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QUESTIONS

Discuss the following:

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

Before we commence the discussion on a breach of contract, it is important that we know what a contract is. A contract can be defined as a legally enforceable agreement between two or more parties. It can be in an oral or written form, and is essentially a set of promises, whereby one party promises to don something for the other, in exchange for a benefit.[[1]](#footnote-1) For a contract to be seen as valid it must have the following characteristics:

* Legal Purpose: A contract must have a legal purpose for it to be enforceable. This means that the contract must have a reason, or purpose, why it is being made in the first place. This will enable the court to know how to rectify the contract in case of the occurrence of a breach.
* Mutual Agreement: All parties in the contract must have “a meeting of minds”. This is when both parties have come to an understanding with each other as to what the buyer wants, and what the seller has to offer, in terms of goods and services.
* Consideration: This is an aspect of the contract where each party has to agree to give up something of value, in exchange for a benefit.
* Competent parties: The contract must have parties within it in order to be valid, and these parties must be competent. This means that they are of sound mind, legal age, and must not be under the effects of drugs or Alcohol.
* Genuine Assent: This means that the parties must enter into the contract freely. The contract will not be valid if mistakes had been made by one or more of the parties, if one party has committed fraud in the contract, or if one party has exerted undue influence over the other party.

Some contracts are Bilateral, and some others are Unilateral. A bilateral contract, is an agreement between two parties in which one side agrees to fulfill his or her side of the bargain. A unilateral contract on the other hand, is a contract that is created by an offer which can only be accepted by performance, it is when the offeror makes a promise in exchange for the act or performance by the other party. This can be seen in the case of Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1[[2]](#footnote-2).

Now that a contract has been defined, it is now time to look at what a breach of contract means. A breach of contract is a civil wrong, and legal cause of action whereby an agreement made by the parties or a bargained-for-exchange, is not honored by one or more of the parties involved in the agreement. This breach is either done by non-performance or interference with the performance of the other party. A breach can occur when one or more of the parties fail to fulfill, his or her obligations as stated in the terms of the contract, or communicates an intention to fail their obligations in the contract. Where there is a breach of contract, the defaulting party will have to pay some form of damages to the aggrieved party in the contract. If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

To determine whether a contract has been breached, a judge has to examine the contract, he has to examine the existence, requirements, and to know if any modifications had been made the contract. Only then can the judge make a decision on the existence and classification of the breach. For a breach to be declared, the judge must deem a breach to have taken place, and the plaintiff must show evidence of a breach to have taken place in the contract, and that he held up his part of the agreement.

There are several ways which a contract can be breached, the ways which they are breached include:

* When a party fails to perform their obligations of the contract in whole or in part.
* Behaves in a manner which shows an intention not to perform their obligations in the future
* The contract becomes difficult to perform as a result of the defaulting party’s act.

Under the law there are three types of breach, based on the seriousness of the breach. These types of breaches of contract include[[3]](#footnote-3):

1. Material breach of contract: This occurs when a party receives significantly less benefit or a significantly less result than what he or she expected the other party to perform according to the contract. Types of material breaches may include: failure to perform the obligations in the contract, or failure to perform them on time. When a material breach occurs, the other party may pursue damages related to the breach and both its direct and indirect consequences.
2. Minor breach of contract: This is also known as Partial or immaterial breach of contract. This occurs when the deliverable of the contract has been carried out, but the party in breach failed to perform some obligations. In this case the affected part may only pursue legal action, if it can be proven that it led to financial losses.
3. Anticipatory breach of contract: A breach does not actually need to occur for the defaulting part to be responsible. This means that the breach has not actually occurred. As long as it can be proven that, there was no intention for the defaulting party to carry out their obligation under the contract, This can occur when the defaulting party, explicitly tells the other party that, they can’t perform their obligations, it can also occur when the defaulting party displays actions, which indicate that they do not intend, or are incapable of fulfilling their obligations under the contract.
4. Actual breach of contract: An Actual Breach of Contract refers to a breach that has already occurred, meaning the breaching party has either refused to fulfill their obligations by the due date or they have performed their duties incompletely or improperly. When a breach does occur, there are several types of remedies the other party may pursue. These include compensatory damages to address direct economic losses stemming from the breach, and consequential losses, which are indirect losses that go beyond the value of the contract itself but are the result of the breach.

Once a breach has been done, there are several ways which the breach of contract can be mitigated, they include:[[4]](#footnote-4)

* 1. Money damages: These refer to the monetary payments which a breaching party has to make for violating the terms of contract. The type of breach determines the extent of the damages. If it is a total breach, then the plaintiff can recover the sum or value which the plaintiff would have received had the contract been fully performed by the defendant and this includes lost profits. However, if it is a partial breach, the plaintiff can recover a sum which equals the amount necessary to hire someone else to complete that part of the contract. However, in some cases of partial breach, the cost of completion can be quite expensive and the portion of the contract which was unperformed may be small. In these cases, a court may only award damages which are equal to the difference between the value of the contract as performed and the full value of the contract which was originally agreed to by the parties. There are two types of monetary damages are:
* Compensatory Damages: This is meant to cover the loss incurred by the non-breaching party because of the breach of contract. The breaching party will have to pay an amount which replaces the loss incurred by the other party
* Punitive Damages: This is rarely awarded for breach of contract cases. Unlike compensatory damages which are meant to cover the actual loss, punitive damages are awarded to punish the wrongdoer for egregious behavior and to deter others from committing similar acts. Punitive damages are given in addition to compensatory damages.
  1. Restitution: Restitution is a remedy which is used to restore the injured party to the position occupied before the contract. Under the principle of restitution, the defendant is supposed to give back any money or property received from the plaintiff under the contract and restitution is not used to compensate the plaintiff for lost profits or other earnings because of the breach of contract. Restitution is typically used in cases where the contract is voided by the court because the defendant lacked the competence or capacity necessary to enter into a contract.
  2. Rescission or Reformation: Sometimes, the contractual duties of both parties may be terminated by the court and when this happens, it is called rescission. This remedy is used in certain cases such as when the parties enter into a contract because of mistake, fraud, undue influence or duress and the only way to do justice is to terminate the contract. However, sometimes the remedy of reformation may be used which is when a court reforms or changes a contract to correct any inequities. In these cases, instead of setting aside the entire contract, the terms of the contract may be rewritten to do justice.
  3. Specific Performance: Under Specific Performance, the breaching party has to perform their duties as specified by the contract and it is used when money damages are not adequate to compensate the plaintiff. Specific performance is used in cases which involve giving a piece of land or a valuable item to the plaintiff. While the legal system frowns upon forcing individuals to do something against their will, if a person signed a contract selling the item but had the intent to defraud the other party, then the court can force them to sell the item. So long as the other party was willing to pay the contracted amount and was ready to do so.

1. MARIANNE BONNER. *The balance small business*. [online]. 27th February 2019. 6th May 2020. URL: <https://www.thebalancesmb.com/what-is-a-legal-contract-462462> [↑](#footnote-ref-1)
2. WIKIPEDIA. *Carlil v Carbolic Smoke Ball CO*. [online]. 24th January 2020. 6th May 2020. URL: <https://en.wikipedia.org/wiki/Carlill_v_Carbolic_Smoke_Ball_Co> [↑](#footnote-ref-2)
3. Andy Silverman. *4 Types of Breaches of Contract You Need to Be Aware Of*. [online]. June 4th 2019. 6th May 2020. URL: <https://www.contractworks.com/blog/4-types-of-breaches-of-contract-you-need-to-be-aware-of> [↑](#footnote-ref-3)
4. Ken LaMance. *What are the Remedies to a Breach of Contract*? [online]. 12th August 2018. 6th May 2020. URL: <https://www.legalmatch.com/law-library/article/ultimate-guide-to-remedies-for-breach-of-contract.html> [↑](#footnote-ref-4)