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BREACH OF CONTRACT

When parties enter into contract, it is expected that the contract will eventually terminate at a particular time *i.e.* when performance has been concluded. For a contract to be discharged, it means that the rights and obligations of the parties has come to the end and the contractual relationship have been extinguished.

A breach of contract occurs when a party fails to fulfill his obligation either partially or wholly or communicates an intent to fail in the performance of his obligation or otherwise appears to be unable to perform his obligation. This means that breach occurs in three situations;

- a. Where a party communicates his intention not to fulfill his obligation
- b. Where a party fails without communicating his intention to repudiate the contract
- c. Where a party appears to be unable to perform his obligation

Usually, in cases of breach, the effect is to make the party guilty of the breach liable for any damages that will be incurred by the other party as a result of the breach. The party affected by the breach (innocent party) is entitled to an action for damages against the guilty party. The innocent party is also allowed to treat himself as being discharged from further performance of his obligation.

When a party communicates his intention not to fulfill his obligation before the time of performance arrives, it is referred to as **ANTICIPATORY BREACH, RENUNCIATION OR**

REPUDIATION. In truth, a contract cannot truly be breached before the time of performance arrives but in the case of an anticipatory breach, the guilty party communicates his intent to commit a breach or shows signs that he will be unable to perform when the time comes hence the breach is anticipated because the innocent party knows that it will eventually happen. In *Hochester v. De La Tour*¹, it was stated that if it should be held that upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems to be no reason for requiring that other party to wait till the day arrives before seeking his remedy by action and the ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as breach of the contract.

If one party assumes to renounce the contract, that is, by anticipation fails to perform it, he thereby so far as he is concerned then and there declares his intention then and there to rescind the contract². And since only one party cannot rescind a contract, such unlawful attempt to rescind the contract entitles the innocent party to bring an action in respect of wrongful rescission. The innocent party is open to sue for breach even if it is anticipated³.

Repudiation may be expressly or implicitly. When it is express, it means that the guilty party directly communicated his intention to fail in his performance. In *Hochester v. De La Tour*, the defendant wrote to the plaintiff stating that he would not perform his obligation when the time came.

Where the repudiation is implied, it means that there is reasonable inference that the guilty party no longer intends to perform his part of the contract. If the repudiation is implied by conduct, the

¹ (1853)2 E & B 678

² *Johnstone v. Milling* (1886)16 QBD 460

³ *Solomon Nassar v. Oladipo* (unreported) High Court of Lagos suit Number LD/222/58

court will use a reasonable man's test to determine whether the action or omission of the guilty party would lead a reasonable person to conclude that he no longer intends to be bound by the provisions of the contract⁴. Even when the guilty party is willing to perform but not capable, except in manner substantially inconsistent with his obligation, it will still constitute repudiation.

A fundamental breach occurs when a guilty party commits a breach of a fundamental term without expressly or implicitly repudiating the contract. For a breach to be fundamental, it has to affect the root of the contract and deprive the injured party from achieving the purpose of the contract. Breach of a fundamental term has the effect of causing the innocent party to terminate the contract⁵

CONSEQUENCES OF BREACH

When one party declares his intention to repudiate the contract or simply commits a fundamental breach, one of these can happen;

- a. The innocent party accepts the repudiation and treats himself as being discharged from further obligations
- b. The innocent party rejects the repudiation and continues with the contract.

As a consequence of repudiation or fundamental breach, the other party is expected to treat himself as being discharged from further obligations. In truth, this does not imply that the contract becomes void *ab initio* but rather it simply means that the innocent party is discharged from performance of all future obligations that he would have been expected to perform had the repudiation not occurred. In this case, the party that repudiated the contract will be liable for damages, even though he is also excused from further performance.

⁴ Sagay, Nigeria Law of Contract, 2nd Edition page 551

⁵ RPM Investment corp v. Lange (2017) ABQB 305

The innocent party is under no compulsion to accept the repudiation, thus discharging himself from performance of obligations. In fact, the innocent party can decide to reject the repudiation and keep the contract alive. When this happens, both parties are still entitled to perform their obligation under the contract. In *Hasham v. Zenab*⁶, minutes after, signing a contract, the defendant repudiated it but the plaintiff brought an action for specific performance to continue the contract. The court ruled in favor of the plaintiff.

REMEDIES FOR BREACH OF CONTRACT

Relying on the Latin maxim, *ubi jus, ubi remedium* which means that where there is a right, there is a remedy, it is safe to say that where there is a breach of contract, there are remedies that the injured party can seek in court. Those remedies include;

- Damages
- Specific function
- Injunction
- Rescission

RESCISSION: the effect of a breach is to discharge the parties from fulfillment of obligations but sometimes the injured party has to seek formal rescission in court. For a contract to be rescinded for breach, the breach must be so substantial that it defeats the purpose of the contract.

DAMAGES: damages for loss in a breach of contract as available as of right. The underlying basis for the common law remedy of damages was laid down in *Robinson v. Harman*⁷ but the modern

⁶ [1960] A.C. 316

⁷ (1848) 1 EX.850

rule was laid down in *Hadley v. Baxendale*⁸. *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 be considered as either arising naturally, i.e. according to the natural course of things, from such breach of contract itself, or such as reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.*

The rule in *Hadley v. Baxendale* pointed out that there are two categories of damages (a) special or abnormal damages which arise due to exceptional circumstances (b) general or normal damages which occur in the usual course of things

The purpose of damages is to put the party whose rights have been violated in the same position so far as money can do so, if his rights had been observed (*Wertheim v. Chicoutimi Pulp Co.*)⁹. The affected party would only be entitled to damages representing the loss of profit which they would have made, that being a loss which at the time of the contract was foreseeable by the defendant as consequences of breach. A claim of damages based on hardship and inconvenience cannot be classified as a claim for special damages¹⁰.

Nominal damages are a form of damages awarded to the injured party of a breach of contract when it is clear that he suffered no actual losses. In the case of *Nigerian Advertising and Publicity Ltd v. Nigerian Airways*, although the plaintiff were unable to establish any loss as a result of the breach, the court held that they were still entitled to nominal damages. The purpose of giving the injured party nominal damages is to acknowledge that the breach is a violation of his legal rights.

⁸ (1854) 9 Ex 341

⁹ [1911] A.C.301

¹⁰ *Kusfa v. United Bawo Construction co.* [1994] 4 NWLR (pt. 336) 1

Exemplary damages are awarded against the defendant as punishment so that the assessment goes beyond mere compensation to the plaintiff. This type of damages is not very popular under breach of contract but when it is awarded, it is usually in a situation where there is a breach of promise to marry. In *Uso v. Iketubosin*¹¹, where the defendant and the plaintiff were engaged for ten years and suddenly the defendant terminated the engagement without justification. The woman was already thirty years old and had stayed with the defendant during the years where her prospects for marriage were greatest. The court awarded exemplary damages to the plaintiff.

Liquidated damages are specific damages that were previously identified by the parties in the contract itself, in the event that the contract is breached. These damages are usually a reasonable estimate of actual damages that might result from breach.

SPECIFIC PERFORMANCE: this is an equitable remedy granted at the courts discretion. It is a decree by the court to compel a party to perform its contractual obligations and it is usually ordered where damages are not an adequate remedy. The basis for granting specific function is that the party seeking it cannot obtain an adequate remedy by the common law judgment for damages. The court considers in each case whether damages would in fact be an adequate compensation and if not, whether specific performance will do more and complete justice than an award for damages. The exercise of specific performance is discretionary and the plaintiff is not entitled to it as of right. The court will consider;

- i. Delay in asking for the order (*Lazard brothers & co. Ltd v. Fairfield Properties co.*
[1977] 121 SJ 793)

¹¹ [1957] W.R.N.L.R. 187

- ii. Whether the person seeking performance is prepared to perform his side of the contract (*Chappell v. Times Newspaper Ltd [1975] 1 WLR 482*)
- iii. Whether the person against whom the order is sought would suffer through hardship in performing. (*Patel v. Ali [1984] 1 All ER 978*)
- iv. The difference between the benefit the order would give to one party and the cost of performance to the other. (*Tito v. Waddell (No.2) [1977] Ch 106*)
- v. Whether any third party rights would be affected.
- vi. Whether the contract lacks adequate consideration (*Jeffrys v. Jeffrys [1841] 1 Cr & Ph 138*)

INJUNCTION: this is another equitable remedy 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 defendant needs to be restrained from starting or continuing the breach of a negative contractual undertaking (prohibitory injunction) or the claimant needs to compel performance of positive contractual obligation (mandatory injunction). In this sense, an injunction is either restrictive or mandatory.

In exercising injunction, the court will consider the same factors it considers for specific performance and will also use the balance of convenience test i.e. weighing the benefit to the injured party and the detriment to the other party.

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