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**LEVEL: 200**

**COURSE NAME: LAW OF CONTRACT II**

 **NO 1**

 **BREACH OF CONTRACT**

A breach of contract occurs where a party fails to perform or shows an intention not to perform one or more of the obligation lay upon him by the contract. A failure to perform the terms of a contract constitutes a breach. A breach which is serious enough to give the innocent party the option of treating the contract as discharged can occur in two ways:

* 1. Either one party may show by express words or by implications from his conduct at some time before performance is due that he does not intend to observe his obligations under the contract; which can be said to be an “anticipatory breach” or;
	2. He may breach a condition or otherwise breach the contract in such a way that it amounts to a substantial failure of consideration; which can be said to be an “actual fundamental breach”.
1. Anticipatory Breach

This is when a party before the date fixed for performance, manifests or shows an intention not to perform the contract. Therefore, an anticipatory breach is one that happens after the agreement but before the date of performance laid down by the parties. It is also known as renunciation or repudiation. Here, the innocent party is not under any obligation to wait until the date fixed for performance before commencing his action, but immediately treat the contract as at end and sue for damages. In this regard, the innocent party has a choice open to him in seeking redress. He/she may there and then accept the breach and immediately commence proceedings for breach of contract. He need not wait until the time for performance, if within a reasonable time the innocent does not indicate that he accepts the other party’s repudiation. So, the contract is discharged, the contract remains open for the benefit of and at the risk of both parties.

In the case of Avery v Bowden[[1]](#footnote-2), Bowden chartered Avery’s ship and agreed to load her within 45 days, but before the period elapsed he informed Avery several times to go away as he would not be able to provide him with cargo. Avery nonetheless persisted and remained in the harbor hoping that Bowden would fulfill his obligation to load the ship. War broke out before the 45 days had elapsed and it became illegal for Bowden to load Avery’s ship. If the plaintiff (Avery) had treated the information by Bowden , that he would not load the ship or his refusal to load the ship as complete repudiation of liability by Bowden (the defendant) for an action for breach. It would have been an illegal act for Bowden to load a ship at a hostile port. Similarly, in the case of Panchaud Freres S.A v Establishments General Grain Co[[2]](#footnote-3), it was held that a victim of anticipatory breach need not sue at once. He may continue to treat the contract as still alive until the date when performance is due before taking action but in doing this, the innocent party should be ready to bear the disadvantage of this option as the party at fault can take advantage of any supervening circumstance which would justify his failure to complete his obligations under the contract. In this situation, the innocent party cannot reprobate his affirmation of the continuance of the contract.

 Anticipatory breach may take one of two forms:

1. Express Repudiation: this arises where one party expressly informs the other party to the contract of his unwillingness to perform his obligations under the contract. This could be in words or in writing. In the case of Hochester v De la Tour[[3]](#footnote-4), Express anticipatory breach can be said to have taken place. Here, 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 engage the plaintiff as a courier during a foreign tour commencing at a future date. It was held that even though the date of performance was still nearly a month ahead he has right to sue for anticipatory breach. The action succeeded.
2. Implied Repudiation: this occurs where there is reasonable inference that the other party to the contract no longer intends to perform his own part of the contract. The innocent party is entitled to treat the contract as discharged and sue for damages. This may arise from the conduct of the defaulting party, from which the other party can imply that performance of contract is possible. In the case of Synge v Synge[[4]](#footnote-5), a contracted before marriage to settle a house on his wife after marriage. He subsequently conveyed the house to a third person. It was held his wife could bring an action for breach of contract, although it was not beyond the bounds of possibility that he might have purchased the house and then settle it upon her.
3. Actual Fundamental Breach

This is where a party fails to perform one or his entire obligation on the date fixed for performance. For an actual breach of a term(s) of a contract to have the legal consequence of discharging the contract, it should amount to a fundamental breach. The breach should be cardinal that it goes to the root of the contract. It should have the effect of depriving the injured party of achieving the main purpose for which he contracted. For a breach of contract to amount to a fundamental breach, it must entitle the innocent party to:

* + 1. Treat himself as discharged from further obligations in the contract which should have the consequence of ending the contract or;
		2. Claim damages for breach of contract.

By such breach, the innocent party is entitled to repudiate and/or claim damages. The innocent party is expected to make a decision because the repudiation of contract by one party does not in itself discharge the contract. A breach of fundamental term or condition which invariably will occasion a fundamental breach does not automatically bring the contract to an end. A lot will depend on the disposition of the innocent party that is the victim of the breach. Where the innocent party treats the contract as still in force, the status quo ante is maintained and the contract remains in being for the future on both sides. In the case of Modern Publications Ltd v Academy Press Ltd[[5]](#footnote-6), the plaintiff which owned monthly magazines contracted the printing of magazines to the defendant. The agreement specified the measurements and quality expected of the print. The magazines which were eventually printed by the defendants were not of the specified size and the quality was substantially inferior to that specified in the contract. Despite these, the plaintiff accepted the magazines and distributed them for sale without protest. This affected their sale and profit negatively. The plaintiff thereafter brought action for breach of contract. The defendant contended that although there have been breach of contract; the fact that the plaintiff took benefit of the contract meant that he waived his right to sue.

In rejecting the contention of the defendant, the court held that when one party is in breach of a condition or a fundamental term of a contract, it amounts to a fundamental breach. Also where there’s a fundamental breach, the innocent party can refuse to continue with the contract and can treat him as discharged. This occurred in Staunton v Richardson[[6]](#footnote-7).

REMEDIES AVAILABLE FOR BREACH OF CONTRACT

There are several remedies for breach of contract, such as award of damages, specific performance, rescission, and restitution. In courts of limited jurisdiction, the main remedy is an award of damages, because specific performance and rescission are equitable remedies that do not fall within the jurisdiction of the magistrate courts. They include;

1. Damages According to Section 74, Contract Act had stated that when one of the parties has encountered losses or injury due to the breach of contract, damages are granted to him or her as compensation. Besides that, penalty is often applied to the contract as if the term and condition of the contract are not reached on the date that has been set. Usually, the court will set the penalty that the defendant needed to give to the plaintiff is in money form. For example, when a supplier had agreed to supply a product to the hotel, the penalty might already being negotiate and agreed by both the supplier and the hotel. From that, the penalty will be applied into the contract. So, if the supplier failed to supply the product on time, the penalty will be applied to the supplier.

Apart from that, there is also few type of damages that we can found due to the breaching of the contract. In tort law, there are two types of damages which are general damages and special damages. General damages are usually refers to damages such as loss of reputation, life expectancy and so on. While for special damages, it means that the defendant facing with money problem that lead to the property or injury loss faced by the plaintiff. It usually includes expenses in medical area, loss of wages and repair cost.

1. Specific Performance In this type of remedies, it is more on performance action than monetary form. Under the Specific Relief Act, the specific performance might be applied to the contract and the compensation of monetary is inadequate. In other word, specific performance means that when one of the parties had breach the contract, the another parties can request the court related to force the parties that had breach the contract to perform the term and condition that is stated in the contract. For example, when a person had sign a contract with the hotel that he or she will perform the action that is stated in the contract. If the person refuses to do what have been stated in the contract, the hotel can bring the contract to the court related and request the person to perform the action in the contract stated. However, there is some condition where specific performance cannot be carry out, such as the specific performance will cause the parties who had breach the contract to faced with hard time. Besides that, specific performance also cannot be carry out if the contract are not clearly stated what should be done. This will lead to the contract cannot be enforce when one of the parties had breach the contract. Specific performance that are impossible are also cannot be carry out when the person had breach the contract.
2. Injunction In this option, injunction can be said as a remedy that is equitable that the court requires the party to do something or the other way, to stop him or her from doing something. There are three types of injunction which is interlocutory injunction, mandatory injunction and also prohibitory injunction. The meaning of interlocutory injunction can be say as to maintain the status quo of something in a pending suit. In the other word, interlocutory injunction means to stop the action from being done. Interlocutory injunction is applied in before the starting of something or stops something for being continued. For example, when there is two people are fighting for the ownership of a hotel, interlocutory injunction is applied to this case. While for mandatory injunction, it means that the court enforce something or some action to be done. In other word, when one of the parties refuse to do the promises that had stated in the contract, the other parties can request the court to apply the mandatory injunction on the parties to finish the action. For example, when a contractor refuses to finish building the hotel new property on the date given, the hotel can request the court to apply the mandatory injunction to the contractor to finish the work. For prohibitory injunction, it can be define as to stop something or some action from being done. When the two parties had sign a contract, and one of the parties decided to sign the same contract with others, the other parties can request the court to apply the prohibitory injunction to the parties that want to sign the other contract.

References

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2. [www.legaldictionary.net](http://www.legaldictionary.net)

3. [www.investopedia.com](http://www.investopedia.com)

4. [www.legalmatch.com](http://www.legalmatch.com)

5. Sagay: Nigerian Law of Contract textbook

6. Aloho Eni Eja: Law of Contract

1. (1855) 5 E & B 714 [↑](#footnote-ref-2)
2. (1970) 1 Lloyd’s Rep 53 [↑](#footnote-ref-3)
3. (1853) 2 E & B 678 [↑](#footnote-ref-4)
4. (1894) 1 QB 466 [↑](#footnote-ref-5)
5. (1968) 2 ALR 336 [↑](#footnote-ref-6)
6. (1872) LR 7 CP [↑](#footnote-ref-7)