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Questions

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.

Nature of breach

A breach of contract occurs where a party to a contract fails to perform, precisely and exactly, his obligations under the contract. This can take various forms for example, the failure to supply goods or perform a service as agreed. Breach of contract may be either actual or anticipatory. **Actual breach** occurs where one party refuses to form his side of the bargain on the due date or performs incompletely. **Anticipatory breach** occurs where one party announces, in advance of the due date for performance, that he intends not to perform his side of the bargain. The innocent party may sue for damages immediately the breach is announced..

Effects of breach

A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in three situations. The breaches which give the innocent party the option of terminating the contract are:

- (a) **Renunciation**: Renunciation occurs where a party refuses to perform his obligations under the contract. It may be either express or implied. *Hochster v De La Tour* is a case law example of express renunciation. Renunciation is implied where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract.
- (b) **Breach of condition**: The second repudiatory breach occurs where the party in default has committed a breach of condition. Thus, for example, in *Poussard v Spiers* the employer had a right to terminate the soprano's employment when she failed to arrive for performances.
- (c) **Fundamental breach**: The third repudiatory breach is where the party in breach has committed a serious (or fundamental) breach of an in-nominate term or totally fails to perform the contract.

Breach of Contract in English Law

A breach of contract could be defined to be an act which occurs when a party without lawful excuse fails or refuses to perform what is due from him under the contract, performs defectively or incapacitates himself from performing. Regardless it is worth noting a breach of contract does not automatically bring a contract to an end, a breach of contract gives to the innocent party a right to claim damages and it may give him the additional right to terminate further performance of the contract. *The Mihalis Angelos*¹ In other circumstances, one contracting party may inform the other party before the time fixed for performance under the contract, that he will not perform his obligations under the contract, of which an anticipatory breach of contract occurs thus entitling the innocent party to terminate further performance of the contract immediately. In *Hochster v De La Tour*² Where the defendant agreed to employ the claimant to act as his courier for three months from the 1st of June of which the defendant subsequently wrote to the claimant informing him that his services would no longer be required, of which the courts held he claimant could commence his action for damages at the date he chose to do so (22nd of May), he did not have to wait until the 1st of June when performance was due.

Damages for Breach of Contract

The major remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the injured party. In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action. In making an award of damages,

Expectation Interest

Firstly, this could be argued by seeking to protect the claimants expectation interest as identified in *Ruxley Electronics and Construction Ltd v Forsyth*³ where the claimants agreed to construct a swimming pool for the defendant, of which in breach of contract the claimants having built the pool to a depth of six feet when its depth should have been seven foot six inches, Lord Mustill held as the loss which the defendant had suffered was the disappointment which he had experienced in not getting a swimming pool of the correct specifications and that loss was best reflected in award of £2500 for loss of amenity. However, as regards to the other question of whether the defendant was entitled to recover the cost of cure damages, it was held that not reasonable for the defendant to recover cost of cure damages due to the fact with due regard to the reasonableness of the course of action pursued by the defendant when seeking to assess the loss which he had suffered, the cost of carrying out the work was out of all proportion to the benefit which the defendant would obtain by its performance.

¹ [1971] 1 QB 164,200,204

² (1853) 1 E&B 678.

³ [1996] AC 344

Restitution Interest

Secondly, as regards to an award of damages for breach of contract, provided a claimant can establish that the defendant was enriched, and that the enrichment was at the claimant's expense of which it would be unjust that the defendant retain the benefit without recompensing the claimant, then a restitutionary remedy may be available in these circumstances so as to seek to protect his restitution interest rather than his expectation interest. Thus, as established in the House of Lords decision in *A-G v Blake*⁴ where the Attorney general sought to recover the profits made by the spy George Blake, from his breach of contract in writing an autobiography, and including within it information which he had given an undertaking to the crown that he would not divulge, the House of Lords held that the crown was entitled to recover the profits made by Blake from his breach of contract and, furthermore, that they were entitled to recover the whole of that profit.

Reliance Interest

Finally, as regards to the award of damages, the claimant may wish to claim the protection of his reliance interest so that he is put in the position which he would have been in had he not entered into a contract with the defendant. For instance, the claimant may have wasted expenditure in the performance of the contract prior to its termination and may wish simply to recover that expenditure.

In *Anglia Television Ltd v Reed*⁵ the claimants engaged the defendant to star in a film which they were making. At the last moment the defendant repudiated the contract and the claimants had to abandon the film because they were unable to find a replacement actor. Lord Denning held whilst the claimants claimed for their loss of expenditure, they were not limited to expenditure incurred after the contract was concluded, but they could also claim for expenditure incurred before the contract was concluded provided that it was within the reasonable contemplation of the parties that it would be likely to be incurred as a result of the defendant's breach.

Nigerian Law on Formation, Breach of Contract and its remedies⁶

Defining Contract under Nigerian Law

A contract may be defined as an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises (Keenan, 1997). Abiola sees contract as simple an agreement made between two or more competent parties which the law will enforce. (Abiola, 2005) Generally, at common law only a party to a contract or persons who are privy to a contract can sue and be sued on it. In other words, a stranger to a contract cannot sue or be sued on a contract even if it was made for his benefit or purported to give him a right to sue.

⁴ [2001] 1AC 268

⁵ [1972] 1 QB 60

⁶ See <www.ccsenet.org/jpl> Journal of Politics and Law Vol. 5, No. 4; 2012 124 for the full article on The Principle and Nature of Law of Contract in Nigeria: Formation of Binding Contract)

Damages for Breach of Contract

In Nigeria, the principles for the assessment of the quantum of damages for breach of contract have their roots in the rule set out in the 19th century English case of *Hadley v Baxendale*⁷ the principle of law enunciated in this case is that damages in respect of breach of contract should be such as:

1. May fairly and reasonably arise naturally (i.e., according to the usual course of things from such breach of contract itself); or
2. May reasonably be supposed to have been in the contemplation of both parties at the time they entered into the contract, as the probable result of breach.

The Nigerian Supreme Court has applied the doctrine in several cases as a means of restoring an innocent party claiming damages for breach to the position it would have been in had the breach not occurred. As a result, the assessment of damages is based purely on damages flowing naturally from the breach.⁸ As it relates to claims for damages for breach of contract, the application of this principle eliminates the categorisation of heads of damages into special and general damages.⁹ One of the issues recently presented before the Nigerian Supreme Court in *British Airways v Atoyebi*¹⁰ was whether the Court of Appeal was right to have awarded general damages in a case involving a breach of contract of carriage by air.

The major remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the injured party. In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action. In making an award of damages, **the court has two major considerations:**

Remoteness for what consequences of the breach is the defendant legally responsible?

The measure of damages – the principles upon which the loss or damage is evaluated or quantified in monetary terms.

The second consideration is quite distinct from the first, and can be decided by the court only after the first has been determined.

Equitable remedies

Specific performance

- This is an order of the court requiring performance of a positive contractual obligation.
- Specific performance is not available in the following circumstances:
 - Damages provide an adequate remedy.
 - Where the order could cause undue hardship.
 - Where the contract is of such a nature that constant supervision by the court would be required,
 - Where an order of specific performance would be possible against one party to the contract, but not the other.
 - Where the party seeking the order has acted unfairly or unconscionably. He is barred by the maxim '*He who comes to Equity must come with clean hands*'.
 - Where the order is not sought promptly the claimant will be barred by the maxims '*Delay defeats the Equities*' and 'Equity assists the vigilant but not the indolent'.

⁷ (1845) Exch 341

⁸ *Stephen Okongwu V NNPC* (1989) 4 NWLR (Pt 115) 296 @ 306h-307a;

⁹ *GKF Investment Nigeria Ltd v NITEL Plc* (2009) 15 NWLR (Pt 1164) 344 @384C-E.

¹⁰ [1] (2014) 13 NWLR (PT 1424) 253

British Airways v Atoyebi

Facts

Atoyebi, a senior advocate of Nigeria was a first-class passenger on board a British Airways flight from London Heathrow to Lagos on May 8 2000. On arrival in Lagos, it emerged that one of his bags which had been tagged and checked in had not arrived with the flight. During one of several visits to British Airways' Lagos office at the airport between May 8 and 10 2000, Atoyebi was informed that the bag had been found at Heathrow and would be sent to Lagos. Atoyebi sent an associate with written authorisation to collect the bag at Heathrow, but British Airways refused to hand over the bag. On May 10 2000 Atoyebi travelled to London for the sole purpose of collecting the bag. Atoyebi was met on arrival in London by a British Airways employee who took him to a luggage storage room where Atoyebi found his bag intact. Atoyebi sought compensation for the manner in which he was treated and the resultant losses he had incurred. British Airways offered to pay £508 in compensation. Dissatisfied with the offer, Atoyebi sued British Airways for each loss particularised as follows:

- ◆ one-way first-class ticket to Lagos on May 7 2000 - \$1,500;
- ◆ two return club-class tickets to London on May 10 2000 - \$3, 950;
- ◆ one night's stay at a London hotel - £225;
- ◆ taxis for him and his associate - £115;
- ◆ telephone calls and faxes - £73;
- ◆ loss of professional time for travelling to the United Kingdom (based on his hourly rate of £150) - £6,600; and
- ◆ Damages for stress and inconvenience of travelling - £100,000.

The trial court granted all of Atoyebi's claims. British Airways' appeal was dismissed and the first instance judgment affirmed by unanimous decision of the Court of Appeal. British Airways appealed to the Supreme Court.

Argument and issues

British Airways argued that the Warsaw Convention 1929, incorporated into Nigerian law by the Carriage by Air (Colonies, Protectorates and Trusts Territories) Order 1953, applied exclusively to Atoyebi's cause of action. It contended that under the Carriage by Air Order, an air carrier's liability is limited to the thresholds set out in Section 22(2) of the order. Thus, the grant of Atoyebi's claims under the common law principles of breach of contract led to an incorrect assessment of damages and the claims ought to have been dismissed. Atoyebi contended that evidence put before the first-instance court showed that British Airways had clearly been negligent and/or guilty of willful misconduct bordering on wanton or deliberate recklessness in the performance of its obligations. He argued that under Article 25 of the Carriage by Air

Order, once willful misconduct has been established, the provisions of the order which seeks to exclude or limit the carrier's liability do not apply.

Supreme Court of Nigeria decision

In a unanimous decision the Supreme Court allowed the appeal in part. The court agreed with Atoyebi and affirmed the lower courts' decisions that although the provisions of the Carriage by Air Order applied to his claims, there was clear evidence of willful misconduct on the part of British Airways in the discharge of its duties. The lower courts were thus correct not to apply the provisions of the order which would limit its liability and to award all specific heads of claims as special damages under the common law as applicable to breach of contract.

However, the Supreme Court allowed the appeal with regard to the award of £100,000 as (general) damages for stress and inconvenience and set aside the award. The Supreme Court held that the rationale behind the compensatory theory of award of damages is to restore the injured party to the position in which it found itself prior to the breach. The court held that an award of £100,000, in addition to compensation for various specific items granted to Atoyebi, was manifestly too high and without any justifiable basis, and amounted to double compensation. Atoyebi's argument that the court should have followed a similar case involving celebrity Victoria Beckham, who had been awarded £100, 000 for the loss of her luggage in the United Kingdom, was rejected on the basis that the facts were different. In Beckham's case, the luggage had been lost; in this case, delivery of the luggage was merely delayed. In any event, there was no evidence that Atoyebi had made any special declaration on the luggage, as Beckham had.

Conclusion

This proposes thesis shall critically reflect on the law in the different contexts of governed by contract law, and as already mentioned in the abstract above, a methodological and scientific approach as to the research question at hand would I embark on in achieving the results intended.

References

1. www.academia.edu
2. www.djetlawyer.com
3. SAGAY: Nigerian Law Of Contract