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Question:

1. 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 perform what is due from the contract or performs defectively or incapacitates himself from performing. (Treitel 2007, para 17-049)

Discus the following:

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

Answer:

A breach of contract is committed when a party when a party without lawful excuse fails or refuses to perform what is due from him under the contract, performs defectively or incapacitates himself from performing.[[1]](#footnote-1) It is important to note that in all cases, the failure to provide the promised performance in a contract must be “without lawful excuse” in order to constitute a breach. Thus, where a contract has been frustrated there is no liability for breach for contract because both parties have been provided with a “lawful excuse” for their non-performance. Similarly, where one party has breached the contract such breach has given to the other party the right to terminate performance of the contract. This party is not in breach of contract in refusing to continue with performance because he is given a “lawful excuse” for his non-performance.

A business contract contains certain obligations that are to be fulfilled by parties the parties who enter into the agreement. Legally, one party’s failure to fulfil any of its contractual obligations is known as a breach of contract. Depending on the specifics, a breach can occur when a party fails to perform on time or does not perform in accordance with the terms of the agreement or does not perform at all. A breach of contract is usually categorized as either a material breach or an immaterial breach. This is for the purpose of determining the appropriate legal solution or remedy for the breach.

Let’s assume that A contracts with B for the purchase of some of its products, for delivery by the following Monday evening. If B delivers the product to A on the following Tuesday morning, its breach of contract would likely be deemed immaterial, and A would likely not be entitled to money damages unless he’s able to show that he was somehow damaged by a late delivery. However, assume now that the contract stated clearly and explicitly that time is of essence and the product must be delivered on Monday evening unfailingly. If B delivers after Monday evening it is a breach of contract which will be deemed to be material. As damages would be presumed; thereby making B liable for the breach even more severe and likely relieve A from the duty to make payment for the product.

When a contract is alleged, one or both of the parties may wish to have the contract enforced on its terms, or may try to recover any financial harm caused by the alleged breach. If a dispute arises and informal attempts at resolution are constantly abortive, the most common step is a lawsuit. However, courts and formal breach of contract lawsuits are not the only option for people and businesses involved in contractual dispute. The parties can agree to have a mediator review the contract dispute or agree to the binding decisions given in an arbitration proceeding of a contract dispute. These out of court options are two (2) methods of Alternative Dispute Resolution (ADR). They are alternatives to business litigation.

REMEDIES FOR A BREACH OF CONTRACT

When an individual or enterprise breaches a contract, the other party to the agreement is entitled to relief or a remedy under the law. An innocent person has several reliefs available to him against the defaulting party. Some of these remedies include:

1. Damages
2. Injunction
3. Specific performance
4. Rescission

**Damages:** in common law, damages are available to a plaintiff as of right. The underlying basis for common law remedy of damages was laid down by Parke, B. in *Robinson v. Harman*.[[2]](#footnote-2) He said: “the rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages as if the contract had been performed”. An innocent / injured party to a contract can claim damages for a breach of contract. The main objective for awarding damages is to put such injured party so far as money can do in a stable position as if the contract had been performed. This position was held in *Univeral Vulcanising (Nig.) Ltd. v Ijesha United Trading and Transport Co. Ltd. and six others*.[[3]](#footnote-3) Such damages could be nominal or substantial as the case may be. Damages are usually awarded to compensate the plaintiff for loss. To be entitled to substantial damage, the plaintiff needs to show that he has suffered a loss from the breach. That is, by reason of the breach of contract, he has suffered harm / injury to his person or property. However, the plaintiff cannot recover damages for any loss which could have been avoided but has failed by act of omission or commission or through unreasonable action or inaction to avoid. Also, damages can be awarded where no loss was incurred and what is involved is the mere infringement of a legal right. In this case, nominal damages are awarded, though in modern times, declaratory judgements are more common.

Damages in contract are compensatory, not punitive, and are normally designed to put the plaintiff into the same financial position that he would have normally been in had the contract been confirmed correctly. However, in exceptional circumstances it is sometimes better to put the plaintiff into the position he would have been in if the contract had never been made.

REMOTENESS OF DAMAGES

A breach of contract may result in far more consequences than could have been anticipated. It is not possible or practicable to award damages to every consequence. And so, the first task of the court is to determine what kind of damage will be paid for. This is the issue of remoteness of damage. Remoteness of damage poses the question: ‘for what kind of damage is the plaintiff entitled to recover compensation?’ The principle of causation of loss and the remoteness of loss [like in tort] are articulated in *Hadley v. Baxendale.*[[4]](#footnote-4) The plaintiffs were millers in Gloucester. The crankshaft of the steam engine which worked their mill came to a halt. The plaintiffs gave the shaft to the defendant, a carrier, to take to the manufacturer in Greenwich as a pattern for a new one. The defendant agreed to deliver the following day, but in fact took one week and the mill was idle unnecessarily. The plaintiffs sued for compensation for loss of the profit during the delay. On the facts, it was held that the plaintiff failed for two reasons. First, in the usual course of things, no one would have expected the mill to have become idle; the defendant was entitled to assume that the mill owner had a spare crankshaft. Second, the defendant had no knowledge of any special circumstances. He wasn’t informed that there was no spare part. The action failed because the loss was too remote. In delivering the judgement, the court formulated a rule. The rule may be summarised in the following terms:

1. An injured party is entitled to such damages as may fairly and reasonably be considered to have arisen naturally from the breach; or
2. The injured party is entitled to such damages as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract.

The test was subsequently reformulated by the Court of Appeal in a latter case giving a clearer illustration of its application. In the case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*,[[5]](#footnote-5) the plaintiffs, who were launders and dyers, wished to extend their business as they had certain very lucrative dyeing contracts lined up. To this end, they contacted with the defendants for delivery of a new and larger boiler, stressing that time of delivery was of essence. The agreed delivery date was June 5, but the boiler as not delivered until November 8. Consequently, the plaintiffs lost not only ordinary business profits from the extension of their business, but also the lucrative dyeing contracts and the profits therefrom. The plaintiff claimed £16 per week as loss of ordinary business profits and £262 per week for loss of the special dyeing contracts. The defendants, knowing what the plaintiffs’ business was, should have known that some business profits would be lost, and were therefore liable for loss of ordinary business profits. However, because the defendant did not actually know of the lucrative dyeing contracts, the plaintiff could not recover the full £262 per week. On the other hand, because some loss of profits from dyeing contract was likely as a part of the plaintiffs’ ordinary business, the plaintiffs could recover some compensation for the loss of the dyeing contracts. The case was remitted to the Official Referee for assessment of compensation. Unfortunately, in his judgement Asquith LJ said: ‘the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.’ This raised a problem, because the words ‘reasonably foreseeable’ are the words applicable for the test of remoteness in the law of torts and by implication suggested that the remoteness in contract and in tort are the same.

This suggestion was rejected by the House of Lords in the *Heron II case*.[[6]](#footnote-6) Lord Reid and Morris made it clear that the contractual test is reasonable contemplation and not reasonable foreseeability, and that Asquith LJ could not have meant reasonable foreseeability in the tortious sense.

MEASURE OF DAMAGES

Having decided which consequences should be paid for, the net question to consider is: ‘how much?’ this is the problem of measure of damages. The question posed here is: ‘on what principle must damage be quantified in monetary terms?’ This is usually a much difficult problem for the courts. However, no matter the difficulty, the courts are not to be deterred from making an award of damages. The problem of remoteness and measure of damages are easily determined if the damages are liquidated. 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 may result from a breach. Where damages are not liquidated, they are said to be un-liquidated. Un-liquidated damages are damages which have not previously been assessed or provided for in the contract.

**Injunction**: this is an equitable remedy. It is an order from the court telling a person to stop committing a wrong. It is for restraining a person from committing a breach of contract. In *Akenzua II v. Benin Divisional Councils*,[[7]](#footnote-7) the plaintiff had sought damages, injunction or specific performance from the defendant council for withdrawing the concession given him to exploit timber. It was held that since he offered no consideration, the remedies brought could not be granted. Injunctions may be prohibitive or mandatory. It is prohibitive where it is sought to stop the doing or repetition of some acts. Injunction becomes mandatory where it compels the performance of an act.

1. Prohibitive injunctions: such an injunction will be granted to enforce a negative stipulation in contract. This means that the defendant will be ordered not to break the stipulation. Prohibitive injunctions may be particularly important where a breach of a contract of employment is involved. However, the effect of granting the injunction must not be to compel a party to perform the contract as this would be tantamount to granting a decree of specific performance of a contract for personal service.
2. Mandatory injunctions: a mandatory injunction orders the defendant to take positive steps to put right what he has done wrong in breach of contract. Such an order is a drastic measure and will be awarded only where vitally necessary. Whether it should be granted or not is subject to a ‘balance of convenience’ test and it may be refused if the prejudice suffered by the defendant in having to restore the original position heavily outweighs the advantage to be derived by the plaintiff from such restoration. A mandatory injunction was granted in *Wakeham v Wood*[[8]](#footnote-8) where the defendant, in breach of a restrictive covenant, erected a building so as to block the plaintiff’s sea view. The court granted a mandatory injunction because the defendant had committed the breach deliberately with full knowledge of the plaintiff’s rights and damages would not have been an adequate remedy.

**Specific performance**: this is also an equitable remedy. It is an order issued by the court, ordering a defendant to perform the promise he had made under the contract. The granting of the request of specific performance by the court is discretionary and is not available in the case of contract of personal service. The court will grant an order of specific performance where an order of monetary compensation will not be a remedy to an injured party. In the case of *Fakoya v St. Paul’s Church*,[[9]](#footnote-9) the appellant sold land to the respondent. He took the price but refused to execute the conveyance. The respondent sued for specific performance and it was granted.

There are numerous restrictions on the availability of specific performance. A request for specific performance will not be granted where an award for damages is an adequate remedy. So it is not normally available for breach of a contract of sales of goods, because the buyer can normally obtain similar goods elsewhere and claim damages if he has to pay more than the contract price. However, it may be granted if the goods are unique or in exceptional circumstances. A case on the latter issue arose in Shy Petroleum Ltd v VIP Petroleum Ltd,[[10]](#footnote-10) where the defendants refused to maintain such supplies during the period of the oil crisis. The plaintiffs sought an interlocutory injunction to prevent the defendants from withholding supplies, which would effectively have amounted to temporary specific performance. The court granted the order, since the plaintiffs had no alternative sources of supply due to petrol shortages caused by the oil crisis. Another restriction is the requirement of mutuality. A party will be entitled to specific performance only if the specific performance will be available to the other party. It follows that since specific performance is never awarded against a minor, it will never be granted against in favour of a minor. Also, specific performance will not be granted of a contract for personal services. A typical example is a contract of employment. The Trade Union and Labour Relations Act (1974) prohibits an order of specific performance against an employee compelling him to work.[[11]](#footnote-11) In addition, specific performance will be granted only where it is equitable to do so: “he who comes to equity must come with clean hands.” If the plaintiff has acted unfairly in the performance of the contract, specific performance will not be awarded. Finally, undue delay in commencing proceedings will defeat a claim for an equitable remedy.

**Rescission**: this is also an equitable remedy available to an injured party for a breach of condition or where there is a mistake or misrepresentation. Rescission terminates the contract. It amounts to setting aside of a contract by one party if the contract has been induced by misrepresentation. In *London Assurance v Mansel*,[[12]](#footnote-12) where a man did not disclose the material facts on his life on a proposal form by concealing that he had been refused insurance by other companies, it was held that the company could rescind the contract. The right to rescind is also available as a remedy for breach of contract, where the injured party can treat the contract as discharged.

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* https://smallbusiness.find law,com/business-contracts-forms/breach-of-contract-and-lawsuits.html

1. Treitel 2007, paragraph 17-49 [↑](#footnote-ref-1)
2. (1848) 1 Ex. 850 at p. 855; [1843-60] All E.R. 383 at p. 385 [↑](#footnote-ref-2)
3. (1992) 9 NWLR (pt 266 at 388) [↑](#footnote-ref-3)
4. (1854) 9 Ex. 341; [1843-60] All E.R. 461 at p. 465 [↑](#footnote-ref-4)
5. (1949) 1 All E.R. 997 [↑](#footnote-ref-5)
6. Known fully as: kosifos v. C. Czarnikow Ltd (1969) 1 AC 350 [↑](#footnote-ref-6)
7. (1959) W.R.N.L.R. 1 [↑](#footnote-ref-7)
8. (1982) 43 P & CR 40 [↑](#footnote-ref-8)
9. (1966) 1 All N.L.R. 68. [↑](#footnote-ref-9)
10. (1974) 1 WLR 576 [↑](#footnote-ref-10)
11. Sec. 16 of the Trade Union and Labour Relations Act (1974) [↑](#footnote-ref-11)
12. (1879) 11 Ch.D. 363 [↑](#footnote-ref-12)