the contract was made. A party will seek restitution when a contract they entered has been voided by the courts because of the defendant’s incapacity or incompetence.

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5 (1967) 1 All NLR 35 [↑](#footnote-ref-2)
3. 6 (1872) L.R 7 Exch.111

7 (1936) 2 K.B 31 [↑](#footnote-ref-3)
4. 8 <https://www.concordnow.com>

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11 (1854) 9 Ex 34,(1843-60) All ER 461 at p.465 [↑](#footnote-ref-4)
5. 12 (1949) 2 K.B 528

13 (1973) 1 Q.B 233; (1972) 3 WLR 954

14 (1915) A.C 79

15 (1965) 1 All NLR 182 at p. 184

16 High Court of Lagos State, suit no. Ik/88/71 [↑](#footnote-ref-5)
6. 17 (1995) 5 NWLR (pt. 396) 441 at 454

18 Chersire, Fitfoot, and Furmston’s Law of Contract 16th Edition pg 946

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7. 20 High Court of Lagos State, Dosunmu J, suit no LD/1300/74 delivered on February 14,1975. [↑](#footnote-ref-7)
8. 21 (1893) 1 Ch. 116 at p.126

22Suit No. SC 373/74 delivered on September 24, 1976.

23 (1966) 5 NWLR (Pt. 450) 589 at 605

24 (1968) A.C. 58 [↑](#footnote-ref-8)
9. 25 Sagay Nigerian Law of Contract pg 675

26 (1993) 5 NWLR (Pt. 298) 148 at 176

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