**COURSE TITLE: LAW OF CONTRACT**

**COURSE CODE: LPB 202**

**TOPIC: Discharge by Breach**

1. **Introduction**

A breach of contract is a legal cause of action which occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract.

The resultant effects of this always make the injured party entitled to an action for damages against the guilty party and also in addition, where the guilty party has repudiated the contract or commits a fundamental breach, the injured party will as well has a right to rescind or terminate the contract.

The rescission right to be exercised above by the injured party is a consequence of the guilty party’s breach and thus entitles this party to treat himself as discharged from further liability under the contract and to the guilty party he remain liable for damages towards the innocent party.

The topic will explore into breach of contract before the due date (anticipatory breach), fundamental breach coupled with the consequences of discharge by breach.

* 1. **Anticipatory Breach**

Where there exist a contract between two parties which is slated to be performed at a future date and one party clearly declares his intention not to perform his own obligation under the contract is popularly referred to as anticipatory breach

In another light, is a term in the law of contracts that describes a declaration by the promising party to a contract that he or she does not intend to live up to his or her obligations under the contract. It is an exception to the general rule that a contract may not be considered breached until the time for performance.

This notion of anticipatory breach was well captured in the case of ***Solomon Nassar v Oladipo Moses[[1]](#footnote-1)*** where Coker, J, said emphatically thus:

*It is open to a party to a contract to sue the other party for breach of same even in anticipation of the time agreed upon for performance, if it is manifest by his conduct and his acts that the defaulting party had made himself unable to fulfill his part of the contract at the agreed time.*

The doctrine of anticipatory repudiation is relatively old, having its origin in the common law. The leading case on the subject is ***Hochster v. De La Tour***[[2]](#footnote-2), which did not involve a contract for the sale of goods, but rather an employment contract. The fact of the case is as stated thus:
In April, De La Tour agreed to employ Hochster as his courier for three months from 1 June 1852, to go on a trip around the European continent. On 11 May, De La Tour wrote to say that Hochster was no longer needed. On 22 May, Hochster sued. De La Tour argued that Hochster was still under an obligation to stay ready and willing to perform till the day when performance was due, and therefore could commence no action before.

 It was held that the contract could be terminated a bit early. If however, the non-breaching party has terminated following renunciation, they can claim damages from that time and do not need to wait until the date fixed for performance under the contract.

**Lord Campbell** as an adumbration emphasized this issue in the following words:

 *If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage.*

*In the present case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in* ***Elderton v Emmens****,[[3]](#footnote-3) which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe.*

*But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.*

*Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August 1852: according to decided cases, the action might have been brought before the 1st June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.*

*An argument against the action before the 1st of June is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial.*

*We do not find any decision contrary to the view we are taking of this case... The only other case cited in the argument which we think it necessary to notice is* ***Planche v Colburn****,[[4]](#footnote-4) which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise; but, before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed, tendered and delivered the treatise, according to the contract. Tindal CJ said: "The fact was, that the defendants not only suspended, but actually put an end to, 'The Juvenile Library;' they had broken their contract with the plaintiff." The declaration contained counts for work and labour: but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus shewing that, in the opinion of the Court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it.*

*If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action: and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.*

It is of utmost importance to note that the breach/repudiation may be expressly through words of mouth or impliedly by conduct made by the guilty party to the injured party. This was the clear position in the case of ***Hocester*** above, where the defendant expressly wrote to the plaintiff declaring that he was not going to perform his own obligation under the contract.

* 1. **Fundamental breach**

A fundamental breach of contract is generally known to occur when a previously agreed upon contract is canceled entirely, due to the other party’s actions (or, inactions, in some cases). While with most breaches of contract, the early termination could be considered a breach of contract, which is not the case with a fundamental breach and therefore, does not provide both parties the right to take legal recourse; that right exists only to the wronged party.

The determinant of what constitute a fundamental breach of contract must be a breach that goes to the root of the contract; for example the inability of a party to supply some drinks on a wedding day after several calls to him. This breach will also entitle the innocent party the right to terminate the contract.

 In the recent decision in ***R.P.M. Investment Corp. v. Lange***,[[5]](#footnote-5) the Alberta Court of Queen’s Bench held that a party to a contract may terminate a contract on the basis of a “fundamental breach” of the contract, in addition to the right to terminate the contract for repudiation.

In that case, The Langes engaged the plaintiff, (called “Mission” in the reasons) to build a home near Calgary. Mission did not complete the construction and the Langes hired a new contractor to complete the construction. Mission sued for the amount remaining due on its contract and the Langes counterclaimed for damage.

Each party accused the other of fundamental breach and repudiation of the contract. The Langes allege that Mission committed fundamental breaches by not complying with the plans and specifications and by abandoning the project. The trial judge found that neither allegation was proven. While there were breaches of the contract, none of them rose to the level of fundamental breach, as they did not deprive the Langes of “substantially the whole benefit of the contract.” As to abandonment, while Mission removed certain property from the job site, that “was done for cost-savings purposes and did not constitute abandonment.” Moreover, Mission demonstrated its continuing intention to complete the project.

As to repudiation, the trial judge found that the Langes had not expressly accused Mission of repudiation, but that abandonment, had it been found, “might well have constituted a repudiation.”

Mission’s claim for fundamental breach was based on unreasonable delay on the part of the Langes, on the basis that “the Langes had an obligation to act in good faith in moving the project forward.” The trial judge dismissed this claim on the ground that “the delays on the part of the Langes did not constitute fundamental breach as they were not sufficient to deprive Mission of the whole benefit of the Construction Agreement.” The trial judge also held that a finding concerning the allegation of fundamental breach was unnecessary “in light of my finding below in respect of Mission’s repudiation allegation.”

The trial judge found that the Langes had repudiated the contract by writing an email stating that” …we are hereby giving notice of our intent to terminate effective November 8, 2010.” The trial judge said:

*“In my view, Mr. Lange’s email would lead a reasonable person in the position of Mission to that conclusion. It is possible that Mr. Lange’s email was merely a tactic intended to force a favourable response from Mission. However, the law is clear that the test is what a reasonable person would conclude, not what was subjectively intended. Therefore, Mr. Lange’s strategy, if that is what it was, is irrelevant to the outcome.”*

* 1. **Consequence of discharge by breach**

When a party to contract has by action or implication repudiate or causes a fundamental breach of a contract, the other party will thus be discharged from the performance of all future obligations under the contract.

It is important to note that the injured party is obliged to exercise some rights where a breach of contract occurs; he may choose to treats the contract as still in force or treats the contract as discharged. Where he treat the contract as still subsisting, the status of the contract will still be maintained and both party is entitled to sue for both past and present breaches. However, where the innocent party treats the obligation as discharged, the guilty party is liable for all breaches committed before the discharge cum the one leading to the discharge.

Again, where a party to a contract alleges a breach of contract for the wrong reason or for no reason at all, he may yet justify his action if there were in existence at a time facts or cases which would have provided a good reason for terminating the contract.

1. Unreported High Court Lagos state, Coker, J, Suit No. LD/222/58 delivered on May 20 1960, casebook, p. 448 [↑](#footnote-ref-1)
2. 118 Eng. Rep. 922 (1853). [↑](#footnote-ref-2)
3. 6 Cornm. B. 160, Affirmed in Dom. [↑](#footnote-ref-3)
4. 8 Bing. 14 [↑](#footnote-ref-4)
5. 2017 Carswell Alta 770, 2017 ABQB 305, [↑](#footnote-ref-5)