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MATRIC NO: 18/LAW01/083

COURSE: LAW OF CONTRACT

BREACH OF CONTRACT

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1. Almost every day of our lives we enter into various contracts, sometimes without even knowing.
2. Who would have thought that an activity as simple as shopping means getting into

A contract. If a buyer pays for some goods and the seller refuses to hand it over, that is a breach of contract. The writer of this paper would be writing on breach of contract and its remedies.

Before delving into the bone of contention, I would give an insight of what a contract is. 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.

A contract is a legally binding promise made between two parties. Each party to a contract promises to perform a certain duty, or pay a certain amount for a specified item or service. The purpose of a contracting legally binding is so each party will have recourse in the event of a breach.

A breach of contract occurs when the promise of the contract is not kept because one party has failed to fulfil their agreed upon obligations, according to the terms of the contract. A breach occurs when one party fails to deliver the inappropriate time frame, does not meet the terms of the agreement, or fails to perform at all. A breach could also occur if there is a contract between two parties to be performed at a later date and a party decides not fulfil his contractual obligations- this is popularly called 'anticipatory breach'. This last term has often been described as 'misleading' on the ground that a contract cannot be capable of breach before the time for its performance has arrived.

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

When a party claims a breach of contract, the judge must answer to the following questions:

1. Did a contract exist?
2. If so, what did the contract require of each of the parties?
3. Was the contract modified at any point?
4. Did the claimed breach of contract occur?
5. If so, was the breach material to the contract?

6. Does the breaching party have a legal defense to enforcement of the contract?

1. What damages were caused by the breach?

TYPES OF BREACHES

MATERIAL AND MINOR BREACH\

A breach of contract can be material or minor. The parties’ obligations and remedies depend on which type of breach occurred.

A breach is material if, as a result of the breaching party’s failure to perform some aspect of the contract, the other party receives something substantially different from what the contract specified. For example, if the contract specifies the sale of a box of tennis balls and the buyer receives a box of footballs, the breach is material. When a breach is material, the non-breaching party is no longer required to perform under the contract and has the immediate right to all remedies for breach of the entire contract.

Factors that the courts consider in determining materiality include:

1. The amount of benefit received by the non-breaching party;
2. Whether the non-breaching party can be adequately compensated for the damages

3. The extent of performance by the breaching party;

1. Hardship to the breaching party;
2. Negligent or willful behavior of the breaching party; and

6. The likelihood that the breaching party will perform the remainder of the contract.

A breach is minor if, even though the breaching party failed to perform some aspect of the contract, the other party still receives the item or service specified in the contract. For example, unless the contract specifically provides that “time is of the essence” (i.e. deadlines are firm) or gives a specific delivery date of goods, a reasonable delay by one of the parties may be considered only a minor breach of the contract. When a breach is minor, the non-breaching party is still required to perform under the contract, but may recover damages resulting from the breach. For example, when a seller’s delay in delivering goods is a minor breach of contract, the buyer must still pay for the goods but may recover any damages caused by the delay.

REPUDIATORY AND ANTICIPATORY BREACH (also known as actual and renunciatory breach)

A repudiatory breach occurs when one person refuses to fulfil his or her side of the bargain on the due date or performs incompletely. It is a breach of an inordinate term, where the consequence of the breach is sufficiently serious to give rise to a right to terminate.

A repudiation may be express or implied, or be in words or by conduct. In the case of *Hochester v. De la Tour* *(1853) 2 E. & B. 678* the defendant actually wrote to the plaintiff stating he was no longer going to perform his part of the contract under which he agreed to employ the plaintiff as a courier during a foreign tour commencing at a future date.

To terminate a contract for repudiatory breach, the innocent party must tell the defaulting party. It is only when the defaulting party is told that a repudiatory has been accepted that the contract is terminated.

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 expressing the "substantially whole benefit" test.

Anticipatory breach

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

Showing an intention to perform a contract also shows an intention not to perform the contract.

The true meaning of anticipatory breach was stated by Lord Escher, M.R., in Johnstone v. milling thus:

When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract.

In the event of an anticipatory breach, the innocent part 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 perforce 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.

The facts of Nigerian Supplies Manufacturing Co. Ltd v. Nigerian Broadcasting Corporation represent a classic case of express anticipatory breach.

CLASSIFICATIONS OF BREACHES OF CONTRACT

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

1. breach of warranty
2. breach of condition
3. breach of innominate or intermediate term

BREACH OF WARRANTY

Breach of a warranty of a contract creates a right to damages for the loss suffered, which was caused by the breach. These "minor" breaches do not entitle the innocent party to terminate the contract. The innocent party cannot sue the party in default for specific performance: only damages. Injunctions (specific performance is a type of injunction) to restrain further breach of a warranty are likely to be refused on the basis that (1) injunctions are a discretionary remedy, and (2) damages are an adequate remedy in the circumstances of the case.

Suppose a homeowner hires a contractor to install new plumbing and insists that the pipes, which will ultimately be hidden behind the walls, must be red. The contractor instead uses blue pipes that function just as well. Although the contractor breached the literal terms of the contract, the homeowner cannot ask a court to order the contractor to replace the blue pipes with red pipes. The homeowner can only recover the amount of his or her actual damages. In this instance, this is the difference in value between red pipe and blue pipe. Since the color of a pipe does not affect its function, the difference in value is zero. Therefore, no damages have been incurred and the homeowner would receive nothing. From the case of *Jacob & Young’s v. Kent* it is clear that if the defect is insignificant the court that there was substantial performance (the work done is good enough and can stand in for what was specified in the contract).

However, had the pipe color been specified in the agreement as a condition, a breach of that condition may well constitute a "major" - i.e. repudiatory - breach. Simply because a term in a contract is stated by the parties to be a condition does not necessarily make it so. Such statements though are one of the factors taken into account to decide whether it is a condition or warranty of the contract. Other than where the color of the pipes went to the root of the contract (suppose the pipes were to be used in a room dedicated to artwork related to plumbing, or dedicated to high fashion), it would more than likely be a warranty, not a condition.

The general rule is that stipulations as to time in a contract are not conditions of the contract (there are exceptions, such as in shipping contracts; it depends in part upon the commercial importance of timely delivery in all the circumstances of the case). As such, missing a date for performance stipulated in a contract is usually a breach of warranty. However, when a contract specifies time is of the essence or otherwise contains an express or implied term that times for performance are critical, stipulations as to time will be conditions of the contract. Accordingly, if a party fails to meet a meet the time stipulations, it will be a breach of a condition of the contract, entitling the innocent party to terminate.

BREACH OF CONDITION

Breach of a condition of a contract is known as a repudiatory breach. Again, a repudiator breach entitles the innocent party at common law to (1) terminate the contract (2) claim damages. No other type of breach except repudiator breach is sufficiently serious to permit the innocent party to terminate the contract for breach.

BREACH OF INNOMINATE TERM

Breach of an innominate term is a repudiatory breach. Breach of an innominate depends entirely upon the nature of the breach and its foreseeable consequences. This is because innominate terms are called the "wait and see" terms of contract- one needs to wait and see the consequences of the breach to ascertain whether the initial act which was a breach was sufficiently serious to amount to a feudatory breach of contract.

For Upjohn LJ in *Hong Kong Fir,* the question of law was:

"Does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only."

The words "does the breach [...] go to the root of the contract" and "deprive the innocent party of substantially the whole benefit of the contract" are the same thing.

ANTICIPATORY BREACH

Anticipatory breach (also referred to as renunciatory breach) is an unequivocal indication that the party will not perform when performance falls due, or a situation in which future non-performance is inevitable. An anticipatory breach gives the innocent party the option to immediately terminate the contract and sue for damages, or wait for the time of performance: if the party required to perform does not perform when required by the contract, the innocent party can terminate then.

For example, A contracts with B on January 1 to sell 500 quintals of wheat and to deliver it on May 1. Subsequently, on April 15, A writes to B and says that he will not deliver the wheat. B may immediately consider the breach to have occurred and file a suit for damages for the scheduled performance, even though A has until May 1 to perform. However, a unique feature of anticipatory breach is that if an aggrieved party chooses not to accept a repudiation occurring before the time set for performance, not only will the contract continue on foot, but also there will be no right to damages unless and until an actual breach occurs.

FUNDAMENTAL BREACH

In Photo Productions Ltd v Securicor Transport Ltd., Lord DIplock defined fundamental breach of a 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 of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract.

The concept of Fundamental Breach as a free standing legal concept no longer has any legal force. It is now simply another term of a contract (when it is used) which needs to be construed like any other term of a contract. A fundamental breach is usually read as a reference to a repudiator breach.

If the contractor in the above example had been instructed to use copper pipes, and instead used iron pipes that would not last as long as the copper pipes would have lasted, the homeowner can recover the cost of actually correcting the breach – taking out the iron pipes and replacing them with copper pipes.

There are exceptions to this. Legal scholars and courts have been known to find that the owner of a house whose pipes are not the specified grade or quality (a typical hypothetical example) cannot recover the cost of replacing the pipes for the following reasons:

**Economic waste:** The law does not favor tearing down or destroying something that is valuable (almost anything with value is "valuable"). In this case, significant destruction of the house would be required to completely replace the pipes, and so the law is hesitant to enforce damages of that nature. In Peevyhouse v. Garland Coal & Mining Co.., the Supreme Court of Oklahoma found that, while the coal company breached its contract with the Peevyhouses, Garland did not have to fix the property nor pay for the work necessary to restore the land, but instead could just pay the Peevyhouses for the difference in land value. The land, while destroyed, had only lost $300 in value. The court found that to pay the Peevyhouses to restore their land would be an economic waste, since the $25,000 in labor would result only in a $300 improvement of the land.

**Pricing in**: In most cases of breach, a party to the contract simply fails to perform one or more terms. In those cases, the breaching party should have already considered the cost to perform those terms and thus "keeps" that cost when they do not perform. That party should not be entitled to keep those savings. However, in the pipe example the contractor never considered the cost of tearing down a house to fix the pipes, and so it is not reasonable to expect them to pay damages of that nature.

Most homeowners would be unable to collect damages that compensate them for replacing the pipes, but rather would be awarded damages that compensate them for the loss of value in the house. For example, say the house is worth $125,000 with copper and $120,000 with iron pipes. The homeowner would be able to collect the $5,000 difference, and nothing more.

REMEDIES FOR BREACH OF CONTRACT

The types of legal remedies available for breach of contract depend largely on the severity of the breach. In courts of limited jurisdiction, the main remedy is an award of damages. Because specific performance and recession are equitable remedies that do not fall within the jurisdiction of the magistrate courts. The main remedies for a breach of contract are:

1. Damages
2. Specific performance
3. Cancellation and restitution

Damages

The payment of damages- payment in one form or another- is the most common remedy for a breach of contract. There are many kinds of damages, including the following:

* Compensatory Damages: are those that compensate the non-breaching party for their losses. This is the most common legal remedy, and a court can order the breaching party to pay the non-breaching party enough money to get what they were promised by the terms of the contract.
* Punitive Damages are given to "punish or make an example of a wrongdoer who has acted willfully, maliciously, or fraudulently. When punitive damages are awarded, which happens only in extreme cases, they are usually awarded along with compensatory damages.
* Nominal damages: are token damages (small amount of damages) awarded when a breach occurred but no actual money loss to the non-breaching party was proven.
* Liquidated Damages: are specific damages that were previously identified by the parties in the contract itself, in the event that the contract is breached. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach.

**Specific Performance**

If damages are inadequate as a legal remedy, the non-breaching party may seek an alternative remedy called specific performance. Specific performance is best described as the breaching party's court-ordered performance of duty under the contract.

Specific performance may be used as a remedy for breach of contract if the subject matter of the agreement is rare or unique, and damages would not suffice to place the non-breaching party in as good a position as they would have been in had the breach not occurred.

**Cancellation and Restitution**

A non-breaching party may cancel the contract and decide to sue for restitution if the non-breaching party has given a benefit to the breaching party.

"Restitution" as a contract remedy means that the non-breaching party is put back in the position it was in prior to the breach, while "cancellation" of the contract voids the contract and relieves all parties of any obligation under the agreement.

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