ASSIGNMENT

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COURSE TITLE: LAW OF CONTRACT II

QUESTION: A breach of contract is committed when a party fails or refuses to perform what is due to 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.

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**BREACH OF CONTRACT**

A breach of contract is a legal cause of action and a type of civil wrong that may take place when a party to the contract does one of the following:

* fails to perform the obligations under the contract in whole or part,
* behaves in a manner which shows an intention not to perform their obligations under contract in the future or
* the contract becomes impossible to perform as a result of the defaulting party's own act**.**

A breach of contract can therefore be said to have occurred where there is defective performance from one party, inherently different from the agreement, or no performance at all (in the case of actual breach),or an indication in advance that they will not be performing as agreed (anticipatory breach).

**REMEDIES AVAILABLE IN THE EVENT OF A BREACH OF CONTRACT**

**AWARD OF DAMAGES**

The basis of the common law remedy of damages was laid down by **Parke, B.** in *Robinson v. Harman (1848)* as follows:

**The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.**

However, the unqualified/general application of this wide principle proved too harsh for a contract breaker as the principle held him liable for unforseen and fortuitous circumstances. Thus, over the years that followed, the application of the principle was progressively qualified and limited in several ways, until the modern rule was finally established by **Alderson, B.,** in *Hadley v. Baxendale (1854).* It limited the liability of breaching parties to losses forseen and excuses damages for losses that could not have reasonably be forseen on the information available to the breaching party.

Once a party to a contract has proved to the satisfaction of the court that the other party has committed a breach of contract, the most common claim is that for damages and it is also the most readily granted type of remedy by the courts.

Damages refer to the monetary payments which a breaching party has to make for violating the terms of contract. The type of breach determines the extent of the damages. In the case of a total breach, the plaintiff can recover damages in an amount equal to the sum or value he would have received had the contract been fully performed by the defendant. This would include lost profits. If the breach is only partial, the plaintiff may seek damages in an amount equal to the cost of hiring someone else to complete the performance contemplated by the contract. Where the cost of completion is prohibitive and the portion of the unperformed contract is small, many courts would award damages only in an amount equal to the difference between the diminished value of the contract as performed and the full value contemplated by the contract. *Tenn Gas Pipeline Co. v Technip U S A Corp (2008).*

The following are categories of damages that may be awarded if a breach of contract claim is proved:

1. COMPENSATORY DAMAGES: It is also known as actual damages. It is either direct/general or consequential/specific. Direct damages are those that flow naturally and necessarily from the breach and compensate for loss that is presumed to have been forseen or contemplated by the parties because of the breach. Unpaid contract amounts, cost to repair defective work, and reduced project value due to non-conforming work are some of the examples of direct losses that can be remedied. *Ghandi v Pfizer.*

Consequential damages are results of special circumstances that are not usually predictable. They do not necessarily, but do directly, naturally and proximately result from the injury for which compensation is sought. For a loss to be remedied under consequential damages, not only must the damage be directly traceable to the breach and result from it, it must also be forseeable. A common example of this remedy is the lost profit on collateral business arrangements. *Dorestin v Hollywood imports, Inc. (2010).*

In *Ijebu-Ode LG v Adedeji-Balogun & Co,* **Kabiri Whyte JSC,** stated that the distinction between general/direct and special/consequential damages, though misleading and likely to confuse is still made to determine the nature of the loss following breach. Accordingly, he defined the terms. **General damages were said to be such as the law will presume to be direct, natural or probable consequence of the breach** **while special/consequential damages are such as the law will not infer from the nature of the act and which do not follow in the ordinary course but are exceptional in character.**

The degree of proof as to the amount of consequential damages is higher than for direct damages. Consequential damages must also be pled with greater specificity. The plaintiff has the burden of proving that the damages are not only the proximate consequence of the breach but that they were also reasonably forseeable or within the contemplation of the parties at the time the parties entered into the contract.

2. PUNITIVE DAMAGES: It is also termed exemplary damages and is not awarded to compensate the plaintiff, but in order to reform or deter the defendant and similar persons from pursuing a course of action such as which damaged the plaintiff. It is awarded to punish a wrongdoer who has acted willfully, maliciously and fraudulently and is often awarded in addition to compensatory damages.

It is however, rarely awarded for breach of contract since the law of contract targets compensation primarily and not punishment. However, this remedy becomes readily available in the case of a breach of contract when the breach is also a tort. Punitive Damages are permited in the law of torts when behaviour is malicious or willful (reckless conduct causing physical harm, deliberate defamation of one's character, a knowingly unlawful taking of one's property), and some kinds of contract breach are also tortious.

Exemplary damages may be gotten in cases of damages for breach of promise to marry. In *Uso v Iketubosin (1957),* after 10 years of engagement, the defendant broke off the engagement without warning. The defendant was made to pay the sum of 600 pounds as damages as he courted and tied down the plaintiff with a promise to marry her, in the years when her prospect of marriage was greatest. As a result of his conduct, she may remain unmarried as she though she was still personable, she was already over thirty years.

3. NOMINAL DAMAGES: When an individual or a party has suffered a breach of contract, he is automatically entitled to nominal damages. Evidence of loss suffered as a result of this breach is inconsequential to this claim. Hence, the violation of a party's contractual rights regardless of whether loss was suffered as a result of the said violation, is enough evidence in a claim for nominal damages. This position was buttressed in *Nigerian Advertising and Publicity Ltd. v Nigerian Airways Ltd.,* where the plaintiffs were unable to establish any loss suffered by them as a consequence of the defendant's breach. The court awarded nominal damages even though special damages could not be proved.

4. LIQUIDATED DAMAGES: Due to the trickery of calculating damages in cases of breach of contract, the parties themselves may specify the amount to be paid in the event of a breach. Courts would enforce a liquidated damages provision as long asthe actual amount of damages is difficult to ascertain and the sum is reasonable in light of the expected or actual harm. If the liquidated sum is unreasonably large, the excess is termed a penalty and is said to be agains public policy and hence, unenforceable. It has been adopted in cases like *Edem Archibong v Ephraim Duke (1922)* where damages were granted as a reason of an agreement signed by both parties stipulating a fee as the penalty of either of them defaulting in the sale contract. The ruling in *Kemble v Farren (1829)* was referenced in deciding the case.

**RESTITUTION**

Restitution can also be called restitutionary damages. Its purpose as a remedy is to restore the injured party to as good a position as was occupied by him prior to the making of the contract.

Being often contrasted with compensation which is a loss-based law, restitution holds its own as the law of gains-based recovery. Thus, parties seeking it may not request to be compensated for lost profits or other earnings caused by a breach. Restitution aims at returning to the plaintiff any money or property given to the defendant under the contract. When a court orders restitution, the defendant is made to give up his gains to the plaintiff.

Plaintiffs typically seek this remedy when contracts that they have entered into have been voided by the courts due to the defendant's incompetence or incapacity. The law allows incompetent and incapacitated people to disavow their contractual duties but only if the plaintiff is not made worse by their disavowal.

The British case of *Attorney-General v Blake* opened up the possibility of restitutionary damages for breach of contract. In this case, the profits made by a defecting spy, for the publication of his book were awarded to the British Government for breach of contract.

**INJUNCTION**

An injunction may be granted against the breach of an express negative clause that obliges a party to act in consistence with his positive contract. An injunction is a court- ratified order or decree that requires a party to do or refrain from a certain thing. They are either preventive/restrictive (e.g. restraining order) or mandatory/compulsive (e.g. order to perform).

It is a way the court can order specific performance. A court can negatively enforce a contract in an instance where a party to a prohibitive contract is ordered not to do same thing he is contractually restricted from doing. This was the case in *Warner Bros. Pictures Inc v Nelson* where a film actress signed an undertaking with the plaintiffs not to act for any other organisation. An injunction restraining her from committing a breach of this stipulation was issued when she attempted to enter the employment of another party.

Where the injunction is mandatory, its effect transcends prevention and it becomes restorative in nature. It directs the defendants to undo all the breaches of contract committed thus far. This type of injunction is rarely granted. It was sought in *African Songs Ltd. v Sunday Adeniyi.* In the aforementioned case, a restraining order had already been placed on the further recordings of the defendant, either for himself or for any other company. This was as a result of the contractual agreement where he agreed to record solely for the plaintiff's company. However, the plaintiff sought the additional remedy of injunction to enable the withdrawal of recorded music by the defendant from the public. **Dosumu J,** relying on *Holt v Holt* held that nothing could be done due to the fact that distribution all over the country had already taken place.

It should be noted however that the courts will not grant specific performance to compel an unwilling party to remain in contract for personal service. But, the courts would be prepared to grant an injunction restraining the servant from performing a similar service for anyone else, provided that this does not force him into a position where he will either have to remain in his master's service unwillingly or remain idle or starve.

**SPECIFIC PERFORMANCE**

In this form of remedy, performance action rather than monetary compensation is the focus. It is when the party who has breached the contract is forced by the court at the insistence of the other party to perform the terms and conditions as stated in the contract. It is an equitable remedy and it exemplifies the maxim: 'equity acts in *personam'*.

Being a foremost remedy, damages is the most widely-used. However, there are breaches that cannot be adequately remedied by this tool. The necessity to grant adequate remedy in such cases birthed this tool of specific performance per **Kay L J** in *Ryan v Mutual Tontine.*

The remedy of specific performance is discretionary and the basis of granting it stems from a situation where the party seeking remedy cannot be adequately relieved by common law. It is granted when the courts feel it would do more justice and be a more adequate compensation than the common law remedy of damages.

In cases where a vendor refuses to convey land sold, this remedy is readily granted as mere damages in this instance would not deliver justice. This was the case in *Fakoya v St Paul's Church Shagamu,* where the defendant had already received money to convey family property to the plaintiff. The defendant however backtracked that he could not deliver the land as he found out that it did not absolutely belong to his family and he had no right to convey. This claim was later discovered to be untrue and specific performance was granted.

**RECISSION**

It is an equitable remedy which allows for the cancellation of a contract. It is the remedy made available when the underlying basis for making a contract is fundamentally tainted. Some conduct of a contracting party undermines the very reason that the other party made the contract in the first place. Also, non-fulfillment of contractual obligations is ground for recission. The contract can be rescinded, at the option of the affected party.

For legal purposes, a rescinded contact is treated as one that never existed. When recission is sanctioned, whatever was done by the parties by making the contract is reversed. The parties are also put back in the position they would have been in, as if the contract has never been made. That's the status quo ante. The said contract is thus treated as non-existing.

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