**NAME: LOLOMARI TAMUNOIBI ESTHER**

**MATRIC NO: 18/LAW01/142**

**COURSE: LAW OF CONTRACT II**

**COURSE CODE: LPB 202**

**ASSIGNMENT TITLE: BREACH OF CONTRACT**

Breach of contract is one of the generally accepted modes of discharging a contract. Discharge of contract, means in general, that the contractual relationship between the two parties has come to an end and the parties are freed from their contractual obligations to each other thereafter.[[1]](#footnote-2) It is generally accepted that there are four modes of discharging a contract. These modes are:

1. Discharge by performance
2. Discharge by agreement
3. Discharge by breach
4. Discharge by frustration

This paper will be focused on the third mode of discharging a contract, which is discharge by breach and the remedies available to an aggrieved party for a breach of contract.

To begin, one must know what constitutes a breach of contract. According to Treitel, “A breach of contract is committed when a party without lawful excuse fails to perform what is due from him under the contract or performs defectively or incapacitates himself from performing”[[2]](#footnote-3)

According to the Supreme Court in the case of ***Saidu H. Ahmed & Ors V Central Bank of Nigeria[[3]](#footnote-4)*** A **contract will** be **discharged** by **breach** when the party in **breach** had acted contrary to the terms of the **contract** either:

1. By non performance or

2. By performing the **contract** not in accordance with its terms or

3. By wrongful repudiation of the **contract**.

**When two parties make a contract and one breaches it, there are generally two types of remedies that are available to the non-breaching party: equitable remedies and legal remedies. Each type has several subtypes of remedies that may be available.**

**Equitable Remedies**

Equitable remedies are those that are imposed when money damages would not adequately cure the non-breaching party. The following types of equitable remedies may be available in the given case:  
 **Specific Performance**  
Specific performance is an order by the court that requires the breaching party to carry out the contract as it was originally written. This type of remedy is rare. However, it may be ordered in certain circumstances. For example, specific performance may be imposed when the subject matter is unique, such as a famous painting or a specific piece of property as was the case in ***Falcke v Gray[[4]](#footnote-5)***; where the Court held that it will enforce specific performance of a contract to purchase chattels, if damages will not be an adequate compensation. But where the contract, although not actually fraudulent, was one in which the parties were not on an equal footing, the Plaintiff knowing, and the purchaser being ignorant, of the value of the thing sold, and the price appeared to be inadequate, the Court refused relief.

Courts are hesitant to order specific performance because it requires the ongoing monitoring by the court of the contract.

**Injunction**

Like specific performance, an injunction is an equitable remedy and therefore only granted at the discretion of the court. 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***[[5]](#footnote-6)*; [Mlle](https://en.wikipedia.org/wiki/Miss) [Johanna Wagner](https://en.wikipedia.org/wiki/Johanna_Wagner) was engaged by [Benjamin Lumley](https://en.wikipedia.org/wiki/Benjamin_Lumley) to sing exclusively at [Her Majesty’s Theatre](https://en.wikipedia.org/wiki/Her_Majesty%E2%80%99s_Theatre) on [Haymarket](https://en.wikipedia.org/wiki/Haymarket_(London)) from 1 April 1852 for 3 months, two nights a week. [Frederick Gye](https://en.wikipedia.org/wiki/Frederick_Gye), who ran [Covent Garden Theatre](https://en.wikipedia.org/wiki/Covent_Garden_Theatre), offered her more money to break her contract with Mr. Lumley and sing for him. Sir James Parker granted an injunction to restrain Mlle Wagner. She appealed. Lord St Leonards LC, in the Court of Chancery, held the injunction did not constitute indirect specific performance of Wagner’s obligation to sing. So an order could be granted that prohibited Mlle Wagner from performing further other than at Her Majesty's Theatre.

In urgent cases a plaintiff may be able to obtain an interim injunction to restrain an act. Special types of injunction may be granted to preserve property and assets pending trial.

**Rescission**Rescission of the contract is a remedy that allows the non-breaching party to cancel his or her responsibilities under the contract. This remedy might be available when the contract was based on fraud or a mistake by one or both of the parties. It is also available if both parties prefer to cancel the contract and return any money that had been advanced as part of the contract.   
**Reformation**Reformation allows two parties to modify a contract so that it more accurately reflects what the parties intend. This remedy requires that the contract be valid. It may be available when one of the parties had a mistaken understanding about a material term of the contract.

**Legal Remedies**  
Legal remedies often take the form of monetary damages that are awarded to help make the innocent party whole. The purpose of damages is to put the claimant party into the financial point they were in prior to entering the contract that caused the problem. It is a monetary sum set by the court to reimburse the claimant. Therefore the innocent party must show that they have suffered actual loss, if this can’t be proved then they will only be entitled to nominal damages. To award the claimant for damages, the court has to think about two things:

Remoteness – for example the consequence of the breach is the defendant legally responsible and

Measure of Damages – the damages are evaluated in monetary terms.

The case of [***Hadley v Baxendale***](https://www.lawteacher.net/cases/hadley-v-baxendale.php)[[6]](#footnote-7) established the rule of Remoteness of loss. The court came up with the principle that where one party is in breach of contract, the claimant is to receive damages which can be considered to come from the breach of contract itself. There are two types of loss for which damages may be recovered, what comes naturally and what the parties can foresee when the contract was made as the likely result of breach. As a result of the first rule in ***Hadley v Baxendale*** the claimant is considered to expect the result of the breach, whether they were expected or not. For the second part of the rule, the claimant can only be held for unusual consequences. Where the party has knowledge that the abnormal consequence will follow where it is reasonably ought to. Damages are not given for non financial loss; they are awarded for losses where the contracts purpose is to promote enjoyment. The innocent party must take reasonable steps to ease the loss for example by trying to find an alternative measure of the contract.

Under **mitigation**, the law does not allow a plaintiff to recover damages to compensate him for loss which would not have been suffered if he had taken reasonable steps to mitigate his loss.[[7]](#footnote-8) Whether the plaintiff has failed to take a reasonable opportunity of mitigation is a question of fact dependent upon the particular circumstances of each case and the burden of proving such failure rests upon the defendant. It has thus been held in the case of [[8]](#footnote-9) that the master of a ship, upon the failure of the charterer to provide a cargo in accordance with the contract, should normally accept cargo from other persons at the best freight obtainable.

In ***Brace v Calder,[[9]](#footnote-10)***the defendants, a partnership consisting of four members, agreed to employ the plaintiff as manager of a branch of the business for two years. Five months later the partnership was dissolved by the retirement of the two members, and the business was transferred to the other two, who offered to employ the plaintiff on the same terms as before. He rejected the offer. The dissolution of the partnership constituted an in law a wrongful dismissal of the plaintiff, and in his action for breach of contract he sought to recover the salary that he would have received had he served for the whole period of two years. It was held, however, that he was entitled only to nominal damages, since it was unreasonable to have rejected the offer of continued employment.

But the burden which lies on the defendant, of proving that the plaintiff has failed in his duty of mitigation, is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one, who is often innocent of blame. This may be illustrated from ***Pilkington v Wood***[[10]](#footnote-11). It was there argued by the defendants solicitor that the plaintiff, the purchaser of the Hampshire house, should have mitigated his loss by taking proceedings against the vendor for having conveyed a defective title. The proposed action, however, would have involved complicated litigation upon a somewhat difficult provision in the Law of Property Act 1925, and it was far from clear that it would have succeeded. Harman J therefore held that the purchaser was under no duty to embark upon such a hazardous venture, merely ‘to protect his solicitor from the consequences of his own carelessness’.

In relation to the computation of damages, mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss. This interrelationship was emphasized by Oliver J in ***Radford v De Froberville[[11]](#footnote-12).*** The plaintiff owned a house which stood in a large garden. The house was divided into flats, which were let to tenants, who had rights in common to use the garden. The plaintiff obtained planning permission to build a house on a plot of land in the garden and sold the plot to the defendant. The defendant contracted to develop the plot and to build a brick wall of stated height and thickness on the plot as a boundary between the plot and the area retained by the plaintiff. The defendant failed to build the wall or develop the plot and sold the plot to a third party, who covenanted to perform the covenants in the transfer from the plaintiff to the defendant but failed to do so.

The plaintiff brought an action for damages and the judgment of Oliver J was directed to the specific issue of the defendant’s failure to build the wall. The defendant argued that the appropriate test was the difference in value between the land with the wall built and the land without. Since the evidence was that the absence of the wall made no difference to the rentable value of the flats, this would have led to a nominal award. Alternatively it was argued that the plaintiff should mitigate his loss by building the cheapest reasonable boundary, namely a prefabricated fence.

Oliver J rejected these contentions. The firs might have been appropriate if the plaintiff had no intention of building a wall but the plaintiff’s evidence was that he intended to build a wall on his side of the boundary as nearly as possible identical with that which the defendant had contracted to build. On that footing the plaintiff was suffering a genuine loss and the cost of rebuilding was the proper measure of that loss.

**Liquidated damage clauses** are where a contract includes a condition that damages of a certain sum will be payable – the courts will acknowledge the certain sum to be a measure of damages. Even if the claimant receives less than the actual loss coming from the breach, the courts can still uphold a liquidated damages clause. But a court will ignore an amount for damages if it is classed as a penalty clause; this is where an amount which is not a genuine pre-estimate of the expected loss on the breached contract. The leading case of Dunlop Pneumatic Tyres*[[12]](#footnote-13)* establishes the tests to distinguish penalties from liquidated damages:

* A clause will be construed as a penalty clause if the sum specified is "extravagant and unconscionable" in comparison with the greatest loss that could possibly have been proved as a result of the breach.
* It is likely to be a penalty if the breach of contract consists of not paying a sum of money and the sum stipulated as damages is greater than the sum which ought to have been paid.
* There is a presumption that if the same sum is stated to apply to different types of breach of contract, some of which are serious and others not, it is likely to be a penalty clause.
* It is not a bar to the operation of a liquidated damages clause that a precise pre-estimation is impossible.

**Reliance loss** can occur when the claimant has suffered a loss in expenditure due to the contract. The purpose of this remedy is the same as expectation loss, as it is designed to put the claimant in the previous financial position they would have been prior to entering the contract. Reliance loss can be claimed as expectation loss cannot be recovered.

From the remedies it can be seen that damages is the main remedy to use when an innocent party faces a contract being breached. Equitable remedies can be sought where damages will be inadequate to reimburse the claimant for their loss. The method in which the loss is calculated is for the claimant to decide and prove to the courts. Instead of going though court seeking damages parties can also use their own methods like retention of title clauses, enforcement of security, withholding payments and rights against the goods themselves.

**BIBLIOGRAPHY**

* Cheshire, Fifoot and Furmston, *Law of Contract (16th edition)* (Oxford University Press 2012)
* Sagay, *Nigerian Law of Contract (2nd edition)* (Spectrum Books Limited 2009)

**REFRENCED WEBSITES**

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| WEBSITES | DATE | TIMES |
| <Https://www.lawteacher.net/free-law-essays/contract/breach-of-a-contract-contract-law-essay.php>. | 05/05/2020 | 2:06am |
| <https://www.hg.org/legal-articles/remedies-for-a-breach-of-contract-20711> | 05/05/2020 | 1:02am |

1. Sagay, Nigerian Law of Contract (Spectrum Books Limited 2009) [↑](#footnote-ref-2)
2. (Treitel 2007, para. 17-049) [↑](#footnote-ref-3)
3. (2012) LPELR-SC 34/2005 [↑](#footnote-ref-4)
4. ([1859] 4 Drew651) [↑](#footnote-ref-5)
5. [1852] 1 DM & G604). [↑](#footnote-ref-6)
6. ([1854] 9 Exch. 341) [↑](#footnote-ref-7)
7. *British Westinghouse Electric and Manufacturing Co v Underground Electric Rly Co of London* (1912) AC 673 at 679, per Lord Haldane. It is wrong to express this rule by stating that the plaintiff is under a duty to mitigate his loss: *Sotiros Shipping Inc v Sameiet, the Solholt* (1983) 1 Lloyd’s Rep 605. [↑](#footnote-ref-8)
8. (1845) 1 Car & Kir 686 [↑](#footnote-ref-9)
9. (1895) 2 QB 253 [↑](#footnote-ref-10)
10. (1953) Ch 770 (1953) 2 All ER 810 [↑](#footnote-ref-11)
11. (1978) 1 All ER 33 [↑](#footnote-ref-12)
12. (Dunlop Pneumatic Tyre Co Limited v New Garage & Motor Co Limited [1915] A.C 79) [↑](#footnote-ref-13)