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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:

- a. Breach of contract
- b. What are the remedies available for breach of contract?

Introduction

A contract is a legally binding promise made between two parties. Each party to a contract promises to perform a certain duty, or pay a certain amount for a specified item or service. The purpose of a contract being legally binding is so each party will have legal recourse in the event of a breach.

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

Further, if one party fails to perform while the other party fulfills their obligations, the performing party is entitled to legal remedies for breach of contract.

There are four main types of contract breaches:

- **Minor Breach:**

A minor breach of contract occurs when a party fails to perform a part of the contract, but does not violate the whole contract. To be considered a minor breach, the infraction must be so nonessential that all parties involved can otherwise fulfill any remaining contractual obligations. A minor breach is sometimes referred to as an impartial breach;

- **Material Breach:** A material breach of contract is a breach that is so substantial, it seriously impairs the contract as a whole; additionally, the purpose of the agreement must be rendered completely defeated by the breach. This is sometimes referred to as a total breach. It allows for the performing party to disregard their contractual obligations, and to go to court in order to collect damages from the breaching party;
- **Fundamental Breach:** A fundamental breach of contract is essentially the same as a material breach, in that the non-breaching party is allowed to terminate the contract and seek damages in the event of a breach. The difference is that a fundamental breach is considered to be much more egregious than a material breach; and
- **Anticipatory Breach:** An anticipatory breach occurs when one party lets the other party know, either verbally or in writing that they will not be able to fulfill 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.

The types of legal remedies available for breach of contract depend largely on the severity of the breach. Generally, damages awarded are categorized into four groups:

- Suit for rescission
- Suit for damages
- Suit for specific performances
- Suit for injunction

- Suit for quantum meruit
- **SUIT FOR DAMAGES**
- Unlike the equitable remedies of specific performance and injunction damages for loss in a breach of contract claim are available as of right.
- An innocent party may claim damages from the party in breach in respect of all breaches of contract. The damages may be nominal or substantial. Nominal damages are awarded where the innocent party has suffered no loss as a result of the other's breach and substantial damages are awarded as monetary compensation for loss suffered as a result of the other party's breach.
- For an innocent party to obtain substantial damages he must show that he has suffered loss as a result of the breach (remoteness) and the amount of his loss (measure). It is up to the party in breach to argue that the innocent party has failed to mitigate his loss.
- **Monetary damages.**
- The party who breached the contract can be held responsible for the losses caused by the breach. Both general or expectation damages and consequential damages can result from a breach of a contract. General or expectation damages refer to the loss directly caused by the breach. Consequential damages refer to losses that occurred because of the breach but that were an indirect cause. For example, if you contracted and paid for a machine to be delivered and it never came, the general losses would include the value of the money you paid for the machine. The consequential losses could include the loss of business caused by the fact you did not have the machine you needed to do your work.
- **Liquidation damages.**

Sometimes, it is very difficult to determine how much a person was damaged by a breach of contract. To address this problem, some contracts contain liquidated damage

clauses. Essentially, these clauses specify that the non-breaching party will be awarded a specific amount of money in the event a breach occurs. These clauses will be upheld as long as they are fair.

- **SUIT FOR SPECIFIC PERFORMANCES.**

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 long delay (*Societe des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyds Rep465).

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-op Insurance 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 (*Rainbow Estates Limited v Token hold Limited and another* [1998] New Property Cases 33).

In some cases, the appropriate remedy for a breach of contract is to correct the breach by forcing the breaching party to complete the terms of the agreement. Specific performance is an appropriate remedy in situations where monetary damages could not possibly make the non-breaching party whole for the losses. For example, if there was a contract created for a buyer to purchase a very rare piece of

art, the buyer could not simply find the art elsewhere. The only remedy that would help the buyer in this circumstance is for the court to require the sale to go through so the buyer got the unique one-of-a-kind painting that he contracted for.

- **SUIT FOR RESCISSION.**

Rescission allows the non-breaching party to essentially be released from performance obligations. Rescission is a remedy for a breach of contract because it makes clear that the party is relieved of his duties due to the failure of the other party to perform. Where consent to an agreement is caused by coercion, fraud or mistake or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. On the other hand where both the parties to an agreement are under a mistake of fact essential to the agreement, the agreement is void.

SUIT FOR 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.

SUIT FOR QUANTUM MERUIT

Quantum meruit literally translates to “as much is earned”. At times when one party of the contract is prevented from finishing his performance of the contract by the other party, he can claim quantum meruit. So he must be paid a reasonable remuneration for the part of the contract he has already performed. This could be the remuneration of the services he has provided or the value of the work he has already done.