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QUESTION

A breach of contract is committed when a party without lawful exercise fails or refuses to perform what is due of him under the contract or performs defectively or incapacitates himself from performing.

Discuss the following:

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

[[1]](#footnote-1)When any party to a contract, whether oral or written, fails to perform any of the contract’s terms, they may be found in breach of contract. While there are many ways to breach a contract, common failures include failure to deliver goods or services, failure to fully complete the job, failure to pay on time, or providing inferior goods and services. In other words, a breach of contract is when one party performs defectively, different from the agreement, or not at all (actual breach), or indicates in advance that they will not be performing as agreed (anticipatory breach). Breach may also give the injured party the right to “terminate” the contract.

There are four main types of contract breaches:

1. **Minor Breach:** a minor breach occurs when a party fails to perform a part of the contract but does not violate the whole contract. To be considered a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining obligations. A minor breach is sometimes referred to as impartial breach.
2. **Fundamental Breach:** a fundamental breach 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.
3. **Material Breach:** a material breach of contract is a breach that is so substantial, it seriously impairs the contract as a whole, additionally, the 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.
4. **Anticipatory Breach**

An anticipatory breach occurs when, before performance is due, a party either renounces the contract or disables himself from performing it. **Renunciation** requires a clear and absolute refusal to perform; this need not be expressed but can take the form of conduct indicating that the party is unwilling even though he is unable to perform. A renunciation may even be inferred from silence where it is a “speaking silence”, e.g. the previous conduct of a party in refusing to perform another related contract may give rise to the inference that he will refuse to perform the contract in question. The true meaning and effect of an anticipatory breach were stated by Lord Esher, M.R., in ***Johnston v Milling[[2]](#footnote-2)*** 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 contract because one party to it himself cannot himself rescind it, but by unlawfully making such a renunciation of the contract he entitles the other party to bring an action in respect of such wrongful rescission.

In ***C.D Ajufo v Trans-Arab Ltd[[3]](#footnote-3),*** a case that did not involve anticipatory breach as such, **Somolu, C.J,** framed the principles of law applicable in cases of breach of contract thus:

It is an indisputable point of law, that the breach of an agreement entitles the other party who is damnified by it to bring an action on it. Such breach may take place before the time fixed for performance or of completing the performance of the contract has arrived. Thus, where a promisor by his own act or default disables himself from performing his promise, the other party is entitled to treat the contract as at end and sue him for damages for a breach of it without waiting for the time fixed for performance, and without further performing his part of the contract.

Such repudiation may be express or implied, or be in words or by conduct. Thus, in ***Hochester v De la Tour[[4]](#footnote-4),*** the defendant actually wrote to the plaintiff stating that he was no longer going to perform his part of a contract under which he agreed to employ the plaintiff as a courier during a foreign tour commencing at a future date. The plaintiff immediately sued for a breach of contract, even though the date of the performance was still nearly a month ahead and he succeeded.

The facts of ***Nigerian Supplies Manufacturing Co. Ltd v Nigerian Broadcasting Corporation[[5]](#footnote-5)*** represents a classic case of express anticipatory breach. There, the plaintiff company leased certain property to the defendant corporation for a term of five years from January 15, 1962, at a rent 26 pounds a year, with an option to renew for further term of five years, which was to be exercised by notice in writing two years before the determination of the original term. On October 30, 1964, the director general of the corporation wrote to the company exercising the option, but on December 31, 1964, he wrote again saying that the board of governors had refused to ratify the exercise of the option. In response, the plaintiffs issued a writ claiming a declaration that the option to renew had been validly exercised and an injunction to restrain the corporation from committing a breach of contract. The trial court held that the option had been validly exercised, but for other reasons he refused to grant the injunction sought.

The plaintiffs appealed to the Supreme Court. Upholding the appeal and granting the declaration and injunction sought by the plaintiffs, the court held that the action of the defendants by their letter of December 31, 1964, after the contract had been concluded, was an attempted repudiation or renunciation of the contract.

Where the defendant’s refusal to perform is the result of a bonafide though erroneous, belief that he was justified to withhold performance, his act may not amount to repudiation. In ***Merry Steel and Iron Co. v Naylor Benzon & Co[[6]](#footnote-6),*** the respondents sold 5,000 tons of iron steel to the appellants to be delivered at the rate of 1,000 tons a month. In the first month, only half rate was delivered. Though some more were delivered the second month, winding up proceedings were commenced against the respondents. Due to wrong legal advice, the appellants refused to pay for the deliveries pending the final determination of the winding-up proceedings. The respondents now alleged that the refusal to pay constituted a repudiation of the contract by the appellants discharging them (the respondents) from all further obligations under the contract. It was held that it was impossible to ascribe to the conduct of the buyers, the character of repudiation of a contract. In reply to the seller’s argument that payment for every delivery was a condition precedent to the obligation to make subsequent deliveries, the court held that the mere failure for the buyer to pay for one delivery could not of itself go to the root of the contract.

**Fundamental Breach.**

Apart from repudiation, the another circumstance in which a party is entitled to treat himself as discharged from further obligations in the contract is where the co-contractor, without expressly or implicitly repudiating the contract, commits a fundamental breach of contract. It must be a breach which goes to the root of the contract; a breach which has the effect of depriving the injured party of achieving the main purpose for which he contracted. One of the problem about basing the discharge of a contract solely on the breach of a fundamental term is the rather subjective nature of that concept. It is said that for a term to be fundamental, the parties must have regarded it as being of major importance when the contract is made[[7]](#footnote-7). It should be noted that a breach of condition also entitles the injured party to repudiate the contract. This, it will be recalled, is the main distinguishing feature between the consequences of a breach of condition and a breach of warranty. Thus, as far as the right to terminate for breach is concerned, there is no distinction between a breach of a fundamental term and a breach of a condition. However, in situations or circumstances in which ***section 11© of the sales of goods act 1893*** is applicable, a breach of condition will only give rise to claim for damages and the right to repudiate will be lost.

**Actual Breach**

An actual breach is a failure to meet the obligations stated in a contract. Failure or refusal to perform a contractual promise when performance has fallen due is prima facie a breach. This means the failure has already occurred and is not something that is merely anticipated. An illustration of an actual breach of contract is Pearles de Rougemont & Co v Plibrow[[8]](#footnote-8). The appellant had telephoned a firm of solicitors and asked to make an appointment with a solicitor. He was not informed that the employee wasn’t 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 an incompetent solicitor. But it had ruled that there had been a 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 services were provided by any solicitor; they therefore had no right to any payment.

**Remedies available for a Breach of Contract**

The appropriate compensation or remedy depends upon the circumstances. The non-breaching party will have to demonstrate that the other party failed to perform in order to be entitled to any type of remedy. The remedies available for breach include:

**Damages**

**A remoteness of damage and measure of damages.**

The extent to which a plaintiff is entitled to demand damages for breach of contract was not fully considered by the courts until ***Hadley v Baxendale[[9]](#footnote-9).*** The principle laid down in that case has since been repeatedly affirmed. Hadley v Baxendale defined the kind of damage, that is, the appropriate subject of compensation and excluded all other kinds as being too remote. Historically, it has been treated as clear in principle that what is to be recovered by way of damage is the loss which the plaintiff has suffered and not the profits the defendant has made. In ***Surrey County Council v Bredero homes[[10]](#footnote-10):***

A local authority had sold surplus land to a developer and obtained a covenant that the developer would develop the land in accordance with an existing planning permission. The sole purpose of the local authority in imposing the covenant was to enable it to share in the planning gain if, as happened, planning permission was subsequently granted for the erection of a large number of houses. The purpose was that the developer would have to apply and pay for a relaxation of the covenant if it wanted to build more houses. In breach of the covenant, the developer in accordance with the later planning permission, and the local authority brought a claim for damages.

Held: the erection of the larger number of houses in breach had not caused any financial losses to the local authority. The court refused to countenance the possibility of awarding restitutionary damages for breach of contract, giving reasons why such an award should be exceptional.

**Specific performance**

A decree of specific performance is a decree issued by the courts which constrains a contracting party to do that which he has promised to do. It is a form of relief that is purely equitable in origin and is one of the earliest examples that equity acts ***in personam.*** The court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.

**Specific performance a discretionary remedy**

The exercise of the equitable jurisdiction to grant specific performance is not a matter of right in the person seeking relief, but of discretion in the court. This does not mean that the decision is left to the uncontrolled caprice of the individual judge, but that a decree which would normally be justified by principles governing the subject maybe withheld, if to grant it in the particular circumstances of the case will defeat the end of justice. In ***Co-op Insurance Society Ltd v Argyll Stores (holdings) Ltd[[11]](#footnote-11),*** the plaintiffs were the developers of a shopping center and they had secured the defendants, a leading supermarket chain, as tenants of one of the major stores in the center. In such development, the presence of such a tenant is very important to other tenants who look to the supermarket as a magnet for shoppers. The defendants had not only taken a 35-year lease but had expressly covenanted that they would operate the leased land as a supermarket. After 15 years they decided that the supermarket was no longer viable and left without notice. This was a clear breach of contract and in principle the plaintiffs were entitled to damages which reflected the impact on the whole development of the defendant’s departure but the calculation of these damages will necessarily be a difficult exercise involving peering into an uncertain future. The plaintiffs chose instead to sue for specific performance and were successful before the Court of Appeal.

**Injunction**

An injunction is either prohibitory or mandatory. So far as concerns the law of contract, a prohibitory injunction is granted only in the case of a negative promise. If for instance, the defendant has broken his agreement not to sell beer other than that brewed by the plaintiff; the court will order him to refrain from doing what he has expressly promised to do. A mandatory injunction on the other hand, is restorative in its effect, not merely preventive. It directs the defendants to take positive steps to undo what he has already done in breach of contract.

1. <http://legaldictionary.net/breach-of-contract/> [↑](#footnote-ref-1)
2. (1886) 16 QBD 460 at 467 [↑](#footnote-ref-2)
3. (unreported) High Court of Western State, Ibadan judicial Division, Somolu, C.J, Suit No. 1/205/69/ delivered on September 28, 1969. [↑](#footnote-ref-3)
4. (1853) 2 E &B 678 [↑](#footnote-ref-4)
5. (1967) 1 ALL N.L.R 35 [↑](#footnote-ref-5)
6. (1884)9 A C 434 [↑](#footnote-ref-6)
7. Bowen L.J in Bentsen v Tailor & Sons &Co (1893) 2 Q.B 274 at p. 281 [↑](#footnote-ref-7)
8. (1999) 2 FLR 139 [↑](#footnote-ref-8)
9. (1854) 9 Exch 341 [↑](#footnote-ref-9)
10. <http://swarb.co.uk> (1993) 1 WLR 1361 [↑](#footnote-ref-10)
11. (1997) 2 WLR 898 [↑](#footnote-ref-11)