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CORSE TITILE: LAW OF CONTRACT 2

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:

a. Breach of contract

b. What are the remedies available for breach of contract.

A breach of contract occurs when the promise of the contract is not kept, because one party has failed to fulfil 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.

A contract case usually comes before a judge because one or both parties claim that the contract was breached. A breach of contract is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry or the requirements of any express warranty or implied warranty, including the implied warranty of merchantability. Breach of contract means that the party on breach has acted contrary to the terms of the contract either by non-performance or by performing the contract not in accordance with its items or by a wrongful repudiation of the contract

We have four are contract breaches and they are as follows:

* Repudiation or anticipatory breach
* Fundamental breach
* Material breach
* Minor breach

Repudiation. An anticipatory breach occurs when one party lets the other party know, either verbally or in writing that they will not be able to fulfil the terms of the contract. The other party is then able to immediately claim a breach of contract and pursue a remedy, such as payment. Anticipatory breach may also be referred to as anticipatory repudiation. Where apart before the day fixed fpr the performance manifest or shows an intention not to perform the contract, the breach is one the agreement but before the date of performance laid down by the parties.

In the case of *Panchaud Freres S A v Establishments General Grain Co* [[1]](#footnote-2)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 day the performance is due before he decides to take action. In doing this innocent party should be ready to bear the consequences of this option as the party involved can take advantage of the situation which will justify him in declining any obligation on his part under the contract. In this situation the innocent party cannot reject his affirmation of the continuance of the contract. They are two forms express and simplied repudiation.

Fundamental breach:

Fundamental breach 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. Because this type of breach is so critical to the contract being carried out, it is often grounds for the aggrieved party to cancel the contract entirely. *International Messengers Nigerian LTD v Pegofor Industries LTD[[2]](#footnote-3)* it was held that Fundamental breach denotes performance totally different from that which the contract contemplated or a breach of contract more serious than one which would entitle the other party merely to damages. The appellant received a parcel for delivery to a consignee. It failed to deliver the package to the consignee. This amounts to fundamental breach of the contract. Per Edozie, JSC at 238. The consequence or effect of an exemption clause on a fundamental breach of contract is a question of interpretation of the contract, depending on the facts of the case. Per Edozie, JSC at 238.

The primary rule is that a party in fundamental breach of a contract should not be entitled to rely upon an exemption clause to escape liability. The appellant, being in fundamental breach, could not rely on the exemption clause. Per Edozie, JSC at 238.

Material breach:

As its name implies, a material breach or total breach, is a serious violation of the terms of a contract. While it usually only causes harm to one of the parties to the contract, it oftentimes can hurt both parties because it typically makes fulfilling the terms of the contract extremely difficult to almost impossible.

Minor breach:

A minor breach is when a party fails to perform a term of the contract, but the breach is so insignificant and unimportant that the remainder of the contract can still be completed in its entirety. A minor breach will not affect the overall purpose of the contract.

**Remedies for Breach of Contract**

The following are some of the remedies available to a party who suffers from the breach of contract by the other party to the contract.

**Damages:**

There must always be a remedy for any wrong, therefore when a part establishes that the other party has committed a breach of contract, he is entitled to claim damages. The reason for awarding of damages is to compensate the innocent party and try to fix the party in the position he would have been in if the contract was done well. *Adamu v Gulak[[3]](#footnote-4)* it was held that damages is a sort of pecuniary compensation of indemnity recoverable in the court by any person who suffered loss, detriment or injury, be it to his person property or right through the unlawful or wrongful act or omission or negligence of another.

1. 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.
2. 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.
3. 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

**Remoteness of loss**

The innocent party may only recover damages for loss sufferedas a result of the breach provided it is not too remote. The aimof damages is to put him in the position he would have been hadthe contract been properly performed.

The principles of remoteness are given in *Hadley v Baxendale[[4]](#footnote-5)* and provide that the following losses are recoverable:

* All loss which flows naturally from the breach.
* All loss which was in the contemplation of the parties at the time the contract was made as a probable results of the breach.

If the loss does not fall within the above categories, then it will be too remote and will not be recoverable.

The rule in *Hadley v Baxendale* has been interpreted to mean that only loss which is within the reasonable contemplation of the parties may be recovered (*The Heron II [1969] 1 AC 350*).

**Measure of damages**

This is the method for calculating the damages to which the innocent party is entitled. It covers loss of bargain or expectation loss. The usual aim of the court is to put the innocent party in the position he would have been in had the contract been properly performed as in *Robinson v Harman [[5]](#footnote-6)* the two usual methods of assessing this are difference in value or cost of cure. The court will generally use the more appropriate.

**Mitigation of damages**

A plaintiff who suffered injury or loss from breach of contract from the other party is entitled to claim damages. It is a trite law that such plaintiff is under a duty which is imposed by the law to take all reasonable steps to mitigate the loss caused by the breach of contract. Where the plaintiff fails or failed to take reasonable steps to mitigate his loss, he cannot recover damages for such loss arising from breach of contract in the case of *Okongwu v NNPC[[6]](#footnote-7)*

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|   | "The duty to mitigate does not imply that a plaintiff whose contractual right has been breached is automatically relegated to a position inferior to the defendant's wherein he is obliged to pick up, as it were, the crumbs that fall from the master's table. The true position is that a defendant who is already in breach of his contract is, as it were, demanding a positive action from the plaintiff who is innocent of blame. For this simple reason, the law has never taken the view that such a plaintiff has to undertake an onerous burden in the name of mitigation of damages. The duty of mitigation on a plaintiff is that of a reasonable man, acting reasonably".Per Nnaemeka, J.S.C. (P.17, Paras.B-E) "I do not think the duty to mitigate losses has as its correlative the right of the other party to impose any conditions as alternative to his breach of contract. The duty to mitigate loss is that of a reasonable man acting reasonably in the circumstances of the case. The plaintiff is clearly not an under dog. He is not obliged to accept conditions which are both onerous and demonstrably intolerable in the name of mitigation of his loss ". PER KARIBI-WHYTE, J.S.C. (P.35, Paras.C-F) - |

**Advance payments**

If a party in breach has made advanced payments under the contract his ability to recover that money depends upon whether that payment constitutes a deposit (that is, a guarantee by him of due performance) or merely a payment of the whole or part of the price in advance.

**Liquidated Damages**

Where the parties to a contract as a part of an agreement between them fix the amount payable on a default of one of them or in the event of breach by the way of damages such sum is classified as liquidated damages. Which means parties to a contract may by their agreement fic the sum payable to the injured party in the event of a breach being committed. In the case of *NUB LTD v Samba PET.CO.LTD[[7]](#footnote-8)* it was held that liquidated damages is a sum which a party agrees to pay. That is to say the amount of damages has been ascertained.

**Specific Performance**

In a breach of contract case, the court can consider ordering **specific performance** as long as the innocent party asks for that remedy. This equitable remedy orders the breaching party to comply with the terms of the contract. This means that the breaching party will be required to do whatever the party originally promised to do.

The court will consider this option when money damages won't provide the innocent party with adequate compensation for the breach. 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* [[8]](#footnote-9)but not if a replacement of the subject matter could be obtained even after a long delay

Most common in sales contracts. 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-op Insurance v Argyll Stores[[9]](#footnote-10)* 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.

**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). *Babatunde Adenuga and ors v K. Odunewu*  Karibi- Whyte JSC defined injunction as an equitable order restraining the person of whom it was directed from doing things specified in order or requiring in exceptional situations the performance of a specified act. A claim for injunction is a claim for equity. Types of injunction

 are

exparte, interlocutory, mareva, pepertual, Quantum meruit,

.QUANTUM MERUIT:

 This is a sort of part- performance in which a party claims “as much as he deserves” Quantum meruit is a claim where work done is in partial performance especially where the contract is severable or divisible or can be separated. In Ekpe v. Mid- Western Nigerian Development Corporation where the plaintiff sued for the payment of his salary for the period he worked for the defendant, it was held that even where a contract was void, the party who worked can sue on a quantum meruit (that is, for work done).

**RESCISSION**:

 This is an equitable remedy available to an injured party for a breach of condition where there is a mistake or misrepresentation. Rescission terminates the contract. In *London Assurance v Mansell[[10]](#footnote-11)*, where a man did not disclose the material facts on his life on a proposal form by concealing that he had been refused insurance by other companies, it was held that the company could rescind the contract.

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2. (2005) (sc103/2000) 21 [↑](#footnote-ref-3)
3. (2013) LPELR-20844 (CA) [↑](#footnote-ref-4)
4. *[1854] 9 Exch. 341*) [↑](#footnote-ref-5)
5. *[1848] 18LJ Ex 202*). [↑](#footnote-ref-6)
6. (1989) 4NWLR (PT.115)296 LPELR (SC) [↑](#footnote-ref-7)
7. (2006) 12 NWLR (PT.992) 98/ LPELR 5974 [↑](#footnote-ref-8)
8. (*[1859] 4 Drew651*) [↑](#footnote-ref-9)
9. (*[1997] 3 All ER 297*) [↑](#footnote-ref-10)
10. (1879) 11 CH.D 363 pp.368-9 [↑](#footnote-ref-11)