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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 (Treitel 2007, Para 17-049).

Discuss the following;

1. Breach of contract.
2. What are the remedies available for breach of contract?
3. BREACH OF CONTRACT

ABSTRACT

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 or services. In other words, a breach of contract is a broken promise to do or provide something. To explore this concept, consider the following breach of contract definition.

What is a Breach of Contract?

A breach of contract is an actual failure by a party to contract to perform his obligation under that contract or indications of his intention not do so (Oxford Dictionary of Law).[[1]](#footnote-1) According to Travis Peeler a breach of contract is occurs when the promise of the contract is not kept, because one party has failed to fulfill their agreed upon obligations, according to the terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement, or fails perform at all (Peeler). A breach of contract occurs when the promise of the contract is not kept because one party has failed to fulfill their agreed upon obligations according to the terms of the contract. A breach can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement or fails to perform at all. It always entitles the injured or innocent party to an action for damages against the guilty party[[2]](#footnote-2) (Sagay 547).

 A breach of contract occurs when the promise of the contract is not kept, because one party has failed to fulfill their agreed upon obligations, according to the terms of the contract. Breaching can occur when one party fails to deliver in the appropriate time frame, does not meet the terms of the agreement, or fails perform at all.

Requirements that must occur before a breach of contract can be upheld in the court. These requirements are:

1. Where one party indicates in advance that they will not be performing as agreed. This is also known as anticipatory breach. In the case of *Frost v. Knight[[3]](#footnote-3)* the defendant had promised to marry the plaintiff once his father had died. He later broke off the engagement while his father was still alive and when his ex-fiancée sued him for breach of promise, he argued that she had no claim as the time of performance had not yet arrived. The Court rejected the Defendant’s argument and ruled in favour of the Plaintiff. Also this principle was upheld in the case of *Johnstone v. Milling[[4]](#footnote-4)* where the court considered the acceptance of the repudiation of a contract.
Held: Lord Esher MR said: ‘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 the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue.
2. Where one party performs defectively, differently from the agreement or not at all. In the case of *Pilbrow v. Pearless de Rougement & co.[[5]](#footnote-5)* the appellant sued the respondent, a firm of solicitors, because he was dissatisfied with their legal services due to the fact that he telephoned them to make an appointment which was later arranged by an employee of the firm who was not a Solicitor. The Court of Appeal held that it accepted as a matter of fact that the standard of legal services had been provided by a solicitor but ruled that there had been a contract no just only to provide legal services but to provide legal services with a Solicitor. The firm did not perform that at all. Since no legal services were provided by a Solicitor, they had no right to payment.

Types of Breach of Contract

There are four types of contract breaches recognized by the law today:

* Minor breach.
* Material breach.
* Fundamental breach.
* Anticipatory breach.
* Minor Breach of Contract.

It is also sometimes called a Partial Breach of Contract or an Immaterial Breach of Contract, a Minor Breach of Contract refers to situations where the deliverable of the contract was ultimately received by the other party, but the party in breach failed to fulfill some part of their obligation. In such cases, the party that suffered the breach may only be able to pursue a legal remedy if they can prove that the breach resulted in financial losses. A late delivery, for example, may not have a remedy if the breached party cannot show that the delay resulted in financial consequences.

* Material breach of Contract.

A material breach occurs when one party receives significantly less benefit or a significantly different result than what was specified in a contract. Material breaches can include a failure to perform the obligations laid out within a contract or a failure to perform contracted obligations on time. When a material breach occurs, the other party may pursue damages related to the breach and both its direct and indirect consequences.

* Fundamental breach of Contract.

It refers to one of the parties in the agreement not keeping their part of the deal by failing to complete a contractual term that was essential to the agreement so much so that another party could not complete their own responsibilities in the contract. In the case of *Photo Productions ltd v. Securior Transport Ltd.[[6]](#footnote-6)* Lord Diplock defined a fundamental breach of contract as an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party substantially off the whole benefit which it was the intention of the parties that he should obtain from the contract. This type of breach is similar to Material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. Note, according to Sagay, 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 by virtue of Section 11(1) (c) of the Sale of Goods Act 1893 is applicable, a breach of condition will only give rise to a claim for damages, and the right to repudiate will be lost. This restriction on the right to repudiate does not apply to fundamental breaches of fundamental terms (Sagay 555)[[7]](#footnote-7).

* Anticipatory Breach of Contract.

A breach need not actually occur for the responsible party to be liable. In the case of an Anticipatory Breach, an actual breach has not yet occurred, but one of the parties has indicated that they will not fulfill their obligations under the contract. This can occur if the breaching party explicitly notifies the other party that they will not fulfill their obligations, but such a claim could also be based on actions that indicate one of the parties does not intend to or will not be able to deliver. This principle manifested in the case of *Hochester v. De la Tour*[[8]](#footnote-8) 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 breach of contract, even though the date of performance was still nearly a month ahead and he succeeded. This same rule is evident in the case of *Nigerian Supplies Manufacturing Co. ltd v. Nigerian Broadcasting Corporation*[[9]](#footnote-9).

1. Remedies Available for a Breach of Contract

When and innocent party is caught up in a breach of contract by the other party to the contract, what can he do? The innocent party should seek for remedies to a breach of contract in the court of law in order to run at a loss. With this we need to discuss the remedies available to the innocent party after a breach of contract. According to Gregory Brown t**here are a variety of remedies available for a contract breach**. The appropriate compensation or remedy depends upon the circumstances. The non-breaching party will need to demonstrate that the other party failed to perform in order to be entitled to any type of remedy. The Southern California Breach of Contract Lawyers at Brown & Charbonneau, LLP can provide legal representation in cases where one party failed to perform according to the terms of a contractual agreement (Brown)[[10]](#footnote-10). Note, only in special circumstances will the equitable remedies of specific performance and injunction be granted by Courts.[[11]](#footnote-11)

1. **Monetary damages**.

Money damages refer to the monetary payments which a breaching party has to make for [violating the terms of contract](https://www.legalmatch.com/law-library/article/contract-consideration.html). 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.

The party who breached the contract can be held responsible for the losses caused by the breach.  Both general or expectation damages and consequential damages can result from a breach of a contract.  General or expectation damages refer to the loss directly caused by the breach. Consequential damages refer to losses that occurred because of the breach but that were an indirect cause.  For example, if you contracted and paid for a machine to be delivered and it never came, the general losses would include the value of the money you paid for the machine. The consequential losses could include the loss of business caused by the fact you did not have the machine you needed to do your work. There are different types of money damages such as:

* [Compensatory Damages](https://www.legalmatch.com/law-library/article/compensatory-damages-in-breach-of-contract.html)

 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](https://www.legalmatch.com/law-library/article/punitive-damages-for-breach-of-contract.html)

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.

Note that punitive damages are requested and it is up to the court to decide if they wish to award them and the amount (LaMance).

## Incidental Damages

In addition to compensatory damages, the nonbreaching party may recover incidental damages. Incidental loss includes expenditures that the nonbreaching party incurs in attempting to minimize the loss that flows from the breach. To arrange for substitute goods or services, the no breaching party might have to pay a premium or special fees to locate another supplier or source of work.

## Consequential Damages

A consequential loss is addressed with consequential damages. These are damages incurred by the nonbreaching party without action on his part because of the breach. For example, if Ralph does a poor job of plumbing Betty’s bathroom and the toilet leaks, damaging the floor, the downstairs ceiling, and the downstairs rug, Ralph would owe for those loses in consequential damages. Or, again, lost sales stemming from a failure to fix a manufacturer’s machine in time or physical and property injury due to a defective machine sold by the promisor would be addressed with consequential damages. Note, however, that one obvious, and often large, expenditure occasioned by a breach—namely, legal expenses in bringing a lawsuit to remedy the particular breach—is not an element of damages, unless the contract explicitly states that it is, and cannot be charged to the defendant. There is one situation, however, in which legal costs can be added to damages: when the breach causes the nonbreaching party to be involved in a lawsuit with someone else. Consequential damages will not be allowed if those damages are not foreseeable. This issue is taken up in [Section 16.5 “Limitations on Contract Remedies”](http://2012books.lardbucket.org/books/the-legal-environment-and-business-law-v1.0-a/s19-remedies.html#mayer_1.0-ch16_s05).

## Nominal Damages

In the situation where there has been a breach but the nonbreaching party has really suffered no loss or cannot prove what his loss is, he is entitled to nominal damages. Ricardo contracts to buy a new car from a dealer; the dealer breaches the contract. Ricardo finds and buys the same car from another dealer at the same price that the first one was to sell it for. Ricardo has suffered nominal damages: five dollars, perhaps.

## Liquidated Damages

Precisely because damages are sometimes difficult to assess, the parties themselves may specify how much should be paid in the event of a breach. Courts will enforce a liquidated damages provision as long as the actual amount of damages is difficult to ascertain (in which case proof of it is simply made at trial) and the sum is reasonable in light of the expected or actual harm. If the liquidated sum is unreasonably large, the excess is termed a penalty and is said to be against public policy and unenforceable. [Section 16.6.2 “Liquidated Damages”](http://2012books.lardbucket.org/books/the-legal-environment-and-business-law-v1.0-a/s19-remedies.html#mayer_1.0-ch16_s06_s02), Watson v. Ingram*[[12]](#footnote-12)*, illustrates liquidated damages.

1. **Specific Performance**

 [Under specific performance](https://www.legalmatch.com/law-library/article/specific-performance-lawyers.html), 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. In some cases, the appropriate remedy for a breach of contract is to correct the breach by forcing the breaching party to complete the terms of the agreement. Specific performance is an appropriate remedy in situations where monetary damages could not possibly make the non-breaching party whole for the losses. For example, if there was a contract created for a buyer to purchase a very rare piece of art, the buyer could not simply find the art elsewhere. The only remedy that would help the buyer in this circumstance is for the court to require the sale to go through so the buyer got the unique one-of-a-kind painting that he contracted for. This is an equitable remedy granted at the Court’s discretion. It is a decree by a Court to compel a party to perform his contractual obligations. It is only usually ordered where damages is not an adequate remedy (where the subject matter of the contract is unique, for example Chinese vases in *Falcke v. Gray*[[13]](#footnote-13) but not if the subject could be replaced even after a long delay[[14]](#footnote-14).

Specific performance is not available for contracts requiring personal services such as employment contracts because such an order would restrict an individual’s freedom[[15]](#footnote-15).

The court has broad discretion to award specific performance and in exercising its discretion, it takes into account factors such as:

* Delay in asking for the order[[16]](#footnote-16)
* Whether the person seeking performance is prepared to perform his side of the Contract[[17]](#footnote-17)
* Whether the person against whom the order is sought would suffer hardship in performance[[18]](#footnote-18)
* The difference between the benefit the order would give to one party and the cost of performance to the other[[19]](#footnote-19)
* Whether any third party rights would be affected
* Whether the contract lacks adequate consideration. Here the rule “equity will not assist a volunteer applies so that specific performance will not be ordered if the contract is for nominal consideration even if it is under seal.[[20]](#footnote-20)

### 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](https://www.legalmatch.com/law-library/article/restitution-lawyers.html), 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.

1. **Injunction**

An injunction is another way by which a Court can order specific performance. Like specific performance, it is an equitable remedy and is 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 he needs to restrain the defendant from starting or continuing breach of negative contractual undertaking (prohibitory injunction) or needs to compel performance of a positive contractual obligation (mandatory injunction).

Where a party to a contract undertakes not to do something (prohibitory injunction), a Court order prohibiting him from doing that thing is a negative way of enforcing the contract. In the case of *Warner Bros. Pictures Inc. v. Nelson*[[21]](#footnote-21) a film actress signed an undertaking with the plaintiffs, her employers, not to act for any other organization. An injunction was issued to restrain her from committing a breach of this stipulation when she attempted to enter the employment of a third party. This is also seen in the case of *African Songs ltd v. Sunday Adeniyi[[22]](#footnote-22)* where a musician who undertook to perform and record solely for the plaintiff company, was restrained for the remaining period of the contract from recording for himself or any other company.

On the other hand, where the injunction is mandatory, it is restorative in its effect and not merely preventive. It directs the defendant to undo what he has already done in breach of contract. However, this type of injunction is rarely granted. In exercising its discretion, the Court will consider the same factors in specific performance and will use the balance of convenience test that is, 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[[23]](#footnote-23).

### Rescission and Reformation

Sometimes, the contractual duties of both parties may be terminated by the court and when this happens, [it is called rescission](https://www.legalmatch.com/law-library/article/contract-rescission-lawyers.html). 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 (LaMance).

With all these discussed above I hope that I have been able enlighten my readers on breach of a contract and the remedies available for innocent parties for the breach of contract. Thank you.

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5. [1999] 3 All ER 355 [↑](#footnote-ref-5)
6. [1980] A.C. 827 [↑](#footnote-ref-6)
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