**AFE BABALOLA UNIVERSITY, ADO-EKITI**

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**COURSE: Law of Contract LPB 202**

**LECTURER: Ms. Faith Bamidele**

**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. 017-049).

Discuss the following:

1. Breach of Contract
2. What are the remedies available for breach of contract?

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. A breach can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement or fails to perform at all. It always entitles the injured or innocent party to an action for damages against the guilty party.[[1]](#footnote-1)

Breach of contract cannot just magically happen suddenly, there would have been certain actions that would lead to that breach. A contract is said to be breached when the following occurs:

1. Where one party performs defectively, differently from the agreement or not at all. In the case of *Pilbrow v. Pearless de Rougement & co.[[2]](#footnote-2)* the appellant sued the respondent, a firm of solicitors, because he was dissatisfied with their legal services due to the fact that he telephoned them to make an appointment which was later arranged by an employee of the firm who was not a Solicitor. The Court of Appeal held that it accepted as a matter of fact that the standard of legal services had been provided by a solicitor but ruled that there had been a contract no just only to provide legal services but to provide legal services with a Solicitor. The firm did not perform that at all. Since no legal services were provided by a Solicitor, they had no right to payment.
2. Where one party indicates in advance that they will not be performing as agreed. This is also known as anticipatory breach. In the case of *Frost v. Knight[[3]](#footnote-3)* 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-fiancée sued him for breach of promise, he argued that she had no claim as the time of performance had not yet arrived. The Court rejected the Defendant’s argument and ruled in favour of the Plaintiff.

There are four main types of contract breaches:

1. 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 contract. To be considered a minor breach, the breach must be so nonessential that all parties involved can otherwise fulfill any contractual obligations. A minor breach is sometimes referred to as impartial breach

1. Material Breach

A material breach of contract is a breach that is so substantial, it seriously impairs the purpose of 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 total breach. It allows for the performing party to disregard their contractual obligations and go to court in order to collect damages from the breaching party.

1. Fundamental Breach

In the case of *Photo Productions ltd v. Securior Transport Ltd.[[4]](#footnote-4)* Lord Diplock defined a fundamental breach of contract as an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party substantially off the whole benefit which it was the intention of the parties that he should obtain from the contract. This type of breach is similar to Material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach.

1. Anticipatory breach

This is also known as renunciation or repudiation. An anticipatory breach occurs where there is a contract between two parties at a future date and on part declares his intention not to perform his own side of it.

Such repudiation may be express, implied, be in words or by conduct. In the case of *Hochester v. De la Tour*[[5]](#footnote-5) 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. This same rule is evident in the case of *Nigerian Supplies Manufacturing Co. ltd v. Nigerian Broadcasting Corporation*[[6]](#footnote-6).

Repudiation can also be implicit where there is a reasonable inference that the defendant no longer intends to perform his own part of the contract, the plaintiff is entitled to treat the contract as discharged and sue for breach. In *Frost v. Knight*[[7]](#footnote-7) 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-fiancée sued him for breach of promise, he argued that she had no claim as the time of performance had not yet arrived. The Court rejected the Defendant’s argument and ruled in favour of the Plaintiff.

Moreover, where repudiation is the result of a bona fide though erroneous belief that the defaulting party was justified to withhold performance, his act may not amount to repudiation. This would be the case of where there is a genuine dispute as to the construction of the contract.

In addition, where repudiation is done by conduct, the test is to ascertain whether the action or omission of the defaulting party will lead a reasonable person to conclude that he no longer intends to be bound by the provisions of the contract.

**REMEDIES FOR BREACH OF CONTRACT**

Once a party to contract establishes, to the satisfaction of the court, that the other part has committed a breach of contract, the most common claim is that for Damages which is certainly the most readily granted type pf remedy by Courts. However, only in special circumstances will the equitable remedies of specific performance and injunction be granted by Courts.[[8]](#footnote-8)

1. Damages

Unlike equitable remedies such as specific performance and injunction, claims for damages for loss in a breach of contract are available as of right. Therefore, an innocent party may claim damages from the guilty party/party in breach in respect of all breaches of contract. The damages may either be nominal or substantial. Nominal damages are awarded where an innocent party has suffered no loss as a result of the other party’s breach while Substantial damages are awarded as monetary compensation for loss suffered as a result of the other party’s breach.

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.

* 1. Remoteness of Loss

The innocent party may only recover damages for loss suffered as a result of the breach provided that 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 principle of remoteness are highlighted in the case of *Hadley v. Baxendale*[[9]](#footnote-9) which provides the following losses as recoverable

* All losses that flow from the natural breach
* All losses which were in contemplation of the parties at the time the contract was made as a result of the breach.

If the loss does not fall within the given categories, then it will be remote and unrecoverable. Therefore, the rule derived from that case was not only interpreted to mean that only losses within the reasonable contemplation of parties may be recovered but was divided into two branches, the first dealing with the normal damage that occurs in the usual course of things and the second with abnormal damage that arise because of special or exceptional circumstances[[10]](#footnote-10)

* 1. Measure of damages

This is a method of calculating the damages to which the innocent party is entitled. It covers the loss of bargain or expectation loss. The general rule with regards to the time of assessment is that damages should be assessed as at time when the cause of action arose, which is, the date of the breach. The aim of the Court is to put the innocent party in the position he would have been in if the contract had been performed properly[[11]](#footnote-11). The two usual methods of assessing this are difference in value or cost or cure. The Court will generally use the more appropriate one.

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[[12]](#footnote-12).

There are many other types of losses that can be claimed by innocent parties. Damages for disappointment or mental distress are not generally awarded[[13]](#footnote-13) unless, for instance, the contract is a holiday contract[[14]](#footnote-14).

* 1. Mitigation of Damages

An innocent party cannot recover for the loss he could have avoided by taking reasonable steps. This is sometimes expressed as duty to mitigate. However, this does not apply to actions for the price of goods delivered because such an action is for an agreed sum, not an action for damages.

Although there is no duty to mitigate before an actual breach occurs, the innocent party should not aggravate his loss. For it is the Defendant who must prove that the Plaintiff has failed to mitigate his loss[[15]](#footnote-15).

* 1. Penalty and Liquidated damages

It is common for parties to expressly state in the contract that if the contract is breached, a specified sum will be payable or that goods will be forfeited. The clauses covering these areas are known as liquidated or agreed damages clause. They frequently appear in commercial contracts, lease agreements but do not appear in contracts of employment.

The purpose of such clauses are to make the recovery of damages easier avoiding the problems of actual loss; to avoid arguments as to the remoteness of certain types of consequential or indirect loss; and to assure the other part of its intention to be bound by the contract.

The normal rules applicable in determining whether a clause operates as liquidated damages or a penalty apply irrespective of the type of contract stated. A difference must be drawn between clauses which purports to impose a penalty on the defaulting party and clauses which levy liquidated damages from that party. Penalty clauses are generally not enforceable, whereas liquidated damages clauses are.

For liquidated damage clause to be valid, the specified sum must be a genuine pre-estimate of the anticipated loss which the plaintiff would be likely to suffer in the event of a breach of the obligation in question. If the loss is difficult to quantify, a best guess procedure should be operated, that is, keeping records of the calculations underlying any elements of the determined figure provided that the selected figure is not vastly in excess of the greatest loss which could be suffered, the clause is likely to be enforceable. The essence of a penalty is that the money specified is *in terrorem[[16]](#footnote-16)* of the defaulting party, in other words, it is intended to apply undue force to the other party to perform his part of the contract.

The use of Penalty or liquidated damages are not conclusive. It is necessary to examine whether the amount specified is in fact a penalty or liquidated damages. It is for the party in breach to show that the sum is a penalty[[17]](#footnote-17).

In the Case of Dunlop Pneumatic Tyre Co. ltd. vs. New Garage & Motor Co. ltd., it is established that there is a test to differentiate between Penalties from liquidated damages:

* A clause would be construed as a penalty clause if the sum specified is extravagant and unconscionable in comparison with the greatest loss that could possibly have been proved as a result of the breach.
* It is likely to be a penalty if the breach consists of not paying a sum of money and the sum stipulated as damages is greater than the sum which ought to have been paid.
* There is a presumption that if the same sum is stated to apply to different breach of contract, some of which are serious and others not, it is likely to be a penalty clause.
* It is not a bar to the operation of a liquidated damages clause that a precise pre-estimation is impossible.

1. Specific performance

This is an equitable remedy granted at the Court’s discretion. It is a decree by a Court to compel a party to perform his contractual obligations. It is only usually ordered where damages is not an adequate remedy (where the subject matter of the contract is unique, for example Chinese vases in *Falcke v. Gray*[[18]](#footnote-18) but not if the subject could be replaced even after a long delay[[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, in the case of Co-op insurance v. Argyll Stores[[20]](#footnote-20) the House of Lords refused specific performance of a covenant to keep a shop open during normal business hours on the grounds that enforcement of a covenant to carry on a business would require constant supervision of the Court with the Court resorting to criminal punishment for contempt of court if the order was not adhered to. However, the case of *Rainbow Estate Limited v. Tokenhold Limited and anor*.[[21]](#footnote-21)reversed the rule in relation to a tenant’s repair covenant.

Specific performance is also 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.[[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[[23]](#footnote-23).

The court has broad discretion to award specific performance and in exercising its discretion, it takes into account factors such as:

* Delay in asking for the order[[24]](#footnote-24)
* Whether the person seeking performance is prepared to perform his side of the Contract[[25]](#footnote-25)
* Whether the person against whom the order is sought would suffer hardship in performance[[26]](#footnote-26)
* The difference between the benefit the order would give to one party and the cost of performance to the other[[27]](#footnote-27)
* Whether any third party rights would be affected
* Whether the contract lacks adequate consideration. Here 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.[[28]](#footnote-28)

1. Injunction

An injunction is another way by which a Court can order specific performance. Like specific performance, it is an equitable remedy and is 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 he needs to restrain the defendant from starting or continuing breach of negative contractual undertaking (prohibitory injunction) or needs to compel performance of a positive contractual obligation (mandatory injunction).

Where a party to a contract undertakes not to do something (prohibitory injunction), a Court order prohibiting him from doing that thing is a negative way of enforcing the contract. In the case of *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 organisation. An injunction was issued to restrain her from committing a breach of this stipulation when she attempted to enter the employment of a third party. This is also seen in the case of *African Songs ltd v. Sunday Adeniyi[[30]](#footnote-30)* where a musician who undertook to perform and record solely for the plaintiff company, was restrained for the remaining period of the contract from recording for himself or any other company.

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. However, this type of injunction is rarely granted

In exercising its discretion, the Court will consider the same factors in specific performance and will use the balance of convenience test, that is, 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[[31]](#footnote-31).

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.

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