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COURSE: LAW OF CONTRACT

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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 incapacity himself from performing.

Discuss: Breach of Contract

 What are the remedies available for breach of contract

**Answers**

**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 honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach occurs when a party to a contract fails to fulfil, its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party.

If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

It is important to bear in mind that contract law is not the same from country to country. Each country has its own independent, free standing law of contract. Therefore, it makes sense to examine the laws of the country to which the contract is governed before deciding how the law of contract (of that country) applies to any particular contractual relationship.

To determine whether or not a contract has been breached, a judge needs to examine the contract. To do this, they must examine: the existence of a contract, the requirements of the contract, and if any modifications were made to the contract. Only after this can a judge make a ruling on the existence and classifications of a breach. Additionally, for the contract to be breached and the judge to deem it worth of a breach, the plaintiff must prove that there was a breach in the first place, and that the plaintiff held up his side of the contract by completing everything required of him. Additionally, the plaintiff must notify the defendant of the breach prior to fling the lawsuit.  A breach of contract may take place when a party to the contract:

* fails to perform their obligations under the contract in whole or in part
* behaves in a manner which shows an intention not to perform their obligations under contract in the future or
* the contract becomes impossible to perform as a result of the defaulting party's own act.

These classifications only describe *how* a contract can be breached, not how serious the breach is. A judge will make a decision on whether a contract was breached based on the claims of both parties.

The first type above is an *actual* breach of contract. The second two types are breaches as to the future performance of the contract, and technically known as *renunciatory* breaches. The defaulting party enunciates the contract in advance of the time they are required to performs their obligations. Renunciatory breach is more commonly known as “anticipatory breach”.

The general law has three categories of breaches of contract. These are measures of the seriousness of the breach. In the absence of a contractual or statutory provision any breach of contract is categorized as a:

* breach of warranty;
* breach of condition; or
* breach of an innominate term, otherwise known as an *intermediate* term.

There is no “internal rating system” within each of these categories (such as “a serious breach of warranty”. It's a breach of a warranty. It's not a minor breach of a condition. It's a breach of a condition). Any breach of contract is one or the other of a breach of warranty, condition or innominate term.

In terms of priority of classification of these terms, a term of a contract is an innominate term unless it is clear that it is intended to be a condition or a warranty.

A right to terminate a contract arises for:

1. *breach of a condition* of the contract, no matter how trivial the breach of the condition may be;
2. *repudiatory breach*, that is an actual breach of an innominate term, where the consequence of the breach is sufficiently serious to give rise to a right to terminate; or
3. *renunciatory breach* (aka anticipatory breach), where the other party makes clear to the 6innocent party that it:
	1. is not going to perform the contract at all, or
	2. is going to commit a breach of a condition, or
	3. is going to commit a breach of an innominate term,

and the consequences will be such as to entitle the innocent party to treat the contract as at an end.

An innocent party is therefore entitled to elect to terminate a contract only for breach of a condition of the contract, repudiatory breach or renunciatory breach. Nothing less.

To terminate a contract for repudiatory breach, the innocent party must tell the defaulting party. Many commercial contracts include clauses which set out a process whereby notice must be given and in what form. Consequently, where there is a written contract, care should be taken to check the contract terms and to ensure compliance notwithstanding that the other party may, on the face of it, have committed a clear and repudiatory breach. It is only when the defaulting party is told that a repudiatory breach has been "accepted" that the contract is terminated. If the defaulting party is not told the repudiatory breach has been accepted, the contract continues in force. An innocent party is not compelled to exercise their right to terminate, and accept a repudiatory breach. When they don't the contract continues in force.

 Repudiatory breaches

Conduct is repudiatory if it deprives the innocent party of *substantially the whole of the benefit* intended received as consideration for performance of its future obligations under the contract.

Different forms of words are used by courts to express this central concept. The most prominent is whether the breach goes to *the root of the contract*. These forms of words are simply different ways of expressing the "substantially the whole benefit" test.

### Renunciatory breaches

Conduct is renunciatory if shows an intention to commit a repudiatory breach. The conduct would lead a reasonable person to conclude that the party does not intend to perform its future obligations when they fell due.

Showing an intention to perform a contract in a manner which is *inconsistent* with the terms of the contract also shows an intention not to perform the contract. Whether such conduct is so severe so as to amount to a renunciatory breached depends upon whether the threatened difference in performance is repudiatory. An intention to perform connotes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. To say: "I would like to but I cannot" negatives intent just as much as "I will not.". Contracting parties must perform contracts in strict accordance with its terms: that is what was agreed in the first instance, when the contract was formed. To do otherwise is therefore a breach of contract.

In the event of a renunciatory breach, the innocent party may:

* choose to accept the breach at once and to terminate the contract, without waiting for the due date of performance, or
* wait for the time for performance of the contract.

If the defaulting party does not perform when the time for performance arrives, the contract may be terminated. However, if the defaulting party does perform, the right to terminate is lost forever.

Conduct comprising a breach for performance of contractual obligations which have fallen due may be insufficient to be a repudiation. However:

* It may nevertheless be conduct which is a renunciation because it would lead the reasonable observer to conclude that there was an intention not to perform in the future, and
* the past and threatened future breaches taken together would be repudiatory.

The reason why a defaulting party commits an actual breach is generally irrelevant to whether it constitutes a breach, or whether the breach is a repudiation (this is an incident of *strict liability* for the performance of contractual obligations). But the reason may be highly relevant to what such breach would lead the reasonable observer to conclude about the defaulting party's intentions in relation to future performance, and therefore to the issue of renunciation. Often the question whether conduct is a renunciation falls to be judged by reference to the defaulting party's intention which is objectively evinced both by past breaches and by other words and conduct.

Question 2

Remedies available for breach of contract;

* Remoteness of damages
* Measurement of damages
* Damages for non- pecuniary losses
* Mitigation of damages
* Penalty and liquidated damages
* General and special damages
* Nominal damages
* Exemplary damages

**Remoteness of damages;** Whenever it has to consider a claim for damages, a court must first resolve the issue whether the defendant is liable for any damage at all, and if so the nature and extent of such damages or losses. This is known as issue of remoteness of damages. It is only having determined the nature and extent of damages that the court can quantify them in terms of money. The question of remoteness of damages in contract was given detailed consideration by the House of Lords in *Koufos v. C. Czarnikow Ltd, known as The Heron.* The respondent chartered the appellants ship, The *Heron*, on October 15 1960, to proceed from Piraeus to Constanza, and there take on a consignment of the respondents sugar, and carry it to Basrah or at the respondents option, to Jeddah. The ship left Constanza, with the cargo on November 1. The option was not exercised and the vessel did not arrive at Basrah until December 2, i.e, nine days later than it ought to have arrived. Thus delay was caused by deviations made in breach of the contract.

**Measurement of damages;**  The general rule with regard to the time of assessment is that damages should be assessed as at time When the cause of action arose, namely. The date of the breach. But as was started in *Johnson v. Agnew,* this is not an absolute rule, and the court will fix any other appropriate day if the date of breach will work injustice. Situations in which the court will not apply the date of breach include (1) where the innocent party refuses to treat the breach as terminating the contract, (2) where the plaintiff did not know until later that a breach had occurred. Indeed, in one case, where there was no market for the subject- matter of the contract at the time of the breach, the court used as it’s date of assessment of damages, a subsequent date when it could be established that such a market had become available. As stated earlier, the aim of awarding damages is to place the injured party, so far as money can do it, in the same situation as if the contact had performed. Thus in contract for sale of goods, if it is the seller who fails to perform, the buyers damages will be equivalent to the difference between the price the buyer had to pay for the goods elsewhere and the contract price with seller. The buyer must be placed in a position that he would have occupied had he received the goods at the time and place of delivery. He will be entitled to damages that will enable him buy the same quantity.

**Damages for Non-pecuniary Losses;** Although damages for breach of contract are based on financial loss, in certain circumstances, damages may be recovered form the defendant for non-pecuniary losses of they were within the contemplation of the parties as not unlikely to result from the breach. Thus, plaintiffs have been held entitled to damages where the defendants breach of contract led to substantial physical inconvenience, pain and suffering, though normally the plaintiff will also have a right of action in tort. But thus was regarded as exceptional. It was previously believed that damages could not be awarded for injury to the plaintiffs feelings or for his mental distress, annoyance or loss of reputation, except in action for breach of promise to marry. In *Hamlin v. Great Northern Railways,* it was held that damages could not be awarded for mental distress and vacation suffered by a plaintiff on account of a breach of contract. See also the case of *Groom v. Crocker.* However, in subsequent years, there has been a decisive change of judicial attitude to non- pecuniary losses arising out of contracts. These decisions indicate very clearly that a plaintiff who has suffered a non pecuniary loss as a result of a breach of contract would be entitled to damages if it can be shown that the distress or unhappiness was the natural and probable consequence of breach complained of ; in order words if such damage ca be brought under the first rule in *Hadley v. Baxendale.*

**Mitigation of damages;** The law imposes an obligation on all parties to take reasonable steps to mitigate the losses caused by break h of contract. The plaintiff cannot therefore recover losses caused by breach of contract. The plaintiff cannot therefore recover loss which he could have avoided by taking reasonable steps. The position of the plaintiff who fails to take reasonable steps to mitigate his losses is similar to that of a plaintiff whose damages are reduced because of contributory negligence. As Lord Haldane put it in *British Westinghouse Electric and Manufacturing Co. V. Underground Electric Rys Co. Of London; the fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but thus first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debate him from claiming any part of the damages which is due to neglect to take suck steps.* In *Payzu Ltd. V. Saunders,* it was argued on their behalf that they could ignore the defendant's offer on the ground that a person who has repudiated a contract cannot place the other party to the contract under an obligation to diminish his loss by accepting a new offer made by the party in default.

**Penalty and liquidated 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 damages clause or a penalty clause. It is a liquidated damages clause if it’s aim is to make a genuine pre-estimate of the loss the plaintiff is likely to suffer in the case of a breach: the purpose of the parties being to facilitate the recovery of damages without the difficulty and expense of proving actual damage. The courts will uphold and enforce such a provision. On the other hand, where the provision in advance of sum payable in case of breach is in the nature of a threat held over the other party in terrorism to ensure that the promise is not broken, such a sum is a penalty and courts of equity have always refused to enforce it on the ground that it is a mere security for the performance of the contract, usually out of proportion to the plaintiffs actual loss whereas the plaintiff can be sufficiently compensated by claiming for his actual loss. The refusal to sanction legal proceedings for penalties is rule of the court's, produced and maintained for purposes of public policy. The nature of liquidated damages in contract to penalties, and the tests for determining whether damages fixed in advance of a breach belong to one category or the other were raised, extensively considered and analysed in *Dunlop Pneumatic Tyre Co v. New Garage and Motor Co. Ltd.*

**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 . The tendency is that where the losses claimed are for specific items with clear or known monetary values, these are referred to as special damages. If for example, the plaintiff is bringing a claim for damages against a motor dealer in respect of a lorry bought by him which has turned out to be full defects. The Supreme Court has declared time again that in the law of contract, damages should not be classified into ‘special’ and ‘ general’ as is done in tort cases. Rather there should be a reference to damages solicited. Thus in *Chanrai v. Khawam, the supreme Court had cause to observe as follows; we would point out that the terms special and general damages are misleading and are likely to create confusion in the assessment of damages, especially when these terms are employed in connection with cases in which no such distinction is either necessary or desirable.*

**Nominal Damages;** Whenever a party has committed a breach of contract, the injured party is entitled to nominal damages, even though he has suffered no actual damage. The violation of his right per se will entitle the plaintiff to nominal damages without proof of any loss incurred by him as a consequence of the Breach. Thus, in *Nigerian Advertising and Publicity Ltd. V. Nigeria Airways lid,* the plaintiffs were unable to establish any loss suffered by them as a consequence of the defendants admitted breach of contract. Nevertheless, the court held that although no recoverable “special” damages had been proved, it awarded nominal damages in sum of 100 pounds. Here again the court treated the term nominal as if it was interchangeable with “general". Although nominal damages will only normally be awarded when the defendants breach has caused no loss to the plaintiff, or although he has suffered a loss, he fails to prove any loss flowing from the breach of contract, there have been occasion when in addition to damages based on established loss flowing from the breach of contract, there have been occasion when in addition to damages based on established loss flowing from breach the court also grants the plaintiff nominal damages usually tagged “general” damages. It should however, be emphasised that this is an unusual use of that discretionary power. If the loss has been established and damages would awarded for it, an additional imposition of nominal damages would appear uncalled for. It should only arise when no loss has been established as flowing from the breach, in which case the court is forced to resort to nominal damages as a recognition of the fact that the plaintiff's right has been infringed. Not all nominal damages are small and not all small damages are nominal. See the case of *Barau v. Cubitts (Nig) Ltd.*

**Exemplary Damages;**  These are damages awarded against the defendant as a punishment, so that the assessment goes beyond mere compensation to the plaintiff. The right is more widely applied in law of tort, although even in this area of law it was severely restricted by the House of Lords in the case of *Rookes v. Barnatd.* The court of appeal explained what constitutes exemplary damages and when they should be awarded for tortious conduct in Alele- Williams v. Sagay. According to the court, exemplary damages are damages which are in nature awards made with a secondary object of punishing the defendant for his conduct in inflicting harm on the plaintiff. They can be made in addition to nominal compensatory damages. Exemplary damages should be awarded only in the following cases,

* In cases of provocative arbitrary and unconstitutional acts by government servants.
* Where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff.
* Where expressly authorised by statue.

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