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COURSE: LAW OF CONTRACT.

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.

INTRODUCTION.

When two parties enter into a contract, it is expected that both parties perform their respective duties[[1]](#footnote-1). However, this isn’t always the case. Before I go on, a contract simply put, is a binding agreement between two parties made up of an offer, an acceptance and consideration majorly[[2]](#footnote-2). Rules have been put in place to guide the actions of parties involved in contracts and to hold parties that fail to perform their duties accountable. In essence, a party to a contract should not agree on something with another party and go back on his or her word without facing certain consequences and also to prevent the innocent party from incurring a loss or ultimately being in a disadvantaged position. This is why there are remedies available when a breach of contract occurs[[3]](#footnote-3). Along the course of this assignment, I intend on giving an insight into the meaning and inner workings of a breach of contract with examples, as well as the remedies available.

WHAT IS A BREACH OF CONTRACT?

A breach of contract entails a failure of any of the parties to a contract to perform any of the terms involved in the contract[[4]](#footnote-4). It could even be interfering with the other party’s performance. In other words, it is the violation of any of the agreed upon terms in a binding contract. From providing inferior goods, to failure to complete the job fully. All entail a breach of contract. Sometimes, the process for dealing with a breach of contract is written in the original contract. For example, a contract may state that in the event of late payment, the offender must pay a $25 fee along with the missed payment. If the consequences for a specific violation are not included in the contract, then the parties involved may settle the situation among themselves, which could lead to a new contract, adjudication, or another type of resolution. A typical breach of contract case is ***Revelations Perfume and Cosmetics Inc. v. Prince Rogers Nelson***

In 2008, the Revelations Perfume and Cosmetics Company sued the famous musician “Prince” and his music label, seeking $100,000 in damages for reneging on an agreement to help market their perfumes. The flamboyant pop star had promised to personally promote the company’s new perfume named after his 2006 album “3121,” and to allow his name and likeness to be used in the perfume’s packaging. Prince then refused to grant interviews related to the project, and refused to provide a current photograph for a press release.

In its breach of contract complaint, Revelations asked the court to award more than $3 million in lost profits, as well as punitive damages. The judge found no evidence, however, that the pop star acted with malicious intent, and ordered him to pay nearly $4 million for the cosmetics company’s out-of-pocket expenses. Revelations’ request for punitive and loss-of-profits damages was denied.

General Requirements

A breach of contract suit must meet four requirements before it will be upheld by a court:

1.) The contract must be valid. It must contain all essential contract elements by law. A contract isn't valid unless all these essential elements are present, so without them, there can be no lawsuit.

2.) The plaintiff or the party who's suing for breach of contract must show that the defendant did indeed breach the agreement's terms.

3.) The plaintiff must have done everything required of them in the contract.

4.) The plaintiff must have notified the defendant of the breach before proceeding with filing a lawsuit. A notification made in writing is better than a verbal notification because it offers more substantial proof.

For example, the case of ***Macy’s v. Martha Stewart Living.*** The case fulfilled all the necessary conditions. Macy’s department stores filed a breach of contract complaint against Martha Stewart Living On media for making an agreement with J.C. Penney for the creation of Martha Steward retail stores within their retain stores beginning February 2013. Prior to the deal, J.C. Penney had purchased a minority stake in Steward’s company for $38.5 million. The mini-retail stores were to carry Martha Stewart home goods, however Macy’s argued they had been granted an exclusive right to make and sell certain Martha Steward Living products in an agreement signed in 2006.

Macy’s asked the court to grand a preliminary injunction to stop Steward from breaching the contract while the court considered the matter. Twelve years later, in June 2014, a New York judge ruled that J.C. Penney had indeed stepped over Macy’s contract with the domestic diva in its attempt to sell products bearing her name. While the J.C. Penney contract has been nullified, monetary breach of contract damages were not immediately decided, and may be limited to the legal fees and costs of the lawsuit, as the judge decided the case did not warrant punitive damages

TYPES OF CONTRACT BREACHES

Breaches of contracts could take various forms and be of different degrees which is why there are different remedies available[[5]](#footnote-5) however, under law, there are four recognised types of breach of contract which include:

Partial Breach

This sort of breach does not go to depth of the contract. A partial breach, or failure to perform or provide some immaterial provision of the contract, may allow the aggrieved party to sue, though only for “actual damages.” For example: A homeowner hires a contractor to put a pond in his backyard, showing the contractor the black liner her would like installed under the sand. The contractor instead installs a blue liner of the same design and thickness, which is totally hidden from view. The contractor may have breached the precise terms of the contract, but the homeowner cannot ask that the contractor be ordered to take out the pond and start over with the black liner. The homeowner could ask that the contractor be ordered to refund the difference in price between the requested black liner and the installed blue liner. In this case, because the colour of the liner has no effect on functionality, and the price was basically the same, the difference in value, or “actual damages,” is zero. In the case of ***Cutler v Powell***, The Court stipulated that, where parties conclude an express contract, no terms can be implied into the contract. On the facts, the contract between the parties expressly provided that the payment was conditional upon the completion of the voyage and only payable after the ship’s arrival. Thus, under the express terms of the contract, the sailor was entitled to receive the payment if the whole duty of the contract was performed, and not entitled to any payment if the contract was only partially performed. The Court noted that the contract made payment conditional on performance of the full voyage as a form of insurance for the employer. Accordingly, the Court held that, even though the sailor was not to blame for failure to perform the contract, the express terms of the contract renders payment conditional on the full performance of the contract. Thus, on a construction of the express terms of the contract, no payment was due for partial performance.

Material Breach of Contract

Failure of one party to perform his obligations under the contract in such a way that the value of the contract is destroyed, exposes that party to liability for breach of contract damages. For example, if the contractor in the above example had used thin plastic not intended for the rigors of maintaining a pond, which could not be expected to last as long as the pond liner, the homeowner might recover the actual cost to correct the material breach, which would include removing the pond and replacing the liner.

A material breach of contract may relieve the aggrieved party of his own obligations under the contract, and give him the right to sue for damages. Such a total breakdown of the material provisions of a contract may be referred to as a “fundamental” or “repudiatory” breach.

Anticipatory Breach of Contract

This particular type of contract breach has raised a lot of questions with experts arguing that a breach of contract can’t occur before the contract is actually breached either by actions, speech or intentions[[6]](#footnote-6). Anticipatory breach, also known as “anticipatory repudiation,” occurs when one party to a contract stops acting in accordance with the contract, leading the other party to believe he has no intention of fulfilling his part of the agreement. In this case, the breaching party may give such an impression by his actions, or failure to act, such as failing to produce an ordered item, refusing to accept payment, or somehow making it obvious that he cannot or will not fulfill the terms of the contract. An anticipatory breach of contract enables the non-breaching party to end the contract and sue for breach of contract damages without waiting for the actual breach to occur. For example: Jane agrees to sell her antique sewing machine to Amanda, and the two agree on the purchase price of $1,000, the sale to occur on May 1st. On April 25th, Amanda tells Jane that she cannot come up with the money on time. Following this communication, Jane can reasonably assume that Amanda is in anticipatory breach. This enables Jane to sell the sewing machine to someone else, or potentially file a lawsuit against Amanda for breach of contract.

Fundamental breach of contract.

This is when the person that has had the contract breached against can sue the breaching party for damages incurred as well as terminate the contract if they wish to do so. This type of breach goes to the depth of the contract. As lord Abinger stated **in *chanter v Hopkins*** [[7]](#footnote-7) “if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty that he should sell him peas; the contract is to sell peas and if he sends him anything else in their stead, it is a non-performance of it. In the case of ***photo production ltd v Securicor transport ltd.*** The house of lords held that the doctrine of fundamental breach was not relevant here, and that the case was a matter of construction of the contract. The exclusion clause did on the facts, cover the damage in question and therefore Securicor were not liable for the damage.

What are the remedies for breach of contract?

When an individual or business breaches a contract, the other party to the agreement is entitled to relief (or a "remedy") under the law. In the case of ***Hadley v Baxendale***, The Court found for the defendant, viewing that a party could only successfully claim for losses stemming from breach of contract where the loss is reasonably viewed to have resulted naturally from the breach, or where the fact such losses would result from breach ought reasonably have been contemplated of by the parties when the contract was formed. As Baxendale had not reasonably foreseen the consequences of delay and Hadley had not informed him of them, he was not liable for the mill’s lost profits. .The main remedies for a breach of contract are:

Damages

The payment of damages — payment in one form or another — is the most common remedy for a breach of contract. There are many kinds of damages, including the following:

Compensatory damages aim to put the non-breaching party in the position that they would have been in if the breach had not occurred.

Punitive damages are payments that the breaching party must make, above and beyond the point that would fully compensate the non-breaching party. Punitive damages are meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the business contracts setting.

Nominal damages are token damages (small amount of damages) awarded when a breach occurred, but no actual money loss to the non-breaching party was proven.

Liquidated damages are specific damages that were previously identified by the parties in the contract itself, in the event that the contract is breached. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach. In the case of ***Smith, Hogg & Co v Black Sea*** ***Insurance (1940***). A ship owner was held liable to a charterer in damages for loss of a cargo which had been caused by a combination of perils of the sea and the Unseaworthiness of the ship. The latter was sufficient to carry a claim for damages.

Specific Performance

If damages are inadequate as a legal remedy, the non-breaching party may seek an alternative remedy called specific performance. Specific performance is best described as the breaching party's court-ordered performance of duty under the contract. Specific performance may be used as a remedy for breach of contract if the subject matter of the agreement is rare or unique, and damages would not suffice to place the non-breaching party in as good a position as they would have been in had the breach not occurred. In the case of ***co-operative insurance society ltd v Argyll stores (holding) ltd 1997 2 WLR 898.*** Co-op Insurance was landlord of Hillsborough Shopping Centre in Sheffield which consisted of 25 retail outlets. In 1979, Argyll Stores took a lease of one of the units for a period of 35 years for the purpose of operating a Safeway supermarket. The lease contained a covenant by which Argyll agreed to use the outlet as a supermarket and keep it open during the usual hours of business. However in 1995, head office of Argyll Stores took the decision to close 27 of their supermarkets including the one at Hillsborough which was trading at a loss. Co-op Insurance sought specific performance of the covenant, fearing the impact on other traders at the site if the Supermarket was to close. Specific performance was refused.

Cancellation and Restitution

A non-breaching party may cancel the contract and decide to sue for restitution if the non-breaching party has given a benefit to the breaching party. "Restitution" as a contract remedy means that the non-breaching party is put back in the position it was in prior to the breach, while "cancellation" of the contract voids the contract and relieves all parties of any obligation under the agreement.

On the other hand, the sale of goods act has a specific approach to actions available for breach of contract. In this act, there are specific actions for both buyers and for sellers.

Remedies for the seller are:

Action for price [[8]](#footnote-8) A seller’s claim for a breach of a sales contract pursuant to Uniform Commercial Code § 2-709(1) that seeks to recover the entire contract price.

Damages for non acceptance [[9]](#footnote-9) if the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may sue for the price notwithstanding that the property has not passed to the buyer, but in other cases, if the property has not passed, the seller may sue only for damages for non-acceptance. This is seen In the case of ***Hickman v haynes***

Remedies for the buyer are:

Damages for non-delivery [[10]](#footnote-10)in the law of sale, as it is the seller's duty to deliver the goods, damages are due for failure to do so.  Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

Specific performances[[11]](#footnote-11)

Specific performance grants the plaintiff what he actually bargained for in the contract rather than damages (pecuniary compensation for loss or injury incurred through the unlawful conduct of another) for not receiving it; thus specific performance is an equitable rather than legal remedy. By compelling the parties to perform exactly what they had agreed to perform, more complete and perfect justice is achieved than by awarding damages for a breach of contract.

Remedy for breach of warranty[[12]](#footnote-12)

Breach of warranty remedies could entail solving a warranty breach problem via arbitration or settling the matter in court. If you sign an agreement to buy a product and it ends up defective, you may have to sue the seller for being in breach of a warranty or agreement. An agreement and warranty sound the same, but they come with different legal meanings.

Interest and special damages [[13]](#footnote-13)

Special damages are the actual losses or expenses that you have incurred, as opposed to those that you estimate have occurred or will occur in the future. The interest is calculated from the date that each item of expense or loss was incurred to the date of the hearing or settlement of the claim.

In conclusion, the concept of breach of contract is a topic that has a lot of history to it. There are several cases and decisions which can serve as precedents for upcoming cases which in my opinion have been given adequate attention and decided properly.

REFERENCES

Sagay: Nigerian law of contract.

Studies in contract law by Ian Ayres.

1. Section 27 sale of goods act 1893 [↑](#footnote-ref-1)
2. Sagay: Nigerian law of contract p 8 [↑](#footnote-ref-2)
3. Sections 49 and 50 of the sale of goods act 1893 [↑](#footnote-ref-3)
4. Sagay: Nigerian law of contract p 547 [↑](#footnote-ref-4)
5. Sections 49-54 sale of goods act 1893 [↑](#footnote-ref-5)
6. 5 WILLISTON, CONTRACTS 1288 (Rev. Ed. 1937). In order to cover the case of anticipatory breach, the somewhat wider definition is given. [↑](#footnote-ref-6)
7. (1838) 4 M &W. 399 at p. 404; 150 E.R 1484 [↑](#footnote-ref-7)
8. Section 49 sale of goods act 1893 [↑](#footnote-ref-8)
9. Section 50 sale of goods act 1893 [↑](#footnote-ref-9)
10. Section 51 sale of goods act 1893 [↑](#footnote-ref-10)
11. Section 52 sale of goods act 1893 [↑](#footnote-ref-11)
12. Section 53 sale of goods act 1893 [↑](#footnote-ref-12)
13. Section 54 sale of goods act 1893 [↑](#footnote-ref-13)