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ABSTRACT

The writer here intends to shed more light on the question pertaining to breach of contract, its meaning, types and sub types, the remedies available for breach and the situations in which these remedies may be used.

QUESTION 1

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 fulfill its obligation, whether partially or wholly, as described in the contract, or communicates 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. A breach which is serious enough to give the innocent party the option of treating the contract as discharge can occur in 2 ways

- a. Either one party may show by express words or by implications from his conduct at some time before performance is due that he does not intend to observe his obligations under the contract (Anticipatory Breach)
- b. He may in fact breach a condition or otherwise breach the contract in such a way that it amounts to substantial failure of consideration (actual fundamental Breach)

Anticipatory Breach: Where a party before the date fixed for performance manifests or shows an intention not to perform the contract, the breach is called anticipatory breach. A preliminary issue in the case of anticipatory breach is to ascertain whether once repudiation (also known as anticipatory breach but in its literal meaning refers to rejection) has been communicated to the innocent party, the party accepts the repudiation or not. Although, the innocent party is under any obligation to wait for the date fixed for execution of performance before commencing his action he may decide to treat the contract as ended and sue for damages due to the other party's

actions. Where the innocent party accepts the breach, he may there and then commence proceedings for breach of contract (as seen in the case of **Nigeria Advertising and Publicity Ltd v Nigeria Airways**).¹ On the other hand, in the case of **Panchaud Freres S.A. v Establishment General Grain Co**². It was held that a victim of anticipatory breach need not sue at once instead continuing although as this may have adverse effects upon him as the guilty party, may take advantage of the situation and claiming that he was justified to forego his own obligations.

Anticipatory breach may be considered in 2 forms

- a. Express repudiation: this is simply where one party expressly informs the other party of his unwillingness to perform his obligation under the contract. This could be done in writing as in the case of **Hochester v De la Tour**³ where the defendants actually wrote to the plaintiff stating he would no longer going to perform his part of a contract they had engaged in for a courier service or in words (in person).
- b. Implied Repudiation: this happens where reasonable interference that the other party to the contract no longer intends to perform his own part of the contract. This may arise, from the conduct and actions of the defaulting party which the other party can imply that from which the other party can imply that performance of the contract is impossible. In **Omnium D' Enterprises and Ors v Sutherland**⁴, the defendants who sold the ship

¹ Unreported high Court of Lagos State suit No. 1k/88/71

² (1970) 1 Lloyd's Rep 53

³ (1853) 2 E & B 678

⁴ (1919) 1 KB 618

which as to be used for hire purchase but instead sold it. The court held that the sale by the defendant, amounted to repudiation of the contract and the plaintiff awarded damages.

Actual fundamental Breach: where a party actually fails to perform one or all of his obligations on the date fixed for performance, the breach is called actual breach. For an actual breach of a term of a contract to have the legal consequence of discharging the contract, it should amount to a fundamental breach. The breach should also be cardinal to affect the root of the contract and have deprived the innocent party from achieving the aim of the contract. A breach of fundamental term or condition which will invariably occasion a fundamental breach does not automatically bring the contract to an end as lot will depend on the position of the innocent party. When the innocent party treats the contract as still in force, the *status quo* is maintained and the contract remains in being for the future on both sides. The parties thus remain subject all their rights and obligations. The innocent party will, however, be entitled to claim damages for the breach as in the case of

Modern Publications Ltd v Academy Press Ltd⁵ where the court upheld the action of the plaintiff continuing with the contract after the defendant had fundamentally breach the contract between them as such the plaintiff could not achieve the purpose of the contract but not sued for damages as he had waived his right to do so by accepting the breach to the contract.

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A legal remedy, also referred to as judicial relief or a judicial remedy, is the means with which a court of law, usually in the exercise of civil law jurisdiction, enforces a right, imposes

⁵ (1997) 8 NWLR (Pt. 516) 187 at 201

a penalty, or makes another court order to impose its will in order to compensate for the harm of a wrongful act inflicted upon an individual. In the case of **Robinet Nigeria Limited v Shell Nigeria Gas limited**⁶ where the court stated that it only comes in to interpret the agreement of the individuals or parties involved in a contract, enforce the rights, duties and obligations of the contract and intervene with remedies as the breach may require if any to cushion the effect of hardship cause by the other party on the innocent.

When a contract is breached, the injured party has several remedies available to him against the defaulting party. Some of these several remedies available to him against are damages, injunction, specific performance, rescission, amongst others.

Damages: Damages are a remedy in the form of a monetary award to be paid to a claimant as compensation for loss or injury. To warrant an award of damages by the court, the claimant must show that a breach of duty has caused foreseeable loss. The main purpose of awarding damages for breach of contract is to put the innocent party as far as monetary terms can handle in a position as if the contract had been properly executed. Damages are seen as pecuniary compensation obtainable by a successful party in an action for a wrong which is either of tort or a breach of a contract in the case of **Beta Glass PLC v Epaco Holdings Ltd.**⁷ The award of damages is at the discretion of a judge. Such discretion must only be exercised judicially but judiciously. The Justice Fabiyi, in the case of **G.K.F.I (Nig)Ltd v NITEL Plc.**⁸, when awarding damages, warned against parties seeking damages to great which may be considered gold digging and goes on to say prospective gold diggers should have no place in courts of law as well as that of equity.

⁶ (2013) LPELR-22144(CA)

⁷ (2011) 4 NWLR (Pt. 1237) 223

⁸ (2009) 13 NWLR (Pt. 1164) 305

For damages, to be awarded, the loss must be real, not speculative or imagines. The loss must flow naturally from the contract as a normal damage that occurs in the usual course of things or in special or exceptional circumstances. The plaintiff, to the knowledge or contemplation of the defendants establishes liability against the latter.

In the 19th Century case of **Hadley v Baxendale**⁹ there were 2 main criteria for the award of damages established namely:

- a. Damages are awarded according to the normal damage that occurs in the usual course of things.
- b. Damages awarded for abnormal damage that arises because of special or exceptional circumstances.

Usually in the court before any award for damages is given, it must first satisfy itself that there was indeed a contract. This was established in the case of **Metibaive v Narelli International Ltd**¹⁰ where the court in its view deemed it fit that there is a primary duty to first ascertain the existence of a valid and subsisting contract enforceable by law. After this, the proceed to look at issue of damages and doing so they will first consider what kind of damages would be paid for and quantify what is to be paid for. This is known as the remoteness of damages.

Damages are of various types and include

- a. General and Special Damages: In the case of **G.K.F.I (Nig) Ltd v NITEL Plc**¹¹ a clear distinction between the 2 was made and goes thus. General Damages are such as the law will presume to be direct natural or probable consequence of the act complained of.

⁹ (1854) 9 Ex 341; (1843- 60) All ER 461

¹⁰ (2009) 16 NWLR (Pt. 1167) 300

¹¹ (2009) 13 NWLR (Pt. 1164) 305

Special damages are not such as the law will deduce in the ordinary course. They are exceptional in character and therefore, must be claimed specially and strictly. The court also did provide for the specifications to follow for the proof of special damages.

- b. Exemplary Damages: These are damages on an increased scale over and above special or actual or ordinary damages, awarded in aggravated circumstances. They are punitive that is they are intended to be given as punishment as half and compensatory in the other half i.e. breach of contract for a promise to marry (Uso v Iketubosin¹²), loss of reputation.
- c. Nominal Damages: this awarded, when the defendants breach has caused no loss to the plaintiff or where he has suffered a loss he is unable to prove any loss flowing from the breach of contract. This means, that the very act of breaching the contract entitles the other party to at least, something even if no loss is occasioned or proved. (Obere vs. Board of Management of Eko Hospital)¹³

An order for specific performance: Specific performance is one by which the court directs the defendant to perform the contract according to its terms. It is usually ordered and requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate i.e. Sale of Land or Sale of a rare article. It is usually ordered directly against the defendant and he must perform the action or else face the consequences at hand. It is a remedy granted at the discretion of the courts and not as of right of the party seeking it.

For specific performance to be considered by the court, the party applying for the specific performance must first prove that a contract does exist i.e. in the case of Ezenwa v Oko& 2

¹² (1957) WRNLR 187

¹³ 1 LRN (1978) p. 246 at 250

Ors¹⁴ where the court said it could not enforce specific performance on the case as it had not been renewed.

An action for specific performance of an agreement cannot succeed if there is a failure on the part of the party applying for the specific performance to discharge his obligations under the said agreement. The court too in exercising their discretion judicially and judiciously as well. The judge has to be discreet and balance the interest of both sides properly in his bid to do justice to the contending parties.

Injunction: Injunction comes from the Latin word *injungere* which means to join, attach or impose. It is an order of a court ordering a person to do some positive act to end a wrongful state of things. The courts can by decree of injunction direct to refrain from a particular conduct or action that might constitute a breach of contract. Injunction is a writ framed or given according to the circumstances of the case, imposing an act which the court regards as critical to justice or restraining an act which it esteems contrary to equity and good conscience. Justice Karibi-Whyte in the case of **Anne Kadiya & ors v Jibo Kadiya & ors**¹⁵ defined injunction as an action generally granted by the courts to protect a legal right which is in existence with the object of keeping matters as they are (*status quo*) until the question at issue between the parties is determined.

An injunction is also another way by which a court can order obedience of specific performance. In the case of **Warner Bros. Picture Inc. V Nelson**¹⁶, where the defendant, was an actress and had breached her contract with the plaintiff not to act for any other person while her contract

¹⁴ (2008) 1-2 SC 1

¹⁵ (2001) 2 NWLR (pt. 690) 184 at 195

¹⁶ (1937) 1 KB 209

still existed. The plaintiff then sought to stop her and applied to the court where it granted an injunction stopping her from breaching the contract with the employers.

It is awarded in circumstances where damages would not be an adequate remedy to compensate the claimant because the claimant needs to restrain the defendant from starting or continuing a breach of a negative contractual undertaking (prohibitory injunction) or needs to compel performance of a positive contractual obligation (mandatory injunction).

In exercising its discretion the court will consider the same factors as above for specific performance and will use the balance of convenience test (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 (**Lumley v Wagner**¹⁷)

In urgent cases a plaintiff may be able to obtain an interim injunction to restrain an act. Other types of injunction may include

- a. Ex parte Injunction: is an order of injunction in which is made to the court in Litigation without the other being put in notice. (**7 Up Bottling Co Ltd v Abiola & Sons (Nig) Ltd**¹⁸)

Others include: Mareva Injunction, Interlocutory injunction amongst others.

Quasi Contracts: Quasi-contract creates obligations at common law, distinct from obligations under a contract. It is an area of law in its own right. Quasi-contractual remedies are sometimes available either as an alternative to a remedy for breach of contract or where there is no remedy for breach of contract. For example, a claim for quantum meruit (a reasonable remuneration for work done of goods supplied under a contract which is later discovered to be void).

¹⁷ (1852) 1 DM & G604

¹⁸ (1989) 3 NWLR (pt 83) p. 257

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