MANGTU PUNMUPUN PRAISE

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LAW OF CONTRACT II

LPB 202

1. BREACH OF CONTRACT.

A 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 honoured by one or more of the parties to the contract either by non-performance or interference with the other parties performance.[[1]](#footnote-1)

A contract is said to be breached when either:

1. One party performs defectively, differently from the agreement, or not at all. See the case of *Pilbrow v. Pearless De Rougemont*.[[2]](#footnote-2): The appellant had telephoned a firm of solicitors and asked to make an appointment with a solicitor. The appointment was arranged with an employee who was not a qualified solicitor. He was not informed that the employee was not a solicitor. The appellant was dissatisfied with the quality of the legal services he had received and refused to pay the outstanding fees. The firm sued for their fees. The Court of Appeal accepted that as a matter of fact the standard of legal services provided had been that of a competent solicitor. But it ruled that there had been a legal contract not just to provide legal services but to provide legal services by a solicitor. The firm did not perform that contract at all. No legal service were provided by any solicitor; they therefore had no right to any payment. To avoid this problem in future, professionals should always make it clear whether to the client whether their services are being provided by a qualified professional or not.

See also the case of *Modahl v. British Athletic Federation Limited*.[[3]](#footnote-3): The claimant was a well- known British international athlete who was suspended from the competition by the British Athletic Federation (BAF) because of an allegation that she had taken prohibited drugs to improve her performance. She successfully appealed against the doping allegations and brought action for a breach of contract and damages against BAF. She alleged that her suspension and an initiation of disciplinary proceedings were in breach of her contract with the defendant. She claimed damages for financial loss suffered because she was unable to compete in international athletics for nearly a year. BAF was a member of the International Amateur Athletic Federation (IAAF). The IAAF had adopted its system of instant suspension followed by disciplinary proceedings in the belief that, although it might sometimes cause injustice in an individual case, it was necessary in the wider interest of the sport. The contract between Modahl and BAF was therefore interpreted as allowing the same procedures and no damages were awarded.

1. Indicates in advance that they will not be performing as agreed (anticipatory breach) – where an anticipatory breach occurs, the other parties can sue for breach straight away and this can be seen in *Frost v Knight*.[[4]](#footnote-4): The defendant had promised to marry the plaintiff once his father had died. He later broke off the engagement while his father was still alive, and when his ex-fiancee sued him for breach of promise (which was a valid claim in those days, though no any longer), he argued that she had no claim as the time for performance had not yet arrived. This argument was rejected and plaintiffs claim succeeded.

See also the case of *Hochester v. De la Tour*.[[5]](#footnote-5).: The parties made a contract in April under which the plaintiff would be a tour leader in Europe for the defendant beginning on 1June. In May the defendant informed the plaintiff that his services were no longer required. The plaintiff started his action for breach of contract on 22 May. The defendant argued that he should be required to wait until the date of performance is due, which was 1 June, as there was no breach of contract until that date. The court rejected this argument. The plaintiff could commence proceedings immediately for damages, even though the date of performance had not yet arrived.

In some cases, an extraneous event which is not sufficiently serious to frustrate a contract would nevertheless provide an excuse for non-performance.

Any breach of contract will entitle the innocent party to sue for damages, but not every breach allows the wronged party to choose to discharge the contract (in contrast with frustration, where the discharge is automatic). If the contract is not discharged, it will still need to be performed. There are three main circumstances in which the innocent party may choose to discharge:

1. Threat of repudiation: this is where one party makes it clear that they no longer intend to be bound by the contract, either during its performance is due (in practice it is usually the latter, and therefore an anticipatory breach).
2. Breach of condition as opposed to warranty
3. Serious breach of an innominate term.

REMEDIES FOR BREACH OF CONTRACT

When an individual or business breaches a contract, the other party to the agreement is entitled to relief (or “a remedy”) under the law. The main remedies for a breach of contract are:

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

1. DAMAGES.

An award of damages is the usual remedy for a breach of contract. It is an award of money that aims to compensate the innocent party for the financial losses they have suffered as a result of the breach. The general rule is that innocent parties are entitled to such damages as will put them in the position they would have been in if the contract had been performed. When a contract is breached, a party may suffer

1. Pecuniary loss- damages aim to compensate the innocent party for their financial losses that result from not receiving the performance bargained for.
2. Non-pecuniary loss – generally mot recoverable in contract and as *Addis v*. *Gramophone Co Ltd*.[[6]](#footnote-6): The plaintiff had been employed as a manager of a company in India. He was wrongfully sacked for alleged dishonesty. He brought an action claiming that the manner of his dismissal had been harsh and humiliating. He had been ostracised by the British community in Calcutta. As a result he had suffered mental pain and anguish. The House of Lords held that he could recover the usual damages for loss of salary and commission, but not for the injury to his feelings caused by the way in which he was sacked. This case shows, more so for mental distress, but recent cases have developed the principle that in limited situations that such distress and loss of amenity will be compensated
3. Where the contracts whole purpose was the provision of pleasure, relaxation and peace of mind. See the case of *Jarvis v. Swans Tours Ltd*.[[7]](#footnote-7)
4. Where a major object of the contract was to provide pleasure, relaxation and peace of mind. See the case *of Farley v. skinner*.[[8]](#footnote-8)
5. If the mental suffering is related to physical inconvenience and discomfort caused by the breach of the contract. See the case of *Perry v. Sidney Phillips and son*.[[9]](#footnote-9)

The underlying basis for the common law remedy of damages was laid down by Parke, B, in *Robinson v. Harman*.[[10]](#footnote-10) As follows:

The rule of common law is that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages,

There are many kinds of damages including the following :

1. General and special damage: 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”.
2. 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 liquidated damages clause or a penalty clause. It is a liquidated damages cause if its 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 court will uphold and enforce any such provisions.
3. 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.

Although norminal damages will only norminally be awarded when the defendants breach has caused no loss to the plaintiff, or although he has suffered a loss he fails to flowing from the breach, the court also grants the plaintiff norminal damages, usually tagged general damages.

1. Exemplary damages: exemplary damages 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 the law of tort, although even in this area of the law it was severely restricted by the House of Lords in *Rooks v. Banard*.[[11]](#footnote-11) The court of appeal explained what constitutes exemplary damages and when they should be awarded.

Exemplary damages would only be awarded in the following cases.

1. Oppressive, arbitrary or unconstitutional actions by the servants of government.
2. Where the defendants conduct was calculated to make profit for himself
3. Where the statute expressly authorises the same.
4. SPECIFIC PERFORMANCE:

Specific performance is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract.

Specific performance is an equitable remedy which the court in its sound discretion , may grant a promisee whose money damages remedy is inadequate. The situation in which courts are prepared to order specific performance are heterogeneous. Typical situations include contracts for the sale of land, but otherwise is not generally available if damages are an appropriate alternative. Specific performance is almost never available for contracts of personal service, although performance may be ensured through the threat of proceedings through the threat of proceedings for contempt of court.

However, in some cases, for instance in a contract to convey land or to sell an antique or famous painting, the remedy of damages provided inadequate. In such situations, the courts of equity decreed specific performance. As *Kay, L.J declared in Ryan v. Mutual Tontine Association:[[12]](#footnote-12)*

This remedy by specific performance was invented, and has been cautiously applied, in order to meet cases where the ordinary remedy by action in damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confirmed within well known rules.

At common law, a claimants right were limited to an award of damages. Later, the court of equity developed the remedy of specific performance instead, should damages inadequate. Specific performance is often guaranteed through the remedy of a right to take possession of the property in dispute.

As with all equitable remedies, orders of specific performance are discretionary, so their availability depends on its appropriateness in the circumstances.

An order of specific performance is generally not granted if any of the following is true:

1. Specific performance would cause severe hardship to the defendant.
2. The contract was unconscionable
3. Common law damages are readily available or the detriment suffered by the claimant is easy to substitute, then damages are adequate.
4. Specific performance is impossible
5. Performance consist of a personal service
6. The contract is too vague to be enforced
7. The contract was terminable at will. Note however that consumer protection laws may disallow terms that allow a company to terminate a consumer contract at will (e.g. Unfair Terms in Consumer Contracts Regulations 1999).
8. The contract required constant supervision
9. The contract was made for no consideration
10. Mutuality was lacking in the initial agreement of the contract.
11. Where an injunction to restrain an employee from working for a rival employer will be granted even though specific performance cannot be obtained.

There is an ongoing legal debate in the legal literature regarding the desirability of specific performance. Economist, generally, take the view that specific performance should be reserved to exceptional settings, because it is costly to administer and may deter promisors from engaging in efficient breach. Professor Steven Shavell, for example, famously argued that specific performance should only be reserved for contracts to convey property and that in all other cases, money, damages would be superior. In contrast, many lawyers from other philosophical traditions take the view that specific performance should be preferred as it is closest to what was promised in the contract. There is also uncertainty arising fro empirical research whether specific performance provides greater value to promises than money damages, given the difficulties of enforcement.

1. EXTINCTION OF REMEDIES

A right of action for breach of contract and tort may be extinguished by the effluxion of time in accordance with the provisions of the English Statute Limitation 1623 (Northern and Eastern States of Nigeria)or the Limitation Decree (Act) No.88 of 1966 (Lagos) superseded by the Limitation Law, Cap.118. 1994 Law of Lagos State, or the Western Nigerian Limitations Law 1959, applicable to the former Western Region.

By these laws, a right of action in contract is extinguished six years from the date on which the cause of action accrued. A case of action becomes statute barred if in respect of it proceedings cannot be brought because the period laid down by the limitation law or acts has elapsed Oputa, J.S.C, put the matter in *Egbe v. Adefarasin*:[[13]](#footnote-13)

How does one determine the period of limitation? The answer is simple – by looking at the Writ of summons and statement of claim alleging when the wrong was committed which gave the plaintiff a cause of action and by comparing that date with the date on which the Writ of summons was filed if the in which the Writ is filed is beyond the period allowed by the limitations of law, then the action is statute barred.

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2. [1992] 2FLR 139 [↑](#footnote-ref-2)
3. [1999] UKHL 37 [↑](#footnote-ref-3)
4. [1872], LR 7 Ex. 111 [↑](#footnote-ref-4)
5. [1853] 2 E & B 678 [↑](#footnote-ref-5)
6. [1909] AC 488 [↑](#footnote-ref-6)
7. [1972] ECWA 8 [↑](#footnote-ref-7)
8. [2001] UKHL 49 [↑](#footnote-ref-8)
9. [1982] 1WLR 1297 [↑](#footnote-ref-9)
10. [1848] 1 Ex. 850 at p. 855 [↑](#footnote-ref-10)
11. [1964]AC 1129 [↑](#footnote-ref-11)
12. [1893] 1 Ch. 116 at p. 126 [↑](#footnote-ref-12)
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