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Assignment Title: Breach of Contract

Course Title: Law of Contract II

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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:

Breach of contract

What are the remedies available for breach of contract.

Answers.

BREACH OF CONTRACT.

Breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach 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. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party.

If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

It is important to bear in mind that contract law is not the same from country to country. Each country has its own independent, free standing law of contract. Therefore, it makes sense to

examine the laws of the country to which the contract is governed before deciding how the law of contract (of that country) applies to any particular contractual relationship.

When a breach of contract occurs or is alleged, one or both of the parties may wish to have the contract enforced on its terms, or may try to recover for any financial harm caused by the alleged breach. If a dispute over a contract arises and informal attempts at resolution fail, the most common next step is a lawsuit.

That said, normally breach of contract is civil; in fact, breach of contract is often the preferred economic move for both parties. So long as you don't engage in fraud by doing so, it's not criminal normally. As for debt, no, you cannot normally go to jail just for failing to pay a debt. there are four types of contract breaches: anticipatory, actual, minor and material.

Anticipatory breach vs. actual breach

Most breaches of contract fall into one of two categories. They can either be considered actual breaches or anticipatory breaches. An actual breach occurs when one person refuses to fulfill his or her side of the bargain on the due date or performs incompletely. Anticipatory breach occurs when one party announces, in advance of the due date for performance, that he intends not to fulfill his side of the bargain.

Both actual and anticipatory contract breaches are bad news for the individuals and organizations at hand. They can waste both money and time, and certainly lead to frustration for everyone involved. That doesn't mean there aren't remedies in either case.

Minor breach vs. material breach

Breaches of contract can also be minor or material. A breach is likely material if one party ends up with something significantly different than what was specified in the contract. For example, if you contact with a web designer to build a new site for home cafe, but end up with a blog about bagels that doesn't even mention your place, the breach is probably

material. In most cases, a material breach means the non-breaching party is no longer required to perform his or her end of the deal and has a right to remedies.

A minor breach, sometimes called a partial breach, can be a big deal, too. In many cases, a minor breach means that one party failed to perform some part of the contract even through the specified item or service was ultimately delivered. Consider the cafe website contract. If the finished product met all the client's demands but was completed a day after it was requested, the breach might be considered minor. Unless the initial contract terms specifically mentioned that 'time is of the essence' or that the website was under a tight deadline, a reasonable delay from the web designer would only be considered a minor breach. See the case of *Wema Bank PLC v Oloko (CA/I/88/2009)[2014] NGCA 1 (27 February 2014) abd WEMA BANK PLC V. ALHAJI SOLA OLOKO (CA/I/88/2009)[2014] NGCA 2 (27 February 2014)*

REMEDIES FOR BREACH OF CONTRACT.

In contract law, a “remedy” is a court-ordered resolution to one party’s breach of contract. A breach of contract occurs when one party to a contract has not fulfilled his or her obligation under the agreement. The non-breaching party is also known as the “injured” party, and the purpose of remedies is to place the injured party in the position they would have otherwise been in had the contract been performed as it was agreed upon.

Once a party to a contract establishes to the satisfaction of the court that the other party has committed a breach of contract, the most common claim is that for damages, and certainly it is the most readily granted type of remedy by courts. Only in special circumstances will the equitable remedies of specific performance and injunction be granted by courts.

Damages.

Damages refers to money paid by one side to the other; it is a legal remedy. For historical and political reasons in the development of the English legal system, the courts of law were originally only able to grant monetary relief. If a petitioner wanted something other than money, recourse to a separate system of equity was required. The courtrooms and proceedings for each were separate. The underlying basis for the common law remedy of damages was laid down by *Parke.B in Robinson vs. Harman " The rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the sane situation, with respect to damages, as if the contract had been performed".* The rule in *Hadley vs. Baxendale* has been divided into two parts or branches, the first dealing with normal damages and the second with abnormal damages that arises because of special or exceptional circumstances.

What Damages Can Be Awarded?

There are two general categories of damages that may be awarded if a breach of contract claim is proved. They are:

1. Compensatory Damages. Compensatory damages (also called "actual damages") cover the loss the non breaching party incurred as a result of the breach of contract. The amount awarded is intended to make good or replace the loss caused by the breach.

There are two kinds of compensatory damages that the non breaching party may be entitled to recover:

A. General Damages. General damages cover the loss directly and necessarily incurred by the breach of contract. General damages are the most common type of damages awarded for breaches of contract.

Example: Company A delivered the wrong kind of furniture to Company B. After discovering the mistake later in the day, Company B insisted that Company A pick up the wrong furniture and deliver the right furniture. Company A refused to pick up the furniture

and said that it could not supply the right furniture because it was not in stock. Company B successfully sued for breach of contract. The general damages for this breach could include:

• refund of any amount Company B had prepaid for the furniture; plus

• reimbursement of any expense Company B incurred in sending the furniture back to Company A;

• payment for any increase in the cost Company B incurred in buying the right furniture, or its nearest equivalent, from another seller.

B. Special Damages. Special damages (also called "consequential damages") cover any loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable. These are actual losses caused by the breach, but not in a direct and immediate way. To obtain damages for this type of loss, the non breaching party must prove that the breaching party knew of the special circumstances or requirements at the time the contract was made.

Example: In the scenario above, if Company A knew that Company B needed the new furniture on a particular day because its old furniture was going to be carted away the night before, the damages for breach of contract could include all of the damages awarded in the scenario above, plus:

• payment for Company B's expense in renting furniture until the right furniture arrived.

2. Punitive Damages. Punitive damages (also called "exemplary damages") are awarded to punish or make an example of a wrongdoer who has acted willfully, maliciously or fraudulently. Unlike compensatory damages that are intended to cover actual loss, punitive damages are intended to punish the wrongdoer for egregious behavior and to deter others from acting in a similar manner. Punitive damages are awarded in addition to compensatory damages.

Punitive damages are rarely awarded for breach of contract. They arise more often in tort cases, to punish deliberate or reckless misconduct that results in personal harm.

How are Compensatory Damages Calculated?

The calculation of compensatory damages depends on the type of contract that was breached and the type of loss that was incurred. Some general guidelines are:

Standard Measure. The standard measure of damages is an amount that would allow the non breaching party to buy a substitute for the benefit that would have been received if the contract had been performed. In cases where the cost of the substitute is speculative, the non breaching party may recover damages in the amount of the cost incurred in performing that party's obligations under the contract.

Contracts for the Sale of Goods. The damages are measured by the difference between the contract price and the market price when the seller provides the goods, or when the buyer learns of the breach.

Are There Any Limitations on the Award of Compensatory Damages?

An important limitation on the award of damages is the duty to mitigate. The non breaching party is obligated to mitigate, or minimize, the amount of damages to the extent reasonable. Damages cannot be recovered for losses that could have been reasonably avoided or substantially ameliorated after the breach occurred. The non breaching party's failure to use reasonable diligence in mitigating the damages means that any award of damages will be reduced by the amount that could have been reasonably avoided.

<u>Liquidated Damages.</u>

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. *Watson v. Ingram, illustrates liquidated damages.*

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 [1953] Ch 770.*

Specific performance.

This is an equitable remedy granted at the court's discretion. Specific performance is a decree by the court to compel a party to perform his contractual obligations. It is usually only ordered where damages are not an adequate remedy (for example where the subject matter of the contract is unique for example,Chinese vases in *Falcke v Gray ([1859] 4 Drew651)* but not if a replacement of the subject matter could be obtained even after a very long delay

It is a general rule that specific performance will not be ordered if the contract requires performance or constant supervision over a period of time and the obligations in the contract are not clearly defined. For example, specific performance of a covenant to keep a shop open during normal business hours was refused by the House of Lords in *Co-opInsurance v Argyll Stores ([1997] 3 All ER 297)* on the grounds that enforcement of a covenant to carry on a business would require constant supervision of the courts with the court resorting to criminal punishment for contempt of court if the order was not complied with. However, a recent case has reversed this rule in relation to a tenant's repair covenants (*RainbowEstates Limited v Token hold Limited and another [1998] NewProperty Cases 33).* The judge in this case

concluded that the old law of refusing specific performance if it would involve constant supervision was no longer good or (at least) that there were exceptions. It may be that only in the most exceptional circumstances such as in this case) specific performance will be available to the landlords; however the arguments advanced indicate that it should be available in other situations.Specific performance was ordered requiring tenants to spend£300,000 on repairs to the flats. Factors militating in favor of this remedy were that the landlord had no right of entry to repair in default of the tenant; that the lease had no forfeiture clause and that the building was listed so that repair as distinct from redevelopment was the most appropriate outcome.

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 [1852] 1 DM & G604).*

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.

Bibliography

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4) Wema Bank PLC v Oloko (CA/I/88/2009)[2014] NGCA 1 (27 February 2014)
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