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Assignment Title: Breach of Contract

Course Title: Law of Contract II

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QUESTION:

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 performs defectively or incapacitates himself from performing. (Treitel 2007, para 17-049)

 Discuss the following:

1. Breach of contract
2. What are the remedies available for breach of contract?
3. [[1]](#footnote-1)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 contract being legally binding is so each party will have legal 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 fulfill their agreed upon obligations, according to the terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement, or fails perform at all. [[2]](#footnote-2)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(s), whether partially or wholly, as described in the contract, or communicates an 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.

 The case of *Taylor v Caldwell [1863]* provides some insight in what a breach exactly is. Regarding the case, Caldwell & Bishop owned Surrey Gardens & Music Hall, and agreed to rent it out to Taylor & Lewis for £100 a day. Taylor had planned to use the music hall for four concerts and day and evening fetes on Monday 17 June, Monday 15 July, Monday 5 August, and Monday 19 August 1861. They were going to provide a variety of extravagant entertainments including a singing performance by Sims Reeves, a thirty-five to forty-piece military and quadrille band, al fresco entertainments, minstrels, fireworks and full illuminations, a ballet or divertissement, a wizard and Grecian statues, tight rope performances, rifle galleries, air gun shooting, Chinese and Parisian games, boats on the lake, and aquatic sports. According to the contract the parties had signed, the defendants were to provide most of the British performers. Taylor & Lewis agreed to pay one hundred pounds sterling in the evening of the day of each concert by a crossed cheque, and also to find and provide, at their own cost, all the necessary artistes for the concerts, including Mr. Sims Reeves. Then, on 11 June 1861, a week before the first concert was to be given, the music hall burned to the ground. The plaintiffs sued the music hall owners for breach of contract for failing to rent out the music hall to them. There was no clause within the contract itself which allocated the risk to the underlying facilities, except for the phrase "God's will permitting" at the end of the contract. Judge Blackburn began his opinion by stating that the agreement between the parties was a contract, despite their use of the term "lease". Under the common law of property in England at the time, under a lease the lessee would obtain legal possession of the premises during the lease period, while the contract at issue in this case specified that legal possession would remain with the defendants.

 Blackburn J reasoned that the rule of absolute liability only applied to positive, definite contracts, not to those in which there was an express or implied condition underlying the contract. Blackburn J further reasoned that the continued existence of the Music Hall in Surrey Gardens was an implied condition essential for the fulfillment of the contract. The destruction of the music hall was the fault of neither party, and rendered the performance of the contract by either party impossible. Blackburn J cited the civil code of France and the Roman law for the proposition that when the existence of a particular thing is essential to a contract, and the thing is destroyed by no fault of the party selling it, the parties are freed from obligation to deliver the thing. He further analogized to a situation in which a contract requiring personal performance is made, and the party to perform dies, the party's executors are not held liable under English common law. Blackburn J thus held that both parties were excused from their obligations under their contract**. Until this case, parties in a contract were held to be absolutely bound and a failure to perform was not excused by radically changed circumstances. Instead, the contract was breached and gave rise to a claim for damages. This ruling, though quite narrow, opened the door for the modern doctrine of contract avoidance by impracticability.**

There are four main types of contract breaches:

1. **Material Breach**: A material breach of contract is a that in which it is so substantial, it seriously impairs the contract as a whole; additionally, the purpose of the agreement must be rendered completely defeated by the breach. This is sometimes referred to as a total breach. It allows for the performing party to disregard their contractual obligations, and to go to court in order to collect damages from the breaching party.
2. **Anticipatory Breach**: An anticipatory breach occurs when one party lets the other party know, either verbally or in writing, that they will not be able to fulfill the terms of the contract. The other party is then able to immediately claim a breach of contract and pursue a remedy, such as payment. Anticipatory breach may also be referred to as **anticipatory repudiation.**

The true meaning and effect of an anticipatory breach were stated by Lord Esher in *Johnstone v Milling* as 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. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue.”

1. **Minor Breach**: A minor breach of contract occurs when a party fails to perform a part of the contract, but does not violate the contract in its entirety. To be considered a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining contractual obligations. A minor breach is sometimes referred to as an **impartial breach**.
2. **Fundamental Breach:** A fundamental breach of contract is essentially the same as a material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. The difference is that a fundamental breach is considered to be much more egregious than a material breach.
3. As stated by Coker J in *Solomon Nassar v Oladipo Moses*, “it is open to a party to a contract to sue the other parties for breach of same even in anticipation of the time agreed upon for performance, if it is manifest by his conduct and his acts that the defaulting party had made himself unable to fulfil his part of the contract at the agreed time.

[[3]](#footnote-3)There are several remedies for breach of contract, such as award of, specific performance, rescission, restitution and damages. In courts of limited jurisdiction, the main remedy is an award of damages. Because specific performance and rescission are equitable remedies that do not fall within the jurisdiction of the magistrate courts, they are not covered in this tutorial.

1. **[[4]](#footnote-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. It is typically available in the sale of land law, 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 also be ensured through the threat of proceedings for contempt of court.
2. **Rescission:** In contract law, rescission is an equitable remedy which allows a contractual party to cancel the contract. Parties may rescind if they are the victims of a vitiating factor, such as misrepresentation, mistake, duress, or undue influence. Rescission is the unwinding of a transaction. This is done to bring the parties, as far as possible, back to the position in which they were before they entered into a contract (the status quo ante).
3. **Restitution**: The law of restitution is the law of gains-based recovery. It is to be contrasted with the law of compensation, which is the law of loss-based recovery. When a court orders restitution it orders the defendant to give up his/her gains to the claimant. When a court orders compensation it orders the defendant to pay the claimant for his or her loss.

[[5]](#footnote-5)At common law, 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 the award, the claimant must show that a breach of duty has caused foreseeable loss. To be recognized at law, the loss must involve damage to property, or mental or physical injury; pure economic loss is rarely recognized for the award of damages.

 In the case of *Umudge v Shell BP (1975),* it was said that “damages, after all, have been defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or a tort …”

There are two general categories of damages that may be awarded if a breach of contract claim is proved. They are:

1. **Compensatory Damages:** Compensatory damages (also called “actual damages”) cover the loss the non-breaching party incurred as a result of the breach of contract. The amount awarded is intended to make good or replace the loss caused by the breach.
There are two kinds of compensatory damages that the non-breaching party may be entitled to recover:
A. **General Damages**: General damages cover the loss directly and necessarily incurred by the breach of contract. General damages are the most common type of damages awarded for breaches of contract.
B. **Special Damages**: Special damages (also called “consequential damages”) cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. These are actual losses caused by the breach, but not in a direct and immediate way. To obtain damages for this type of loss, the non-breaching party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was made.
2. **Punitive Damages**: Punitive damages (also called “exemplary damages”) are awarded to punish or make an example of a wrongdoer who has acted willfully, maliciously or fraudulently. Unlike compensatory damages that are intended to cover actual loss, punitive damages are intended to punish the wrongdoer for egregious behavior and to deter others from acting in a similar manner. Punitive damages are awarded in addition to compensatory damages.
Punitive damages are rarely awarded for breach of contract. They arise more often in tort cases, to punish deliberate or reckless misconduct that results in personal harm.

The calculation of compensatory damages depends on the type of contract that was breached and the type of loss that was incurred. Some general guidelines are:

Standard Measure. The standard measure of damages is an amount that would allow the non-breaching party to buy a substitute for the benefit that would have been received if the contract had been performed. In cases where the cost of the substitute is speculative, the non-breaching party may recover damages in the amount of the cost incurred in performing that party’s obligations under the contract.
Contracts for the Sale of Goods. The damages are measured by the difference between the contract price and the market price when the seller provides the goods, or when the buyer learns of the breach.

The other types of damages include: incidental, consequential, nominal, and liquidated.

1. **Incidental Damages**: In addition to compensatory damages, the non-breaching party may recover incidental damages. Incidental loss includes expenditures that the non-breaching party incurs in attempting to minimize the loss that flows from the breach. To arrange for substitute goods or services, the non-breaching party might have to pay a premium or special fees to locate another supplier or source of work.
2. **Consequential Damages**: A consequential loss is addressed with consequential damages. These are damages incurred by the non-breaching party without action on his part because of the breach.
3. **Nominal Damages**: In the situation where there has been a breach but the non-breaching party has really suffered no loss or cannot prove what his loss is, he is entitled to nominal damages.
4. **Liquidated Damages**: Precisely because damages are sometimes difficult to assess, the parties themselves may specify how much should be paid in the event of a breach. Courts will enforce a liquidated damages provision as long as the actual amount of damages is difficult to and the sum is reasonable in light of the expected or actual harm. If the liquidated sum is unreasonably large, the excess is termed a penalty and is said to be against public policy and unenforceable. Example in the case of *N.U.B. ltd V Samba Per. Co. ltd. (2006).*

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