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QUESTION: 1) A breach in contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract to 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?

DATE: 7th of May 2020

**SOLUTION:**

**BREACH OF CONTRACT**

A breach of contract is a legal cause of action which 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. Breach contract could also be defined as the act of not performing any term of contract, written or oral, without a legitimate legal excuse. This may include not completing a job, not giving the payment in full or on time, failure to deliver all the goods contracted for, subsisting’s the goods for inferior goods. Being late for no reason or any act that shows that a party would not complete his tasks. Breach of a contract is one of the common causes of law suits for damages and have the court order for “specific performance”

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 party will as well has a right to rescind or terminate the contract.

**TYPES OF BREACH OF CONTRACT**

**Fundamental breach**

A fundamental breach of contract is generally known to occur when a previously agreed upon contract is canceled entirely, due to the other party’s actions (or, inactions, in some cases). Although in other types of breach of contract, the contract is breached early, and therefore there is an opportunity to terminate the contract by the court, this is the case in Fundamental breach, only the wronged party can seek for relieve, this is mostly because, an fundamental clause of the contract has been broken (very important clause of the aforementioned contract). 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 cement to the construction site after several calls to him. This breach will also entitle the innocent party the right to terminate the contract.

An example of this breach is in ***R.P.M. Investment Corp. v. Lange***,[[1]](#footnote-1) based on this case 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. The defendant in this case ( Langes), made a contract with the plaintiff ( Mission) to build a home for them near Calgary, mission did start the construction, however Mission did not complete the construction. The defendant however went forward, to employ another constructor to complete the construction. Mission then sued the defendant to the remaining part of the sum, alluded to him by the contract. . The trial judge found that neither allegation was proven. While there were breaches of the contract, none of them rose to the level of fundamental breach, as they did not deprive the Langes of “substantially the whole benefit of the contract.” As to abandonment, while Mission removed certain property from the job site, that “was done for cost-savings purposes and did not constitute abandonment.” Moreover, Mission demonstrated its continuing intention to complete the project. The trial judge found that the Langes had repudiated the contract by writing an email stating that” …we are hereby giving notice of our intent to terminate effective November 8, 2010.” The trial judge said:

*“In my view, Mr. Lange’s email would lead a reasonable person in the position of Mission to that conclusion. It is possible that Mr. Lange’s email was merely a tactic intended to force a favorable response from Mission. However, the law is clear that the test is what a reasonable person would conclude, not what was subjectively intended. Therefore, Mr. Lange’s strategy, if that is what it was, is irrelevant to the outcome.”*

**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

In another light, is a term in the law of contracts 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[[2]](#footnote-2)*** where Coker, J, said emphatically thus:

*It is open to a party to a contract to sue the other party 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 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***[[3]](#footnote-3), which did not involve a contract for the sale of goods, but rather an employment contract. The fact of the case is as stated 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 11 May, De La Tour wrote to say that Hochster was no longer needed. On 22 May, 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.

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1. **What are the remedies available for breach of contract?**

Due to the fact that there is so many contracts and business around the world, and of course the court has come to the decision on different remedies**.** The remedies include the following**;**

1. **Penalty or liquidated damages**

For a liquidated damages clause to be valid the specified sum must be a genuine pre-estimate of the anticipated loss which the claimant would be likely to suffer in the event of a breach of the obligation in question. If the loss is difficult to quantify "best guess" procedure should be operated, keeping a record of the calculations underlying any elements of the determined figure. Provided the selected figure is not vastly in excess of the greatest loss which could be suffered, the clause is likely to be enforceable. The essence of a penalty is that the money specified is *in terrorem* of the defaulting party, in other words, it is intended to apply undue force to the other party to perform his side of the contract.

The use of the words "penalty" or "liquidated damages" are not conclusive. It is necessary to examine whether the amount specified is in fact a penalty or liquidated damages. It is for the party in breach to show that the sum is a penalty (*Robphone Facilities Ltd v Blank[[4]](#footnote-4) )*

There is no public policy issue in relation to the upper limit of damages to which parties can contract to be liable. The Unfair Contract Terms Act 1977 will in certain circumstances impose a test of reasonableness in relation to exclusion clauses (which purport to limit or exclude liability) but this is unlikely to apply to a genuine liquidated damages clause. If the clause specifies a sum which is more than a genuine pre-estimate (and therefore a penalty) the clause will be unenforceable. The courts will not benefit the party claiming damages by imposing a lower substitute figure.

1. **Mitigation**

An innocent party cannot recover for loss that he could have avoided by taking reasonable steps. This is sometimes expressed as the duty to mitigate. This does not apply to actions for the price of goods delivered. Such an action is an action for an agreed sum and not an action for damages.

Although there is no duty to mitigate before actual breach occurs the innocent party should not aggravate his loss. It is for the defendant to prove that the plaintiff has failed to mitigate his loss (Pilkington v Wood *[[5]](#footnote-5)*[1953] Ch 770).

1. **Remoteness of loss**

The innocent party may only recover damages for loss suffered as a result of the breach provided it is not too remote. The aim of damages is to put him in the position he would have been had the contract been properly performed.

1. **Damages**

Unlike the equitable remedies of specific performance and injunction (see "Specific performance" and "Injunctions “below) damages for loss in a breach of contract claim are available as of right.

An innocent party may claim damages from the party in breach in respect of all breaches of contract. The damages may be nominal or substantial. Nominal damages are awarded where the innocent party has suffered no loss as a result of the other’s breach and substantial damages are awarded as monetary compensation for loss suffered as a result of the other party’s breach.

For an innocent party to obtain substantial damages he must show that he has suffered loss as a result of the breach (remoteness) and the amount of his loss (measure). It is up to the party in breach to argue that the innocent party has failed to mitigate his loss.

In conclusion of course there are other methods in which individuals breach contracts in which they have entered into legally, some individuals even breach the contract without with the idea in their minds that they could prove that the contract is otherwise not effective. The few remedies for the breach of a contract earlier mentioned are just based on the few judgments made by the court.

**REFERENCES**

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2. Unreported High Court Lagos state, Coker, J, Suit No. LD/222/58 delivered on May 20 1960, casebook, p. 448 [↑](#footnote-ref-2)
3. 118 Eng. Rep. 922 (1853). [↑](#footnote-ref-3)
4. *[1966] 3 All ER128*). [↑](#footnote-ref-4)
5. [1953] Ch 770 [↑](#footnote-ref-5)