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MATRIC NO: 18/LAW01/070

COURSE: LAW OF CONTRACT

COLLEGE: LAW

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.

Discuss the following

- a. Breach of Contract
- b. What are the remedies available for breach of contract

ANSWER

A contract case usually comes before a judge because one or both parties claim that the contract was breached. A breach of contract is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry or the requirements of any express warranty or implied warranty, including the implied warranty of merchantability.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract. A breach of contract is when one party breaks the terms of an agreement between two or more parties. This includes when an obligation that is stated in the contract is not completed on time. A breach of contract of contract occurs when one party fails or refuses to carry out essential collateral part of the contract with respect to that party's obligation either in its essential manner or connected with the partial discharge of his obligation thereat. A breach can be actual, anticipatory breach occurs. This is when after the agreement, but before the due date of performance, "the guilty party" evinces action or steps showing that he cannot perform the contract in its essential or particular stipulations. In a situation like the anticipatory breach, the innocent party needs not wait for the due date; he might as well commence action for breach after giving notice to the guilty party or party in breach. In the case of *Nigerian Advertising & Publicity Ltd v Nigerian Airways*,^[1] the defendant awarded an advertising and publicity contract to the plaintiff for three years. When the contract still had about two years to go, the defendant without any just gave notice of termination. The plaintiff immediately brought an action for

breach of contract. It was held that the defendant notice of termination amounted to an anticipatory breach and that plaintiff was entitled to institute action immediately as they did.¹

A breach of contract can also be defined as a legal cause of action which occurs when a party to a contract fails to fulfill its obligation, 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. The resultant effects of this always make the injured party entitled to an action for damages against the guilty party and also in addition, where the guilty party has repudiated the contract or commits a fundamental breach, the injured will as well has a right to rescind or terminate the contract. The rescission right to be exercised above by the injured party is a consequence of the guilty party's breach and thus entitles this party to treat himself as discharged from further liability under the contract and to the guilty party he remains liable for damages towards the innocent party.

CASES ON BREACH OF CONTRACT

Revelations Perfume and Cosmetics Inc. v. Prince Rogers Nelson^[2]

In 2008, the Revelations Perfume and Cosmetics company sued the famous musician "Prince" and his music label, seeking \$100,000 in damages for reneging on an agreement to help market their perfumes. The flamboyant pop star had promised to personally promote the company's new perfume named after his 2006 album "3121," and to allow his name and likeness to be used in the perfume's packaging. Prince then refused to grant interviews related to the project, and refused to provide a current photograph for a press release.

In its breach of contract complaint, Revelations asked the court to award more than \$3 million in lost profits, as well as punitive damages. The judge found no evidence, however, that the pop star acted with malicious intent, and ordered him to pay nearly \$4 million for the cosmetics company's out-of-pocket expenses. Revelations' request for punitive and loss-of-profits damages was denied.

Macy's v. Martha Stewart Living^[3]

Macy's department stores filed a breach of contract complaint against Martha Stewart Living Omnimedia for making an agreement with J.C. Penney for the creation of Martha Stewart retail stores within their retail stores beginning February 2013. Prior to the deal, J.C. Penney had purchased a minority stake in Stewart's company for \$38.5 million. The mini-retail stores were to carry Martha Stewart home goods, however Macy's argued they had been granted an exclusive right to make and sell certain Martha Stewart Living products in an agreement signed in 2006.

1 (Unreported) H/C of Lagos State Suit No. HCL/88/71

Macy's asked the court to grant a preliminary injunction to stop Steward from breaching the contract while the court considered the matter. Twelve years later, in June 2014, a New York judge ruled that J.C. Penney had indeed stepped over Macy's contract with the domestic diva in its attempt to sell products bearing her name. While the J.C. Penney contract has been nullified, monetary breach of contract damages were not immediately decided, and may be limited to the legal fees and costs of the lawsuit, as the judge decided the case did not warrant punitive damages.

TYPES OF BREACH OF CONTRACT

a. Anticipatory Breach

Where there exist a contract between two parties which is slated to be performed at a future date and one party clearly declares his intention not to perform his own obligation under the contract is popularly referred to as anticipatory breach. It also occurs when one party to a contract stops acting in accordance with the contract, leading the other party to believe he has no intention of fulfilling his part of the agreement. In this case, the breaching party may give such an impression by his actions, or failure to act, such as failing to produce an ordered item, refusing to accept payment, or somehow making it obvious that he cannot or will not fulfill the terms of the contract. An anticipatory breach of contract enables the non-breaching party to end the contract and sue for breach of contract damages without waiting for the actual breach to occur. For example:

Jane agrees to sell her antique sewing machine to Amanda, and the two agree on the purchase price of \$1,000, the sale to occur on May 1st. On April 25th, Amanda tells Jane that she cannot come up with the money on time. Following this communication, Jane can reasonably assume that Amanda is in anticipatory breach. This enables Jane to sell the sewing machine to someone else, or potentially file a lawsuit against Amanda for breach of contract.

In another light, it is a term in the law of contract that describes a declaration by the promising party to a contract that he or she does not intend to live up to his or her obligations under the contract. It is an exception to the general rule that a contract may not be considered breached until the time for performance. This notion of anticipatory breach was well captured in the case of *Solomon Nassar v Oladipo Moses*^[4] where *Coker J*, said, "*It is open to a party for breach of same even in the anticipation of the time agreed upon for performance, if it is manifest b his conduct and his acts that the defaulting party had made himself unable to fulfill his part of the contract at the agreed time*".

The doctrine of anticipatory repudiation is relatively old, having its origin in the common law. The leading case on the subject is *Hochster v De La Tour*,^[5] which did not involve a contract for the sale of goods, but rather an employment contract. The fact of the case is

stated as thus: In April, De La Tour agreed to employ Hochster as his courier for three months from 1 June 1852, to go on a trip around the European continent. On May 11th, De La Tour wrote to say that Hochster was no longer needed. On May 22nd, Hochster sued. De La Tour argued that Hochster was still under an obligation to stay ready and willing to perform till the day when performance was due, and therefore could commence no action before. It was held that the contract could be terminated a bit early. If however, the non-breaching party has terminated following renunciation, they can claim damages from that time and do not need to wait until the date fixed for performance under the contract.

The facts of *Nigerian Supplies Manufacturing Co. Ltd v Nigerian Broadcasting Corporation* represent 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 a further term of five years, which was to be exercised by notice in writing two years before the determination of the original term. 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 judge held that the option had been validly exercised, but for other reasons he refused to grant the injunction sought.

In *Frost v Knight*,^[6] the defendant having agreed to marry the plaintiff on the death of his father, broke off the engagement during the father's lifetime. It was held that the plaintiff was immediately entitled to sue for breach of contract.

b. Fundamental Breach

A fundamental breach of contract is generally known to occur when a previously agreed upon contract is cancelled entirely, due to the other party's actions. The determinant of what constitute a fundamental breach of contract must be a breach that goes to the root of the contract; for example, the inability of a party to supply some drinks on a wedding day after several calls to him. This breach will also entitle the innocent party the right to terminate the contract. In the recent decision in *R.P.M Investment Corp v Lange*^[7] the Alberta Court of Queen's Bench held that a party to a contract may terminate a contract on the basis of a "fundamental breach" of the contract in addition to the right to terminate the contract for repudiation. One 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 was made. But since the parties will not normally specify this in advance, in the end it is the court's view of what is of major importance that prevails. Thus, the parties' presumed intention becomes what the judge thinks it ought to be.

In **Karsales v Wallis**^[8] [1956] a buyer inspected a car dealer's used Buick car and agreed to buy it. The car was later delivered at night, and had been towed. When the buyer inspected the car in the morning, it would not work and it was clear it had been involved in an accident, and there were other changes: its tyres had been replaced by old ones, body parts were missing, and the engine's cylinder head was detached, revealing burnt valves. This was a serious breach, but the dealer sought to rely on a clause in the contract: "No condition or warranty that the vehicle is roadworthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein." Although the clause was clear and well drafted, the Court of Appeal declared that a "car" was a "vehicle capable of self-propulsion", and accordingly this Buick was not a proper car. Following **Glynn v Margetson**^[9] and using its "main purpose" concept, the court held that the dealer was "in breach of a fundamental obligation" and so could not rely on any exclusion clause.

This decision was clearly fair to the buyer, and **Karsales v Wallis** soon became the leading case on "**fundamental breach**". As a matter of law, under the doctrine of fundamental breach of contract, exclusion clauses were deemed not to be available to a party in fundamental breach of the contract. However, all was not well, as business people felt alarmed that an agreed contract term could be set aside by a court; there seemed to be no "certainty".

There are a variety of different courses of action that can be taken in the instance of a fundamental breach. Four of these actions are:

- **Specific Performance:** One option is requesting a court order that all parties be required to complete the terms of the contract. While this may prove difficult for certain parties depending on the circumstances of the breach, it is effective in getting the required goods and services contracted for.
- **Rescission:** Another option is to cancel the contract and get a refund for the attempted service or product. While this option is easier for most parties, it often leaves the initial party without their goods or services.
- **Reformation:** Another way to deal with a fundamental breach is to rewrite the contract to be more versatile, forgiving, or helpful to the party who could not fulfill the contract. While this option does extend the life of the contract and delay the delivery, it is diplomatic to all parties as a renegotiation can take place to determine an outcome that is best for all sides.
- **Sue for Damages:** Finally, when nothing else can be done, reclaiming the money for damages that the offending party has caused is another option. If a company has no other means of paying damages and there's no need to maintain a good relationship with the offending party, this is often the best move to make.

- c. **Minor or Partial Breach :** A minor or partial breach is when the non-breaching party of the contract is not entitled to an order for performance of its obligations but only to collect the damages for which they are owed. For instance, if a homeowner hires a contractor to install new windows in a home and asks for wind resistant windows but the contractor uses windows that aren't wind resistant the homeowner will ask the contractor for damages incurred. Since there is no difference in value between the two windows, the homeowner will not be awarded any damages. If there was a difference between the two windows then the homeowner would have been awarded damages that amount to the difference between the two windows.

- d. **Material Breach:** A material breach is when there is a failure to perform a part of a contract that permits the other party of the contract to ask for damages because of the breach that has occurred. For example, if the contractor mentioned above uses windows that aren't wind resistant and the windows break, the homeowner can collect damages for replacing the windows with the wind resistant ones. The following, as defined by the Restatement of Contracts, must be present to determine whether or not a material breach has occurred:
 - i. The extent to which the injured party will be deprived of the benefit which he reasonably expected
 - ii. The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived
 - iii. The extent to which the party failing to perform or to offer to perform will suffer forfeiture.

2. REMEDIES AVAILABLE FOR BREACH OF CONTRACT

There are several remedies for breach of contract, such as award of damages, specific performance, rescission, and restitution. 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 include;

a) Damages

According to **Section 74, Contract Act^[10]** had stated that when one of the parties has encountered losses or injury due to the breach of contract, damages are granted to him or her as compensation. Besides that, penalty is often applied to the contract as if the term and condition of the contract are not reached on the date that has been set. Usually, the court will set the penalty that the defendant needed to give to the plaintiff is in money form. For example, when a supplier had agreed to supply a product to the hotel, the penalty might already being negotiate and agreed by both the supplier and the hotel. From that, the penalty will be applied into the

contract. So, if the supplier failed to supply the product on time, the penalty will be applied to the supplier. Apart from that, there is also few type of damages that we can found due to the breaching of the contract. In tort law, there are two types of damages which are general damages and special damages. General damages are usually refers to damages such as loss of reputation, life expectancy and so on. While for special damages, it means that the defendant facing with money problem that lead to the property or injury loss faced by the plaintiff. It usually includes expenses in medical area, loss of wages and repair cost.

b) Specific Performance

In this type of remedies, it is more on performance action than monetary form. Under the **Specific Relief Act^[11]**, the specific performance might be applied to the contract and the compensation of monetary is inadequate. In other word, specific performance means that when one of the parties had breach the contract, the another parties can request the court related to force the parties that had breach the contract to perform the term and condition that is stated in the contract. For example, when a person had sign a contract with the hotel that he or she will perform the action that is stated in the contract. If the person refuses to do what have been stated in the contract, the hotel can bring the contract to the court related and request the person to perform the action in the contract stated. However, there is some condition where specific performance cannot be carry out, such as the specific performance will cause the parties who had breach the contract to faced with hard time. Besides that, specific performance also cannot be carry out if the contract are not clearly stated what should be done. This will lead to the contract cannot be enforce when one of the parties had breach the contract. Specific performance that are impossible are also cannot be carry out when the person had breach the contract.

c) Injunction

In this option, injunction can be said as a remedy that is equitable that the court requires the party to do something or the other way, to stop him or her from doing something. There are three types of injunction which is interlocutory injunction, mandatory injunction and also prohibitory injunction. The meaning of interlocutory injunction can be say as to maintain the status quo of something in a pending suit. In the other word, interlocutory injunction means to stop the action from being done. Interlocutory injunction is applied in before the starting of something or stops something for being continued. For example, when there is two people are fighting for the ownership of a hotel, interlocutory injunction is applied to this case. While for mandatory injunction, it means that the court enforce something or some action to be done. In other word, when one of the parties refuse to do the promises that had stated in the contract, the other parties can request the court to apply the mandatory injunction on the parties to finish the action. For example, when a contractor refuses to finish building the hotel new property on the date given, the hotel can request the court to apply the mandatory injunction to the contractor to finish the work. For prohibitory injunction, it can be define as to stop something or some action from being done. When the two parties had sign a contract, and one of the parties decided to sign the same

contract with others, the other parties can request the court to apply the prohibitory injunction to the parties that want to sign the other contract.

REFERENCES

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4. www.legalmatch.com
5. Sagay: Nigerian Law of Contract textbook
6. Law of Contract in Nigeria by Dr Samuel Chisa Dike.

FOOTNOTES

1 [1967] 1 All N.L.R. 35.

2. Revelations Perfume & Cosmetics v Prince Rogers (2008)

3. Macy's v Martha's Stewart Living (2006)

4. Solomon Nasar v Oladipo Moses

5 [1853] 2 E & b. 678.

6 [1872] L. R 7 Exch 111

