



# **NATIONAL OPEN UNIVERSITY OF NIGERIA**

## **SCHOOL OF LAW**

**COURSE CODE:-LAW 234**

**COURSE TITLE:-THE LAW OF CONTRACT  
II**



**LAW 234**  
**THE LAW OF CONTRACT II**

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Published by  
National Open University of Nigeria

Printed 2009

ISBN: 978-058-786-1

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## **Introduction**

Law of contract is a two semester course. You already have taken the first part in the first semester. That was a foundation level course directed at fulfilling core requirements for the degree in Law. You learnt about the basic law principles, coupled with practical examples developed to suit students in Nigeria.

The present course is the second part – coded LAW 234. It is a continuation of what the course is about, what course materials you will be using and how you can work your way through these materials. It suggests some general guidelines for the amount of time you are likely to spend on each unit of the course in order to complete it successfully. It also gives you some guidance on your tutor marked assignment (TMAs). Detailed information on TMAs is found in the separate assignment file, which will be available to you in due course. There are regular tutorial and tutorial classes that are linked to the course. You are advised to attend these sessions.

## **What You Will Learn in this Course**

The over aim of LAW 234 is to complement the fundamental principles and applications of Law of contract. During this course you will experience practical demonstration of vitiating factors and validity of contract, misrepresentation, discharge of contract and remedies for misrepresentation.

## Course Aims

The aim of the course to give you an understanding of general principles of law and how they operate in practice..

This will be achieved as we discuss issues of:-

- Factors which may vitiate a contract
- Rules and Exceptions
- Discharge of contract
- Remedies

## Course Objectives

To achieve the aims set out above, the course sets overall objectives. In addition, each unit also has specific objectives which are always included at the beginning of a unit; you should read them before you start working through the unit. You may want to refer to them during your study of the unit to check on your progress. You should always look at what you have done and what was required of you by the unit.

Set out below is the wider objectives of the course as a whole. By meeting these objectives you should have achieved the aims of the course as a whole.

On successful completion of this course, you should be able to:

- Explain the term and formation of contract
- Understanding the vitiating elements of a Contract
- Privity of contract
- Rules and Exceptions.
- Discharge of contract
- Offer and acceptance
- Remedies

## Working through this Course

To complete this course you are required to read the study units, read set books and other materials: Each unit contains self-assessment exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course is a final examination. The course should take you about 12 weeks or more in total to complete. Below you will find listed all the components of the course, what you have to do and how you should allocate your time to each unit in order to complete the course successfully on time.

## **Course Materials**

Major components of the course are:

- Course guide;
- Study units;
- Textbooks;
- Assignment file; and
- Presentation schedule.

In addition, you obtain the set book; these are not provided by NOUN, obtaining them is your own responsibility. You may purchase your own copies. You may contact your tutor if you have problems in obtaining these textbooks.

## Study Units

These are 6 study units in this course, as follows:

### Module 1

Unit 1	Vitiating Factors and Validity of a Contract
Unit 2	Misrepresentation
Unit 3	Types of Misrepresentation
Unit 4	Remedies { 1 } Misrepresentation

### Module 2

Unit 1	Discharge of a Contract
Unit 2	Remedies { 2 } Misrepresentation

Each unit contains a number of self-tests. In general, these self-tests question you on the materials you have just covered or required you to apply it in some way and, thereby, help you to gauge your progress and to reinforce your understanding of material. Together with TMAs, these exercises will assist you in achieving the stated learning objectives of the individual units of the course.

## Text Books and References

There are some books you should purchase for yourself:

The Nigeria Law of contract: Pro Utse sagay 2005.

Obilade, A. O. (1994). *The Nigerian Legal System*. London: Sweet & Maxwell.

## Assignment File

In this file you will find all the details of the work you must submit to your tutor for making. The marks you obtain for these assignments will count towards the final mark you obtain for this course. Further information on assignments will be found in the Assignment file itself and later in this course guide in the section on assignment. You are to submit five assignments, out of which the best four will be selected and recorded for you.



## **Presentation Schedule**

There are two aspects to the assessments of the course. First are the TMAs, second, there is a written examination.

In tackling the assignments, you are expected to apply information, knowledge and techniques gathered during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work you submit to your tutor for assessment will count for 30% of your total course mark.

At the end of the course you will need to sit for a final written examination for three hours duration. This examination will also count for 70% of your total course mark.

## **Tutor-Marked Assignment**

There are five tutor-marked assignments in this course. You only need to submit four of five assignments. You are encouraged, however, to submit all five assignments, in which case the highest four assignments count for 30% towards your course mark.

Assignment questions for the units in this course are contained in the Assignment file. You will be able to complete your assignments from the information and materials contained in your set books, reading, and study units. However, it is desirable in all degree level education to demonstrate that have read and researched more than the required minimum. Using other references will give you a broader viewpoint and may provide a deeper understanding of the subject. When you have completed each assignment send it together with a TMA form to your tutor. Make sure that each assignment reaches your tutor on or before the deadline given in the presentation schedule and Assignment file. If, for any reason, you cannot complete your work on time, contact your tutor before Assignment is due to discuss the possibility of an extension. Extensions will not be granted after the due date unless there are exceptional circumstances.

## **Final Examination and Grading**

The final for LAW 234 will be of two hours duration and have a value of 70% of the total course grade. The examination will consist of questions that reflect the types of self-testing, and tutor-marked problems you have previously encountered. All areas of the course will assessed.

Use the time between finishing the last unit and sitting the examination to revise the entire course. You might find it useful to review your self-assessment exercises, TMAs and comments by your tutorial facilitator before the examination. The final examination covers information from all parts of the course.

### Course Marking Schedule

The following table lays out how the actual course mark allocation is broken down:

Assessment	Marks
<b>Assignments 1-4</b>	Four assignments, best three marks of the count at 30% of course marks.
<b>Final examination</b>	70% of overall course marks
<b>Total</b>	100% of course marks

**Table 1 course-marking schedule**

### Course Overview

This table brings together the units, the number of weeks you should take to complete them and the assignments that follow them.

Unit	Title of work	Weeks Activity	Assessment (End of Unit)
	Course Guide	Week 1	
<b>Module 1</b>			
1	Vitiating Factors and Validity of a Contract	Week 2	Assignment 1
2	Misrepresentation	Week 3	Assignment 2
3	Types of Misrepresentation	Week 4	Assignment 3
4	Remedies {1} Misrepresentation	Week 5	Assignment 4
<b>Module 2</b>			
1	Discharge of a Contract	Week 6	Assignment 5
2	Remedies {2} Misrepresentation	Week 7	Assignment 6
	Revision	Week 8	
	Examination	Week 9	

## How to Get the Most from this Course

In distance learning the study units replace the university lecturer. This is one of the great advantages of distance learning; you can read and work through specially designed study materials at your own pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. In the same way that a lecturer might recommend some reading, the study units tell you when to read recommended books or other material, and when to undertake practical work. Just as a lecturer might give you an in-class exercise, your study units provide exercises for you to do at appropriate time.

Each of the study units follows a common format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with the other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit you must go back and check whether you have achieved the objectives. If you make a habit of doing this you will significantly improve your chances of passing the course.

The main body of the unit guides you through the required reading from other sources. This will usually be either from your recommended books or from a reading section. Self-assessment exercises are interspersed throughout the unit, and answers are given at the end of units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each self-assessment exercise as you come to it in the study unit. There will also be numerous examples given in the study units; work through these when you come to them, too.

The following is a practical strategy for working through the course. If you run into any trouble, telephone your tutorial facilitator or visit your study centre. Remember that your tutor's job is to help you. When you need help, don't hesitate to call and ask your tutor.

- Read this course guide thoroughly.
- Organize a study schedule. Refer to the 'Course overview' for more details. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e.g. details of your tutorials, and the date of the first day of the semester is available. You need to gather together all this information in one place, such as your diary or a wall

calendar. Whatever method you choose to use, you should decide on and write in your own dates for working on each unit.

- Once you have created your own study schedule, do everything you can to stick to it. The major reason that students do not perform well is that they get behind with their course work. If you get into difficulties with your schedule, please let your tutor know before it is too late for help.

### **Facilitators/Tutors and Tutorials**

There are 10 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials together with the name and phone numbers of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress and on any difficulties you might encounter and assistance will be available at the study centre. You must submit your tutor-marked assignments to your tutor well before the due date (at least two working days are required). They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone, e-mail, or during tutorial sessions if you need to. The following might be circumstances in which you would find help necessary. Contact your tutor if:

- You do not understand any part of the study units or the assigned readings
- You have difficulty with the self-assessment exercises
- You have a question or problem with an assignment or with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and to ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will learn a lot from participating in discussions actively.

Some of the questions you may be able to answer are not limited to the following:

- Distinguish between Agreement and a contract
- Outline the constituent elements of a contract

- Enumerate factors what may vitiate a contract
- Explain the term offer? And invitation to Treat
- What constitute acceptance in the law of contract
- What is illegal contract & what relation with Public Policy
- Can a court of law enforce an illegal contract
- Explain the Term Frustration.
- Distinguish legal from equitable remedies.

## **Summary**

Of course the list of question that you can answer is not limited to the above list. To gain the most from this course you should try to apply the principles that you encounter in every day life. You are also equipped to take part in the debate about legal methods.

We wish you success with the course and hope that you will find it both interesting and useful.

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Published by  
National Open University of Nigeria

Printed 2009

ISBN: 978-058-786-1

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## MODULE 1

Unit 1	Vitiating Factors and the Validity of a Contract
Unit 2	Misrepresentation
Unit 3	Types of Misrepresentation
Unit 4	Remedies (I): Misrepresentation

## UNIT 1 VITIATING FACTORS AND THE VALIDITY OF A CONTRACT

### CONTENTS

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2.0	Objectives
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3.1	Duress
3.1.1	Economic Duress
3.2	Alternatives to a Bad Business Decision?
3.3	Undue Influence
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3.4.1	Unequal Bargaining Power
4.0	Conclusion
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### 1.0 INTRODUCTION

There must be a meeting of the mind or consensus *ad idem*; otherwise, a misrepresentation by one of the parties destroys a contract. This can happen in so many ways: e.g., when the parties enter into an agreement in which they are mistaken as to what vessel they intended to use (*Raffles v Wichelhaus*), or when a party has misrepresented the sales volume of a petrol station (*Esso v Mardon*), (1975)6 *QB* 81 (1976) 2 *AER* 203 and *Afegha v A.G. Edo State* (2001) *NWLR* (Pt 733) 405.

Misrepresentation then creates what may be described as a defective contract. In this section you will examine three other factors which may adversely affect the validity of a contract: duress, undue influence and unconscionable conduct.

## 2.0 OBJECTIVES

At the end of this Unit, you should be able to:

- identify factors that can vitiate a contract
- define Duress
- identify elements of undue.

## 3.0 MAIN CONTENT

### 3.1 Duress

At common law, duress is a somewhat narrow concept and is confined to cases where one party has agreed to something with another party, but consent to that agreement has not been freely given. Under such conditions the agreement is subject to challenge.

Duress frequently emerges in criminal law and also in contract, the latter being the focus of this section. However, criminal cases usually involve the party facing actual or threatened violence to the person, or often, the threat of imprisonment.

In cases based on contract, similar threats of violence may induce the party to sign something he would not normally sign, and in the commercial world a 'softer' version, not involving the threat of physical violence, may arise from 'high-pressure' sales techniques. Or it may be a more subtle element in which the party signs, say, a flat purchases agreement in an overheated market in which he feels, 'if don't sign now, prices are going to soon be so high that I'll never be able to afford one'.

In summary, duress appears in three ways:

1. Duress of the person (threats to one's physical well-being) or, sometimes, to the contracting party's spouse or close relatives.
2. Duress of goods (threatened damage to, or unlawful retention of goods)
3. Economic duress (where pressure is applied by taking actual or threatened advantage of the unfavourable economic circumstances of the contracting party).

### What is True Consent?

Before you turn to some cases in these areas, two underlying concepts should be considered. Firstly, the party who has entered into a contract under duress is in a position where he can void the contract at his option. And secondly, the victim, in trying to get the contract set aside, must

show that his consent was not a true consent and that the duress to which he was subject 'vitiates' it, whereby its legal force and effect is destroyed.

In *Barton v Armstrong* (1975) AC 104 in which it was held that one of the reasons Barton had sold a controlling interest to Armstrong and others, was that threats had been made on his life. The Privy Council held also that the death threat did not have to be the only reason, as it was shown that Barton had sound commercial reason for selling.

Threats to seize a person's goods can also constitute duress. This is a somewhat controversial area of the law, as traditionally this form of duress was insufficient to allow the party to avoid the contract. But money paid to recover goods that have been wrongfully seized, or paid to avoid their seizure, can be recovered: *Maskill v Honer*, (1915) An example of one line of judicial thinking on the topic is illustrated by Kerr J in *The Sibeon and The Sibotref*, (1976):

'.... if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed.... I do not think the law would uphold the agreement.'

### 3.1.1 Economic Duress

Of particular interest in this course is the concept of 'economic duress' which, in law, is a latecomer, but has led to an interesting line of cases in which one party has been coerced into signing something that in more favourable circumstances he would not have. In *North Ocean Shipping v Hyundai Construction: The Atlantic Baron*, (1979) Q.B. 709, a shipbuilding contract was based on US dollars. This currency, at the time, was falling. Consequently, the builders told the buyers that unless they increased the contract price by 10% they would not deliver the vessel on time. They also were aware of the fact that the buyers urgently needed the vessel as they had entered into a charter contract with a third party. The purchaser made an additional payment as it did not want to breach its contract with the third party. It was held by the court that economic duress had taken place and the buyer could recover the payment from the shipbuilder. However, the judge also held that the purchaser had delayed too long in making its claim and had therefore affirmed the variation in the contract. See also *Isiaka Lawal v C.A Awoyemi* (unreported) High Court of Lagos State, Backe J. Suit No. LD/201/95.

Refresh your memory of the concepts of laches or delay by referring to the case of *Leaf v. International Galleries* (1956) 2 KB 86.

The concept of economic duress was also acknowledged in a case where the Plaintiff's vessel could not leave port due to a boycott by the International Transport Workers' Federation (ITF), who complained that the Plaintiff was not complying with its labour requirements. Upon the ITF's request, the Plaintiff paid backpay and a contribution to the ITF's welfare fund in order to allow the vessel to sail. The court held that this amounted to economic duress. See *Universal Tankships Inc of Monrovia V International Transport Workers Federation*, (1982).

Before you turn to other cases in this area of law, complete this activity to ensure that you understand this subject.

### SELF ASSESSMENT EXERCISE

Define the common law concept of 'duress', and give two examples of cases in which the courts have recognised 'economic duress'.

### 3.2 Alternatives to a Bad Business Decision?

As the *Atlantic Baron* case indicates, a party who has been subjected to economic duress must move swiftly in order to recover money which has been paid out under these circumstances; in other words, one must move while the pressure is on. Unfortunately, as some case law indicates, variations to an existing contract may, under some circumstances, amount to re-negotiation that is binding on the parties; in some it may not, and one party may be able to recover the additional payment. This leads again to an examination of what constitutes duress in the economic sense. One factor is whether or not possible alternatives exist to the person who claims he has been 'pressured'. The following cases illustrate the different approaches that may be taken.

In *Atlas Express v Kefko*, (1989) the Defendant contracted with the Plaintiff to ship the Defendant's goods over a seven-month period. The Plaintiff miscalculated his costs and told the Defendant he could not handle a large shipment from Woolworth unless he would sign a new contract. The Plaintiff's driver arrived and his manager deliberately made himself unavailable to discuss the matter with the Defendant. The Defendant signed, the goods were shipped but the Defendant refused to pay the additional charges. The court held the Defendant was not liable to make the payment as the agreement was signed under compulsion, based on the fact he had no reasonable alternative available at the time; that is, to find another shipper.

In the second case, you will recall *Williams v Roffey Bros* which, among other things, examined the important element of consideration, and whether or not promises can be upheld where consideration is lacking.

This case also raises economic duress, as Williams was asking for additional payment from Roffey Bros for work he was already contracted to complete because he was facing severe financial difficulties. To make matters worse, he had miscalculated the costs in completing the work.

On the other hand, Roffey Bros had a clause in their contract with the developer that would have triggered a payment on their part if completion were delayed. Although Williams may have been the architect of his own misfortune in making a bad business calculation, it was sound commercial sense for Roffey Bros to make the additional payment in the interest of completing the job.

Finally, you will complete this section by reference to *D & C Builders Ltd v Rees*, (1966) 2 Q.B. 617 which is included partly because it raises not one issue, but several, which are familiar to you: the rule in *Pinnel's Case*, accord and satisfaction, consideration, promissory estoppel and duress. The Plaintiff builder completed building renovation for Mr. and Mrs. Rees, and although they were not fully paid, there was no dispute as to the quality of the work. After two requests for payment, Mrs. Rees complained about the work and offered £300 in settlement of the £482 bill: 'that is all you will get. It is to be in satisfaction', she said. The Plaintiff was in financial trouble and was facing bankruptcy, so he accepted £300 with the balance to be paid in one year. Mrs. Rees refused, stating that they would never have enough money and that '£300 is better than nothing'.

The Plaintiff said 'we have no choice but to accept' and Mrs. Rees insisted on a receipt 'in completion of the account' for the £300 cheque she gave to the Plaintiff. The Plaintiff sued Rees for the outstanding balance. The lower court ruled in favour of the Defendant, on the basis of *Goddard v O'Brien*, which stated that the rule in *Pinnel's Case* could be overcome as the payment of a lesser sum, by cheque, was sufficient to discharge a larger debt. This principle, as you know, has been abandoned. As a result, the Court of Appeal held that Rees was obliged to pay the remaining balance to the Plaintiff, D & C Builders.

As a further exercise in how you should approach the legal problems, which will enable you to successfully complete this course, briefly review again the issues which are raised in this case and consider the respective legal positions of the Plaintiff and the Defendant:

The Plaintiff, D & C Builders, could argue:

- Pinnel's Case: payment of a smaller sum for a larger debt does not discharge the debt;

- Duress: the Defendant's knew the Plaintiff's were facing financial difficulties.

The Defendant, Rees, might argue:

- A settlement of the debt had been negotiated;
- An exception to the rule in *Pinnel's Case* by 'substituted performance': payment of the debt by cheque;
- Promissory estoppel (*High Trees'*): the Plaintiff had agreed to accept a smaller sum in payment of the debt and Rees had relied on that promise.

Happily for the Plaintiff, the court ordered the Defendant to pay the full amount, and further acknowledged that the doctrine of promissory estoppel might allow a promisee to accept a lesser sum as binding, but not where it would be inequitable. Here, on the facts, there was no true accord between the parties, as the debtor's wife had held the Plaintiff to ransom as a result of their financial problems.

As you can see, there is often a fine line between economic duress and the legitimate commercial pressure which is part and parcel of the business world. If a Defendant was the major shareholder in a company and was persuaded to give a guarantee to *the Plaintiff* on the latter's threat to break his contract with the Defendant, this would have harmed the Defendant, but the guarantee remains valid as the threat was ultimately regarded as legitimate commercial pressure.

### 3.3 Undue Influence

Undue influence is an equitable doctrine in which a person's free will may also be influenced by another person, normally in cases where some special relationship exists: solicitor and client, doctor and patient, banker and customer (under some circumstances), financial advisor and client, or trustee and beneficiary.

In these and other similar relationships, there is a presumption that the stronger party is in a position to exert influence over the weaker; hence the onus is on the stronger party to rebut that presumption. Therefore, if the claim of undue influence is successfully made by the weaker party, the resulting contract will be set aside, unless of course the dominant party can convince the court that he did not unduly influence the other. A simple procedure to avoid these problems that are inherent in certain

relationships, is to have the weaker party seek independent legal advice before entering into the contract.

The presumption of undue influence was successfully established in *Lloyd's Bank Ltd v Bundy* (1975). There, Bundy, an elderly farmer, was able to set aside a mortgage and guarantees he had signed on behalf of his son when the son defaulted on the payments. The court concluded that the Bank had exerted undue influence over Bundy as follows:

- a special relationship had developed over the years between the parties so that there was trust, reliance and total confidence in the Bank's advice. Note, however, that there is no fiduciary relationship *per se* between a bank and its customers; the relationship is purely contractual;
- the Bank did not tell Bundy that he should obtain independent legal advice;
- the assistant bank manager had visited Bundy at his farmhouse to convince him to sign the third guarantee.

A special relationship also arose in *Westmelton (Vie) Pty Ltd v Archer and Schulman*, (1982). In this case the presumption was rebutted where an experienced business operation tried to set aside a solicitors' legal fee which had been accepted on the basis that it had been reduced in exchange for a share of the company's profits. Later, they tried to avoid it on the basis of undue influence. The court rejected the argument on the grounds that the company was experienced, there was nothing improper in the solicitors' professional conduct, there was no inequality in the parties' bargaining power, and the company had suffered no harm.

After the *Bundy* decision, it was considered in some circles (probably banking!) that a fiduciary relationship existed between a bank and its customers. As you have already read, this is not necessarily true, although it does have some fiduciary aspects. However, the point was clarified by the House of Lords in *National Westminster Bank plc v Morgan*, (1985) AC 686 in which a wife was obliged to sign a bridging loan with the Bank in order to finance some of her husbands debts. She later tried to set aside the loan on the basis that a fiduciary relationship existed between herself and the Bank. The court dismissed her argument and, among other things, made the following points:

- *Bundy* was rightly decided because a special relationship had developed between the parties over a long period of time, which was not the case here;

- it was her husband's Bank and she had never been a customer there, so no special or fiduciary relationship had been established;
- she could not prove there had been undue influence.

### **The Spousal Relationship**

Regarding husbands and wives, *Turnbull & Co v Dural* (1902) indicated that a special relationship existed between them, as with solicitor and client and the other relationships mentioned above, which by law raises that presumption. This is not the case today as husbands and wives do not fall within the generally accepted class of presumed undue influence cases, which you have just read about. In practical terms then, the spousal relationship does not carry a presumption of undue influence unless of course it can be shown (as in *Bundy*) that there is some *de facto* evidence (in fact) of a certain degree of trust, and reliance has been imparted by one party in the other. However, another case: *Barclay's Bank v O. Brien*, (1993) indicates that a creditor would be obliged to inquire into a transaction whereby a wife guarantees her husband's debt if, on its face, the transaction is not to her financial advantage and there is a risk that the husband has committed some legal or equitable wrong in convincing his wife that she should sign. Again, obtaining independent legal advice can normally solve the inherent problems in this and similar situations.

Finally, as with duress, a person pleading undue influence must move swiftly. In addition, the plea will not be successful if some third party rights are involved in the transaction. As we all are obliged to deal with banks and other large institutions, it is not difficult to realise that these relationships can be unbalanced, usually in the organisation's favour! You will now examine the concept of unequal bargaining power.

### **3.4 Unconscionable Bargains**

This is a mystery factor and has only been fleetingly referred to by legal writers over the years. However, as you have learned thus far, there are many contractual situations in which there is unequal bargaining power which can potentially give rise to unconscionable (unfair or oppressive) conduct.

As you have seen, unconscionable conduct was considered, but not found, in the solicitor/client relationship in the *Westmelton (Vie) Pty Ltd* case. Although there is, at the present time, no general principle of English law in this area has been developed in Australia, Canada and New Zealand and 'the following general observations can be made.



### 3.4.1 Unequal Bargaining Power

It is an equitable concept and can arise in cases involving economic duress. The mere fact that unequal bargaining power exists between the parties (an everyday occurrence!) is not, in itself, sufficient grounds for treating a contract made under those conditions as voidable. In this case, it was stated that, Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing: *Hart v O' Connor* (1985).

You will appreciate how uncertain this area of law is when you consider that Lord Denning in *Bundy* stated, among other things, that duress of goods, unconscionable contracts, undue influence and undue pressure all have a single thread that rests on inequality of bargaining power.

He felt that they should be united in a single concept. Unfortunately, the House of Lords did not agree with him and, in the *National Westminster Bank* case, stated that although unequal bargaining power could be a relevant feature in some cases of undue influence, there was no need in contract law to, 'erect a general principle of relief against inequality of bargaining power.

It also appears that some jurisdictions are not yet ready to accept the doctrine that Lord Denning suggested, and it was duly rejected in Hong Kong in the case of *OTB International Credit Card Ltd v Au Sai Chuk, Michael*, (1980). There, the Hong Kong Court of Appeal, in considering the terms and conditions of Mr. Au's credit card, took the 'reasonableness' approach and ruled that he was bound by them. It rejected the trial judge's consideration of the unequal bargaining power of the parties.

#### Statutory Considerations

The House of Lords in the *National Westminster Bank* (supra) case, indicated that the question of inequality of bargaining power was a legislative task. If a party can show a contract is 'unconscionable' — which is not defined — remedies are available. For example, the court may refuse to enforce it, eliminate the 'unconscionable' part and enforce the remainder, or alter or limit any such part which is deemed unconscionable.

Although 'unconscionable' is not defined, certain considerations will be relevant in attempting to establish that the other party's conduct was such that it is unquestionable:

- the relative bargaining positions of the parties;
- where conditions have been imposed which are not in the legitimate interests of one of the parties;
- whether the consumer understood the content of the documents;
- whether any undue influence, pressure or unfair tactics were used against the consumer;
- whether or not under the circumstances the consumer could have acquired identical or equivalent goods or services from another party.

It has to be admitted that this is an uncertain area of law needs some increase of consistence in approach.

To show that unconscionable conduct has induced a party to enter the contract, such onus or responsibility lies with that party. This is quite the reverse from a situation involving undue influence in which the 'stronger' party has the task of rebutting the presumption. The inherent problems in proving that the consumer has been the subject of unconscionable conduct may also prove difficult and potentially deprive him of any remedy.

You have now completed a substantial amount of the material you need in order to have a firm grasp of the fundamentals of the contracting process. You have studied what constitutes a contract and have examined the elements that comprise it, together with terms and conditions, both express and implied. You have also examined various vitiating factors — misrepresentation, duress, undue influence and unconscionable conduct — which can render a contract defective.

#### **4.0 CONCLUSION**

Now that you have learned how a contract is 'built', you are soon to study how it can be destroyed or terminated. As you have already seen, in a perfect world the parties enter into a contract, exercise their respective rights and obligations and live happily ever after. But of course, that is not the case in the world of commerce, and sometimes the parties are not happy and are obliged to resort to litigation to seek an appropriate remedy. Finally, in the last section of this unit, you will study the ways in which a contract can be discharged, and the remedies to which an aggrieved party may be entitled.

## 5.0 SUMMARY

You are now about to start the final section of this module. You will examine the ways in which a contract can be ended or discharged and if it has been breached. Then you will study the important topic of damages and the manner by which courts assess them. However, take a break, tackle this Activity, and then move on.

## 6.0 TUTOR-MARKED ASSIGNMENT

1. Wilberforce operates a computer consultancy firm and installs a 'state of the art' system in the offices of Shady Properties Ltd (SPL), for a contract price of N1.2 million. The quality of his system is not disputed by Managing Director of SPL, but when Wilberforce submits his statement of account, he receives a letter from the financial officer enclosing a cheque for N800,000 in 'full satisfaction'.

Poor Wilberforce already had 18 creditors chasing him and is in financial trouble. He explains this to Managing Director SPL who says, 'that's your problem, N800,000 is better than nothing', and, in addition, insists upon a receipt for 'completion of the account', to which Bill agrees.

He later consults you as to whether or not he can recover his balance of N400,000. Outline the arguments that will be presented by SPL and Wilberforce, and indicate what you think the courts would decide.

2. a. Your friend has negotiated a mortgage with Friendly Bank, to purchase a flat in the FCT. Six weeks later, he is having lunch with a lawyer friend who studies the mortgage document he happens to have in his briefcase. 'You're mad to have signed that' the lawyer exclaims, 'it's an unconscionable transaction and should clearly be set aside. Big banks should not take advantage of little guys like you'. Your friend cannot afford to pay the lawyer's hourly rate for advice, so he arrives in your office, where he knows the fees will be more reasonable.

How do you advise him?

- b. In the *Bundy* case, the court held, among other things, that the guarantees signed by the old man in favour of his son could be set aside on the basis of the Bank's undue influence. If Bundy's lawyers had argued unequal bargaining power between him and the Bank, would it have been successful?

## **7.0 REFERENCES/FURTHER READINGS**

Sagay I.E. (1999). *Nigerian Law of Contract*. Treitel

(1979). (5<sup>th</sup> Ed.). *The Law of Contract*. Olusegun

Yerokun (2004). *Modern Law of Contract*.

M.P. Furmston, (10<sup>th</sup> Ed). *Law of Contract*. Cheshire and FiFoot.

## UNIT 2 MISREPRESENTATION

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 A Term of the Contract
  - 3.2 Statement of Fact
  - 3.3 Silence
  - 3.4 Inducing the Contract
  - 3.5 Reliance
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

### 1.0 INTRODUCTION

There are many factors that can lead people to enter into a contract, and during the negotiations preceding a contract, statements are made with a view to 'making a deal'. You saw the difficulties inherent in the negotiation process and at requests for information as distinct from counter-offer. 'Negotiation' may sometimes embrace a misrepresentation made by one party, for example, we are all familiar with claims made by local estate agents who describe cramped Lagos flats as spacious. Also, the purveyors of unit trusts often advertise rates of return that are unrealistic.

There is a distinction, however, between mere 'puff, which is a meaningless, non-actionable statement such as 'the best real estate deal in Lagos Nigeria and say, when someone selling a piece of land says 'no' to a potential buyer who asks 'is it subject to flooding?', when in reality the land sits three feet under water every spring. The false statement in the latter case (rather than a statement which is mere opinion), made by the vendor to the buyer to induce him to buy the land, may allow the buyer to void the contract on the basis of the vendor's misrepresentation. Now read the following section, which deals with the topic of statements made by the parties to a contract, and misrepresentation.

As you will have gathered from this reading, misrepresentation, in general terms, is:

- a false statement of fact (not of law or, as noted, simply an opinion, unless given by an expert, say in a company prospectus: *Unit 5*), made by one party to another before the contract;

- made with the view to inducing the other party to enter into it;
- intended to be acted upon; and
- actually deceives the other party to be induced into entering into the agreement.

## 2.0 OBJECTIVES

At the end of this Unit, you should be able to;

- identify terms of a contract
- state the meaning and effect of misrepresentation
- state the importance of disclosure when entering into a contract.

## 3.0 MAIN CONTENT

### 3.1 A Term of the Contract?

The problem lies in deciding if and when a *representation* made by one party to another, at or about the time of the making of the contract, has become a 'term' of that contract. If it has not been intended as such, then problems still arise if a party, on the strength of that representation, has been induced to enter into the contract. If it is a representation and not a term, but is untrue (a misrepresentation) then this does not give rise to a breach of contract but, as you will see, entitles the other party to certain remedies.

Read again the elements of a misrepresentation, above, and consider what this means in the real world (as reported in various cases). Consider also where a misrepresentation is not a term of the contract but has induced a party to enter into the agreement. Now do the following activity.

Turning aside from consideration of what might constitute a term of a contract, and by now you should appreciate how important that is to the parties, let us now examine the nature of statements — or representations — which are made between parties to a contract. This is a difficult topic, but if you read the cases used to illustrate the points, then you should be able to gain some appreciation of what is required. Why then is a representation so important to the contracting process, and what happens if the statement has become a 'misrepresentation'?

To commence your understanding of this area of law, the unit will expand on the points made earlier in this section, as they are critical in establishing what constitutes a misrepresentation. Do not forget that generally speaking, 'puffs' (meaningless statements), statements of

opinion, or intention are not considered. Bearing this in mind, a misrepresentation has the following features:

- 1) The statement must be of *fact* (not opinion or a statement of law);
- 2) The statement is untrue;
- 3) The statement is made before, or at the time the contract was entered into;
- 4) The statement induces the party to enter into the contract;
- 5) The statement is relied upon (although other facts may be relevant).

Look out for these features as you work your way through the various cases that will be presented to you, and also remember one other salient feature that can be relevant in the parties' dealings:

- Generally speaking, silence will not normally constitute a misrepresentation.

As an illustration of the above, here are some relevant cases:

### 3.2 Statement of Fact

Consider the principles concerning statements of fact. In 1957, the car dealer made a statement of fact about the age of the car it was selling to the Plaintiff (even though the registration book was forged). It was held that this was not a term of the contract but an innocent misrepresentation. Opinion, as noted, is not actionable, as in *Bissett v Wilkinson* (1927) AC 177 where a vendor of land gave, in his opinion, the view that it could support 2,000 sheep, which was not true. The purchaser's claim against him failed, because the statement made was merely opinion and did not constitute misrepresentation. The court held that the purchaser must have known the vendor was only stating his opinion. And in *Edgington v Fitzmaurice* (1885) 29 Ch.D 459 the Plaintiff was induced into lending money to a company when its directors claimed they wanted to improve the company's buildings; in reality, they were paying off its creditors. The Plaintiff successfully sued the directors for fraud on the basis of the tort of deceit. The Defendants' argument was that it was a statement not of past or present fact but of future intention, failed.

### 3.3 Silence

If A is selling his car to B, and A is aware that the clutch will probably need replacing in one month, is he obliged to tell B? Generally speaking, no, because in this situation A has no duty to disclose such facts to B ('*caveat emptor*' or buyer beware).

However, note these exceptions:

- There is a duty to correct statements which, although they were true at the time were made, were false or misleading when the contract was they completed: in *With v O'Flanagan* (1936) the income from a doctor's practice decreased between the time the contract was made and completion. The Plaintiff purchaser was entitled to rescind the contract as the representation on the original income had induced him into entering into the contract.
- If a statement is made it must be 'full-disclosure' and not 'half-disclosure' as this may create a false impression: in *Peek v Gurney* (1873) Peek relied on statements made in the prospectus of Gurney's company, of which he was a director. Certain statements were false and Peek sued the directors. His action failed as the statements were intended to mislead the original allottees of the shares; Peek had bought his shares on the open market although he had read the prospectus. The statements were held not to be directed at him, but the original allottees. Later we will examine this 'relationship' or 'proximity' question in terms of whether or not the directions in this case, owed a duty of care in tort to Peek when they published their prospectus. Or example, the ruling here would not have applied if he could have shown that the misrepresentations by Gurney and his directors were intended to be 'passed on' third parties, or members of the public. *John Holt Ltd. v. Oladunjoye* (1956)<sup>13</sup> NLRI
- Contracts *uberrimae fidei* 'of utmost good faith' in insurance contracts, there is a duty on the insured to disclose all material facts relevant to the insurance, even if not expressly asked (you remain silent about the fact that you bungee jump and smoke 100 cigarettes a day!).

The essence then of a representation – true or otherwise – is whether or not it has been material to the other party's decision to enter into a binding contract; in other words, did the statements induce him into making that decision? Before we study this important concept, complete the following activity.

### SELF ASSESSMENT EXERCISE 1

What are the circumstances (if any) by which a party to a contract has a duty to disclose facts material to the contract and which may influence the other party's judgment?



### 3.4 Inducing the Contract

If a party is unaware of a misrepresentation that has been made, then it does not affect the contract as he has not relied on it so as to induce it: *Attwood V Small*, (1838) 6.cl&f. 232 in which in the purchase of a mine, the Defendant (buyer) was allowed by the Plaintiff (seller) to send his own agents to check the income figures. The agents misrepresented the figures and the Defendant relied on them and entered into the contract. The House of Lords rejected the Defendant's attempts to rescind the contract as he had relied on his own investigations and not upon the Plaintiff's representations.

Compare this case with *Redgrave v Hurd* (1889) 20 Ch.D 1 where the solicitor Plaintiff negotiated with the Defendant to enter his practice based on the Plaintiff's income figures, which were inaccurate. The Defendant discovered the error, the Plaintiff sued the Defendant for breach of contract and the Defendant counter-claimed for rescission of the contract. It was held that (unlike *Attwood v Small*) the Defendant had relied on the Plaintiff's income statements and not his own skill and judgment and it did not matter that Hurd could have found a third party to examine Redgrave's figures.

### 3.5 Reliance

As you have no doubt noticed, there are key words upon which a given line of cases depends. In misrepresentation, the statement must have induced the other party to enter into contractual relations or, in other words, the injured party must show that he relied upon certain statements made, or actions demonstrated. You also encountered the importance of this concept in promissory estoppel and the High Trees case as earlier shown.

#### SELF ASSESSMENT EXERCISE 2

1. What are the underlying requirements for statements made by one party to another for such statements to constitute a 'misrepresentation'?
2. Chidi is negotiating the sale of her restaurant to Christine and honestly believes that her annual net profit is N500,000 per annum. They agree that the sale will be effective July 1, 2006. on the day before the completion date, Chidi realises that an economic slump has affected her and the net profit now is more likely to be N300,000 per annum. Should Chidi disclose these changed circumstances to Christine reasons, citing appropriate cases.

## **4.0 CONCLUSION**

You now know the meaning of Terms of Contract, Statement of fact, silence and the duty to disclose material facts when entering into a contract. You have been able to be exposed to the importance of representation and the effect of Reliance on Statement made by a party to a contract.

## **5.0 SUMMARY**

In this Unit, you have learned about contract and the terms of a contract. You have also been given some basic characteristics of a contract which the text tried to capture. The unit also discussed some of the basic dimensions of the concept of contract which you should know for you to claim actually knowing terms of contract, they include misrepresentation, including a contract, silence, statement of fact, (Caveat emptor of buyers beware)

## **6.0 TUTOR-MARKED ASSIGNMENT**

Write a brief answer to the following question:

What do you understand by the 'term' of a contract?

## **7.0 REFERENCES/FURTHER READINGS**

Treitel (1979). (5<sup>th</sup> Ed.). *The Law of Contract*. Sagay,

I.E. (1985). *Nigerian Law of Contract*. Olusegun

Yerokun, (1999). *Modern Law of Contract*.

## UNIT 3      TYPES OF MISREPRESENTATION

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
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  - 3.2 Fraudulent Misrepresentation
  - 3.3 Negligent Misrepresentation
- 4.0 Conclusion
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- 6.0 Tutor-Marked Assignment
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### 1.0 INTRODUCTION

There are three types of misrepresentation and you should be able to distinguish their essential characteristics, as well as the respective remedies that are available to the injured party. The injured party is referred to as the ‘**representee**’ as distinct from the ‘**representor**’, who makes the statement. Although generally speaking, a misrepresentation makes a contract voidable (that is, a contract is valid until it has been set aside) at the option of the party who has been misled, the consequences of the type of misrepresentation may vary accordingly.

Let us consider the categories of misrepresentation. They can be briefly defined as follows:

- **Innocent** – a false statement made in the honest belief that it is true.
- **Fraudulent** – not to be confused with the criminal law view of ‘fraudulent’. In the civil sense, it means a statement made knowingly or without belief in its truth, or made recklessly to the extent that the party does not care whether it is true or false.
- **Negligent** – a false statement made honestly yet without reasonable grounds for belief in its truth. As you will see later, under the traditional principles of tort law, there was no liability for negligent misrepresentation unless it could be shown that the party making the representation owed some contractual duty of care to the party to whom he was making the representation.

As you have learned, a misrepresentation may or may not form part of a contract. In a sales agreement for example, the vendor may insert

standard terms and conditions which emphasize that no representations have been made about the goods which form part of the agreement. However, not all contractual relations are that clear. Many contracts are entered into on the strength of representations which may have been made by one of the parties, and it may often be a question of fact as to whether or not the representation is part of the contract. If a given matter is litigated, it will be up to the courts to decide if the representation forms part of the contract. This conclusion is arrived at by examining the circumstances of the case and deciding what is, and what is not, a contractual term.

What is important to you as a student of this course, and as a professional in the commercial world, is that in the cases you are about to examine, you should remember that if a representation is a term of the contract, then the injured party can sue for breach of contract. If it is not a term of the contract, then the innocent party may sue on the misrepresentation. Alternatively, an action may be based in tort. This possibility is traditionally harder to prove and raise different concerns in the assessment of damages.

## 2.0 OBJECTIVES

At the end of this Unit, you should be able to:

- define 'misrepresentation'
- describe different classes of misrepresentation
- define innocent, fraudulent and negligent misrepresentation.

## 3.0 MAIN CONTENT

### 3.1 Innocent Misrepresentation

At common law, an innocent representation does not give a party the right to damages. If you contract with a company to buy certain goods from it and find that prior to delivery, a misrepresentation has been made as to the content of the goods, then your equitable remedy is rescission: you may avoid the contract and recover any monies you may have paid. The essence of rescission is to place the parties in the position they were in prior to the making of the contract. This is known as *restitution in integrum*.

This is clearly not possible if the parties' position has changed; hence there is a distinction between misrepresentations made prior to entering into the contract and misrepresentations that have become incorporated as a term of the contract. In the latter case it may be advantageous for the deceived party to sue for breach of contract, which, if successful

under the common law, gives an automatic right to damages. Generally speaking, if the person making it can show he genuinely believed it to be true, it is a defence to making a misrepresentation (as you will see later when you study directors' misstatements in company prospectuses).

### **Promises or Misrepresentation?**

It is also difficult to distinguish between contractual promises and mere representations in contracts of sale. There, statements made by dealers or 'people in the trade' may become contractual terms. Similar statements made by private individuals do not become contractual terms and remain mere representations. In *Dick Bentley Productions v Harold Smith Motors*, (1965) 1 WLR 623 a garage's representation about a 'well-vetted Bentley car' was found to be false and the court held that a term had been broken, leading to the buyer having the right to claim damages. However, in *Oscar Chess v Williams*, (1957) 1 WLR 370 the private owner's false statement to the garage regarding the age of the car was held to be a mere representation.

In cases involving misrepresentation, the contract is voidable at the option of the party deceived. The equitable remedy of rescission may be applied and the parties restored to their original positions by transferring the property and paying back any monies paid. Clearly, this remedy is lost if the parties have changed their position; for example, if the purchaser of a car has resold their car to a third party. This right is also lost if the deceived party 'affirms' or approved the misrepresentation by carrying on with the contractual process in full knowledge of the misrepresentation. The right to rescission is also influenced by the fact that the deceived party must act reasonably promptly to seek remedy once he discovers the misrepresentation; this rule helps avoid uncertainty as to ownership when the title remains voidable. As you know from last unit a 'reasonable time' is a question of fact and in *Leaf v International Galleries* until five years had elapsed!

The Misrepresentation Act allows the court to award monetary damages in lieu of rescission, but this does not help the deceived party in equity where the parties have changed their position and third parties have acquired some right to the subject matter of the contract. The Misrepresentation Act remains a 'faithful duplicate' of the English Act which, incidentally, has been the target of some criticism from lawyers and academics.

### 3.2 Fraudulent Misrepresentation

Fraudulent misrepresentation can be distinguished from innocent misrepresentation. In fraudulent misrepresentation, the statement is being made with knowledge of its falsity, without belief in its truth, or by recklessly not caring whether it is true or false: *Derry v Peek*, (1889)14 AC 337. Rescission is available, as with innocent misrepresentation, but only if the misrepresentation is made fraudulently will a claim for damages, for the tort of deceit, be possible. Also, from the facts, it was clear that the directors did not intend to deceive anyone.

To complicate matters, it is often difficult to distinguish between a fraudulent misrepresentation and one in which the representor has merely been negligent. In *Howard Marine & Dredging Co Ltd v A Ogden & sons (Excavations) Ltd* (1978) damages were awarded for false statements made by the owners for the carrying capacity of two barges. It has been pointed out that this reference to fraudulent misrepresentation as being a 'negligent misrepresentation', is misleading and we should restrict the latter to actions based on the tort of negligence. They quickly point out that it is often difficult to adduce evidence of a 'wicked mind' and, in the real world, unless you get the police involved, your chances of success in obtaining redress from the representor are slim. Also in *Abba v Mandilas Kara Beris Ltd* 2 ALR Comm 241 and *Sule v Aromire* (1951)20 NLR 20.

### 3.3 Negligent Misrepresentation

Negligence is probably the most important of all torts as it has an impact on many aspects of our lives, professional and personal. As you will recall the law imposes a duty of care upon persons who owe a duty to others (from preparing an audit to driving a car), and if that duty is breached and damage or loss occurs, then that person is potentially liable. *Agbonmagbe Bank Ltd v D.F.A.O Ltd* (1966)1 ANLR 140.

In studying negligent misrepresentation it should be borne in mind that this is particularly relevant to you in your professional capacity in the business world. Moreover, this is an area of the law which has recently witnessed significant change. All of us have an obligation to perform our job to the best of our ability (an implied term in each of our employment contracts) and, if the above-noted aspects of a relationship exist between us and, say, a client – that is, a duty of care which has been breached with a resulting loss or damage – then we may be deemed negligent. More specifically, you will examine in detail the potential liability of negligent misstatements made by company directors and auditors. This is an important topic as there have been significant developments in this area of the law over the past few years.

When the English Misrepresentation Act was passed in 1967, the common law approach to negligence had not progressed appreciably since the ‘neighbour’ principle enunciated by the House of Lords in *Donoghue v Stevenson* (1932). This is what is meant by the ‘neighbour’ principle. In *Donoghue v Stevenson*, a duty of care (the central issue of this line of cases) was imposed upon the manufacturer of contaminated ginger beer which was held liable to the ultimate consumer. The years following this decision found the English courts adopting a somewhat cautious stance on imposing liability on careless verbal or written statements. This attitude was partly based on the fact that we do not live in a perfect world and, also, it is unwise to open the ‘floodgates’ of potential claims in what many may argue is already an overloaded, litigious society.

As business professionals, the question of negligent misrepresentation is of particular importance to your own daily activities. You will return to this topic again. Before examining other vitiating factors in the contracting process, please complete the following activity. Then you will be introduced to another important topic – remedies – and, specifically, to remedies that may exist to protect a person who is at the ‘receiving end’ of a misrepresentation, be it innocent, fraudulent or negligent.

### **SELF ASSESSMENT EXERCISE**

List three types of misrepresentation and explain how they differ.

## **4.0 CONCLUSION**

It is obvious that misrepresentation can vitiate a contract you now understand the different types of misrepresentation and the consequences of each on the validity of a contract.

## **5.0 SUMMARY**

You have learnt that for a contract to be valid, it must satisfy some conditions precedent. These precedents entail and contain essentially the embodiment of the fundamental rules of contract. Misrepresentation is an essential ingredient in contract that must be fulfilled before a contract can be declared valid

## **6.0 TUTOR-MARKED ASSIGNMENT**

1. Explain the term misrepresentation.
2. What is the difference between innocent and fraudulent misrepresentation, if any.

## **7.0 REFERENCES/FURTHER READINGS**

M.P. Furmston, (10<sup>th</sup> Ed). *Law of Contract*. Cheshire and FiFoot.

Olusegun Yerokun (2004). *Modern Law of Contract*.

Sagay, I.E. (1985). *The Law of Contract*.



## **UNIT 4      REMEDIES (I): MISREPRESENTATION**

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- 2.0 Objectives
- 3.0 Main Content
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- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Readings

### **1.0 INTRODUCTION**

As you have seen, a misrepresentation can manifest itself in many ways; directly or indirectly, by words or conduct, and sometimes by omission.

### **2.0 OBJECTIVES**

At the end of this Unit, you should be able to explain the following:

- misrepresentation
- fraudulent misrepresentation
- innocent misrepresentation
- negligent misrepresentation
- other vitiating factors of a contract.

### **3.0 MAIN CONTENT**

#### **3.1 Innocent Misrepresentation**

In an innocent misrepresentation, the common law does award damages but the contract is voidable at the option of the representee. Sometimes a monetary award will be made together with an order for rescission, the former being given not as damages, but as compensation necessary to place the representee in his original position.

In *Newbigging v. Adam*, (1886)<sup>34</sup> ch.D 582 the Plaintiff became a partner in a partnership as the result of misrepresentations made by Adam regarding the partnership's financial status. The Plaintiff obtained a court order to dissolve the partnership and for repayment of

the monies he had paid into it. In addition, as he was still liable as a partner for the partnership's debts, the court also ordered award for damages but, in equity, merely received compensation for the losses he suffered as the result of setting aside a contract that Adam had induced him into entering.

As you will note from the cases you read, there is a distinction between a misrepresentation made before the contract has been entered into, and a misrepresentation being apparent when the contract is underway.

Clearly, if the misrepresentation is noted before the contract has been concluded, then the representee's right to rescission is relatively clear-cut. But if the right to rescind is lost, the victim will generally be obliged to accept the resulting loss. Therefore, the representees in innocent misrepresentation are in a tricky position: should they walk away nursing a loss, or claim there was a contract which the other party breached? In many cases the Plaintiff will attempt to show that the relevant statement was not a misrepresentation (which may make life difficult for him!), but was a term of the contract, say a breach of warranty. In other words, he is not walking away from a potential contract, but is claiming one exists. An example of this was shown in the *Oscar Chess Ltd v Williams case* (1957) 1 WLR 370.

Another variation to this dilemma is that the representee might argue that the 'misrepresentation' was a collateral (or secondary) contract as in *De Lasalle v Guildford* (1901). There, just before exchanging written contracts for the lease of premises, the tenant asked the landlord for confirmation that the drains were in good working order and he was told they were. They were not, as the tenant discovered after the contract was completed.

The issues raised in this case are worth nothing. Firstly, the tenant had a problem with a concept known as the 'parol evidence' rule. This rule broadly states that if a contract is wholly or entirely in writing, then extrinsic or outside evidence, which would add to, vary or contradict the written document, is not an introduced verbal evidence designed to add extra terms or clauses to, or in any way modify the agreement. Secondly, to overcome this problem he argued that there was a collateral contract and that he only entered into the written lease because the landlord had assured him the drains were in good working order; without that promise he would not have signed the lease. The court accepted the tenant's arguments and awarded him damages for breach of collateral contract. You should note that reliance was critical in the outcome of this case.

Many of these old problems created at common law have now been modified by statutory intervention as illustrated in the next section of this unit.

### **Misrepresentation Act**

The old common law rule that rescission was not possible if the contract was executed (completed or modified by equity), has been amended by Misrepresentation Act,

Where a person has entered into a contract after a misrepresentation has been made to him, and

- (a) the contract has been performed a term of the contract; or
- (b) the contract has been performed;

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Ordinance, notwithstanding the matters mentioned in paragraphs (a) and (b).

As you have seen, at common law (prior to the Act) the potential remedies were 'easier' on the representee if he could show the misrepresentation had become a term of the contract. Fraud was always regarded differently, in which case the representee always had the right to rescind, regardless of what his rights might be. This is not quite the same when misrepresentation is not fraudulent. As you know from your readings, if the representation had become a term of the contract, the common law courts basically had two choices: treat it as a condition, giving the injured party the right to repudiate the contract, or treat it as a warranty, thereby leaving a claim for damages.

In both cases, the representation had truly become part of the contract in which case there no need to seek the equitable remedy of rescission. Perhaps one problem with this approach, is that if the injured party has successfully shown that the representation was a term of the contract then he has lost his rights to rescission which, depending on the circumstances, may not necessarily be a good thing. Now it appears from the misrepresentation Act that the common law right to rescind is in addition to the representee's right to terminate for breach.

### 3.2 Fraudulent Misrepresentation

A fraudulent misrepresentation gives the representee a right to damages. This is possible whether or not there is a claim for rescission. The *quantum* or amount of damages is based not in contract law, but in tort (arising from deceit). Thus, for the representee it would be as though the representation had not been made, and if it were true. If, for example, a fraudulent misrepresentation by the managing director of an insolvent company to whom goods are sold, had induced the seller to sell, then the measure of damages is the market value of the goods which would not have been sold by the seller if the misrepresentation had not been made: (*Polaroid Far East Ltd v. Bel Trade Co Ltd* (1990)). In the last section of this unit, you will briefly refer to the differing criteria which courts adopt in their assessment of damages in a case of breach of contract.

As you will see in the final section of this unit, the general principle in the awarding of damages in a breached contract, is that the Plaintiff is to be compensated for the financial loss he has suffered. Thus it is in monetary terms, as if the promise had been performed. The measure is limited to what may reasonably be supposed to have been contemplated by the parties. But as Lord Denning also pointed out, in fraud they are not so limited and in the sale of a business which was induced by the vendor's fraudulent misrepresentations, additional damages were awarded for 'strain and worry': *Dyle v Olby (Ironmongers) Ltd & Others* (1969).

Unfortunately, in many cases involving fraudulent misrepresentation, the misrepresentator may well disappear (often with his ill-gotten gains), thereby placing the injured party in a difficult position to communicate his right to rescind the contract. Here, rescission can be effective, in the contractual sense, if the injured party notifies the police or goes through the appropriate organizations. Although notification of a fraudulent transaction may help the injured party, it will not necessarily guarantee the return to him of goods sold or monies paid, as this involves physically tracing the monies or goods. Even if this is achieved, problems exist as to whether or not title, or legal ownership, has passed to a third party. This is an extensive area of the law that you will only touch on occasionally.

Finally, it should be pointed out that the misrepresentation Act has not changed the legal and equitable remedies for fraudulent misrepresentation.

### 3.3 Negligent Misrepresentation

As the early part of this section of the unit indicates, the common law gives a right to damages for a negligent misrepresentation, whether rescission is claimed or not. As with fraudulent misrepresentation, the measure of damages is based on the principles of tort. Again, the law will attempt to put the representee in the position he would have been in, if the representation had not been made, and not if the representation were true. In *Esso Petroleum v Mardon* (1976) Esso negligently misrepresented the sales volumes were awarded on the basis of the losses Mardon had suffered, being the difference between the petrol sold and Esso's estimate, in addition to expenses and losses incurred in acquiring the business. See *Agbonmagbe Bank Ltd v C.F.A.O Ltd* (Supra) where damages were awarded to the defendant on negligent misrepresentation on part of the bank.

Note that the Esso sales representative, who gave false information to Mardon, was not 'in the business' of giving advice, as bank was in the Hedley Byrne case, nor was he an auditor. However, the court held that he had an obligation not to make negligent statements while negotiating the lease with Mardon. However, a court must take due consideration of what is reasonably foreseen as the natural and probable consequences of the representor's act.

Negligent misrepresentation allows the representee to void the contract at his option. This right has been limited and the principles regarding remedies are substantially the same as those for a fraudulent misrepresentation. *Sule v Aromire*, where the contract was rescinded.

The misrepresentation Act as you will note, gives the representee a right to damages, but does not establish how the measure of damages is calculated: by the common law principles of tort, being the foreseeability of the loss; or the compensatory approach of contract law, in which the courts attempt to place the parties in the position they would have been in if the contract had not been breached.

The courts' approach to assessing damages is typified by the case where the Plaintiff Company rented premises from the Defendant for one of its senior managers. The house was for a three-year lease, with a monthly rental of N5,000. The Defendant's agent negotiated the lease with the Plaintiff's manager and the former advised the manager that the vacant lot surrounding the house was included in the rental. For months after the Plaintiff's manager took occupancy, construction of a house took place in the garden and the Plaintiff sued for damages.

It was held by the court that the false representation made by the Defendant's agent to the Plaintiff's manager (who was accompanied by a colleague who gave evidence at the trial as to what was said during the negotiations) had induced him to enter into the lease and that the damages were recoverable on the basis of what the Plaintiff paid, less the value of what he had received, together with any consequential loss which resulted from the tenancy. The court awarded the Plaintiff company N76,000 on the following basis:

- As the result of the loss of garden space after four months due to the new house that was built on it, the monthly rental was reduced from N15,000 to N13,500 x 32 months = N15,000 x 32 = N48,000.
- The Plaintiff's manager had spent N34,000 to have the unkempt land cleared, filled and laid with turf. The work was completed directly as a result of the Defendant's misrepresentation that the Plaintiff's manager could enjoy the garden; consequently, the remaining space in the garden was calculated to be between 10 and 20% of its original size after the new house had been built. Hence, approximately N28,000 of the N34,000 spent had been wasted. Accordingly, an allowance of N28,000 was made, totaling an award to the Plaintiff of N76,000.

The court also considered, but rejected, the possibility of damages for the inconvenience that the Plaintiff's manager and his family suffered as the result of the construction that lasted for one year. In general terms, it was considered too 'remote'. Do you think Lord Denning would have taken a different view?

Misrepresentation Act allows rescission even though the contract has been completed. Furthermore, in a negligent misrepresentation, the representee may also claim damages, awarded at the court's discretion.

To help you summarise the topic on misrepresentation, a brief table is outlined below and some comments are given regarding diagrams and charts that you will encounter in these course notes. Note that they do not provide a definitive or exhaustive outline of the topic. You are surely familiar with the reality that although the law does have 'rules' there are, almost invariably, exceptions to a greater or lesser extent. Please bear in mind then that these 'shorthand' pointers do not cover all relevant aspects.

The table below illustrates how the common law remedies for the three types of misrepresentation have been modified by misrepresentation Act.

Table of common law and statutory remedies of misrepresentation

Common Law		
Innocent Misrepresentation	Fraudulent Misrepresentation	Negligent Misrepresentation
Rescission	Rescission	Rescission
Voidable at deceived party's option	Voidable at deceived party's option	Voidable at deceived party's option*
No damages available but if deceived party's position is changed, compensatory award possible.	Damages on basis of tort of deceit; difficult to prove a 'wicked mind': <b>Derry v Peak</b>	Damages assessed on tort principles (placed deceived party in they would have been in if the
Rescind if misrepresentation made before contract entered into; recover any monies paid		had not been made, not if it were true)
claim		Generally cannot
Problem if after contract entered into restitutio in integrum not possible: deceived party may treat misrepresentation as term of the contract and sue for damages as rescission not available*		rescission and damages
Misrepresentation Ordinance		
Innocent Misrepresentation	Fraudulent Misrepresentation	Negligent Misrepresentation
Allows court to award damages in lieu of rescission	Common law and equitable remedies not altered:	Damages available under
aware of the		Can be claimed after contract entered into even if the deceived party was
		facts

**SELF ASSESSMENT EXERCISE**

1. What element must a Plaintiff prove to maintain an action based on fraudulent misrepresentation?
2. Billy enters into a sales agreement with Shade Properties Ltd (SPL) to purchase a luxury flat in Maitama – Abuja which has a tenant who, the agent claims, is 'a first-rate individual, with impeccable financial credentials and a tripe- A credit rating'. Billy intends to assume the tenancy and occupy the premises when the tenant leaves in 18 months.

Shortly before completion, he finds out that the tenant is five months in arrears with the rent and is on the brink of bankruptcy. Billy on his legal position. Would your answer be any different if he had completed the contract and only then discovered that the tenant was in financial trouble? (You need not consider the issue as to whether Billy should proceed against the agent for SPL, which in turn is the owner of the flat, or both of them.

#### **4.0 CONCLUSION**

You have now completed a very important topic in the law of contract. In the business world, 'representations' are an integral part of the negotiating process by which the parties to a potential agreement ultimately reach decision on whether or not to proceed. While you have seen that it is not always easy to claim that a person has made a fraudulent misrepresentation which we honestly believe to be true, but which, in fact, is wrong. With the pressures inherent in the hurly-burly of Nigeria process, Aba, Kano and Lagos commercial world, it is not uncommon to find that negligent misstatements have been made regarding, say, the attributes of a flat or been prepared for a corporate client.

#### **5.0 SUMMARY**

You have completed a brief examination of misrepresentation in its three forms – innocent, fraudulent and negligent – and it is time to move on with those elements which can render an otherwise 'perfectly good' contract ineffective or inoperative. Before you move on, complete the following activity.

#### **6.0 TUTOR-MARKED ASSIGNMENT**

Explain the term Negligent Misrepresentation.

#### **7.0 REFERENCES/FURTHER READINGS**

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(1979). (5<sup>th</sup> Ed.). *The Law of Contract*. Olusegun

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## MODULE 2

Unit 1	Discharge of a Contract
Unit 2	Remedies (II): Legal and Equitable

### UNIT 1 DISCHARGE OF A CONTRACT

#### CONTENTS

1.0	Introduction
2.0	Objectives
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#### 1.0 INTRODUCTION

You have by now read many cases, and perhaps have arrived at the conclusion that businessmen spend most of their lives in litigation. This of course, is not true. In practical terms, most contracts that are entered into are successfully completed and the parties have given and received what they bargained for when they entered into negotiations, weeks, months or even years before.

However, you are now going to examine contracts that do not necessarily end happily. If the cause of discharge is breached, then the courts may be obliged to step in and assess the amount, or *quantum* of the injured party's loss.

A very common question that law students are asked to answer is: 'Describe the ways in which a contract can be discharged and write a brief memorandum on each.' Whether or not you will have this in your course examination remains to be seen, but in the meantime, the following are materials you will need to learn thoroughly.

A contract can be brought to an end in four ways:

- 1) by performance (after which hopefully the parties live happily ever after);

- 2) by agreement;
- 3) by frustration;
- 4) by breach, including the relevant remedies.

Performance and breach are founded on the terms of the original contract, but agreement and frustration arise from subsequent outside events. Now read the following section which deals with the discharging and enforcing of contracts.

Some legal texts may expand the list beyond four categories by which a contract can be terminated, adding termination by the operation of law (i.e. merger, bankruptcy or a unilateral alteration of a document) or one party accepting the other party's repudiation (which is effectively part of the doctrine of breach of contract).

## **2.0 OBJECTIVES**

When you have completed this Unit, you should be able to:

explain the following contract terms, phrases or concepts

- substantial performance
- standard of performance
- repudiatory breach
- doctrine of frustration
- self induced frustration

identify the circumstances:

- where an innocent party may terminate a contract for breach
- which give rise to or terminate contractual obligation
- the limitations of the law reform (frustrated contracts) act of 1961 and 1994 Lagos state
- the limitations on the doctrine of frustration

determine the consequences that flow from

- breach of contract
- frustration of contract.

## **3.0 MAIN CONTENT**

### **3.1 Discharge by Performance**

Even in our imperfect world, this is the most common way in which a contract is discharged. The basic rule is that both parties must adhere to

the terms of the contract and complete precisely what they have bargained to perform. Clearly, there is a potential problem in defining what will constitute *precise* performance of the terms of the contract. In *Re Moore & Co v Landauer & Co*, (1921) a shipment of Australian canned fruit was to be packed in cases containing 30 cans each. The ship was delayed. It arrived late in London and about one half of the shipment was in cases containing 24 cans, not 30. The buyers refused to accept them. It was held that the buyers were entitled to reject. Although the market value of the goods had not been affected, it was a sale by description under the English Sale of Goods Act and the description had not been complied with. See also *Oroyinyin v Roman* (1997)2 NWLR (Pt 489) 72 CA.

Strict compliance with 'performance' can obviously lead to inflexibility, and the courts have tried to balance rigidity with plain common sense if microscopic variations lead to hardship for one of the parties. However, more serious implications arise when a party has partially or substantially performed his obligations, or has failed to complete the entire contract. Three cases are used to illustrate difficulties in defining 'partial' or 'substantial'.

### **Partial and Substantial Performance**

In *Sumpter v Hedges*, (1898)1 QB 673 the Plaintiff/builder agreed to erect buildings on the Defendant/owner's land, the contract price being £565. He completed part of the work to a value of £333 and then abandoned the contract as he had insufficient money. The Defendant paid part of the £333 and completed the work himself, using the Plaintiff's materials which had been left on the site.

The Plaintiff sued the Defendant for the work he had carried out, plus the cost of the materials used by the Defendant. The court held that he was not entitled to anything for the work he had carried out. The principle of *quantum meruit* (as much as he has earned) was not applicable as the Defendant had not voluntarily accepted the Plaintiff's work, but had been obliged to accept it. The concept of *quantum meruit* will appear later in this unit, as acceptance of partial performance in practical terms means the original contract between the parties has been varied. Although we may feel sorry for Sumpter because he ran out of money, possibly because he made a bad business decision in estimating his costs, the fact remains that he *breached* his contractual obligations. This reasoning has been described as the 'entire contract' rule in which even a small fault by one party would constitute a breach.

A similar situation arose in *Bolton v Mahadeva*, (1972)2 AER 1322 where the Plaintiff installed a heating system in the Defendant's house

for a contract price of £560. The Plaintiff did not do a good job and it cost the Defendant £169 to correct the defects. The Court of Appeal held that the Plaintiff was unable to recover any money for his partial performance as it was an entire, lump sum contract which he had breached. Meanwhile, the Defendant received a new heating system for £169 (less perhaps some legal fees). The County Court held that the Plaintiff had substantially performed his contract and was entitled to receive £381, being the contract price of £560 less the £169 the Defendant had to spend to remedy the defects. The Court of Appeal, however, disagreed saying the Plaintiff had not substantially performed the contract, and could recover nothing. Is this a case of 'unjust enrichment'? You will examine it shortly.

Now consider *Hoenig v Isaacs*, (1952) in which, for a contract price of £750, the Defendant employed the Plaintiff to decorate his one-room flat: 'Net cash as the work proceeds and balance on completion'. The Defendant paid the Plaintiff £300 by two installments plus a further £100. He refused to pay the remaining £350 as Hoenig's work was defective: the wardrobe door had to be replaced, and a bookshelf had to be re-built for an additional cost was £55. The Defendant (as in *Bolton v Manadeva*) claimed the contract was entire and that the Plaintiff must completely perform the contract before being paid. The Official Referee disagreed, holding that the Plaintiff had substantially performed the contract and was entitled to £395, being the contract price of £750 less £300 paid by the Defendant and £55 for rectifying the defects.

### **Divisible Contracts**

As you can see from those cases, the problems encountered in distinguishing between contracts which are partially or substantially performed, raise questions that are difficult to answer. They can be partly solved by making the contract terms divisible; that is, the agreement is drafted in such a way that a party is entitled to recover part of the total price by performing a part, or parts, of his obligations. However, this must be clearly intended between the parties in order to rebut the general principle that a contract is 'entire' (as in the *Bolton* case) and not divisible, as in the latter case, where it would have to be clearly spelled out that the work was to be paid for in installments as it progressed.

The harshness of the 'entire contract' rule was demonstrated in *Cutter v Powell* 1.795 6 T.R 320 in which the estate of a deceased sailor who had died during the voyage was not entitled to compensation for the services he had sadly, only partly performed. This principle was affirmed in *Sumpter v Hedges*. However, the modern position on employment contracts would likely negate the *Cutter v Powell* ruling, and it is quite

common in building contracts to make provision for progress payments. In some cases, unless the parties have agreed otherwise, periodic payments payable in an instrument in writing or otherwise, considered as accruing from day to day, and apportionable in respect of time accordingly'. *Omoleye v Okeowo* (1973) 3 U.I. L.R 180.

## Unjust Enrichment and Quasi-Contract

Situations in which individuals spend time and effort for which they are not necessarily rewarded, raise a complicated aspect of the law often referred to as 'unjust enrichment', where sometimes a person has unjustly benefited at the expense of another. This can arise, as when the courts take an 'all or nothing' approach as evidenced by the general presumption that a contract is to be treated in its entirety, and partial performance by a party does not entitle him to any remuneration (as in the *Bolton case*). As noted earlier, to rule otherwise would amount to re-writing the contract. This concept is allied to *quasi-contract* in which some person, as in *quantum meruit*, has performed an act or service and is not remunerated because of legal principles which operate against him.

In *Craven-Ellis v Canons Limited*, (1936), the principle is enlarged even more as there was never a binding contract to start with. By technicality, the directors who signed the Plaintiff's employment contract lacked legal capacity to the extent that they had not obtained the requisite qualification shares; hence the contract was invalid. Meanwhile, the Plaintiff had performed services for which he had not been paid. The court ordered payment to him on the basis of *quantum meruit, or quasi-contract*, as indeed, at common law, there was no contract but he had performed services.

## 3.2 Discharge by Agreement

Under the common law principle of freedom of contract, it follows that if we can create contracts we can also terminate them. We can also vary the terms even when the contract is in progress. The parties can agree that the contract will terminate upon a specific date, or upon a certain event, or upon completion of a particular task. You have studied the implications of conditions precedent, conditions subsequent and performance in the preceding unit. Many contracts, particularly in employment, simply provide that either party may terminate the agreement by giving one month's written notice to the other.

By now, you should appreciate that if a new agreement is to replace an existing one or an old one, consideration is necessary. Where obligations remain outstanding on both sides there is no problem, as

there are mutual promises by the parties to give up those rights which constitute consideration of the one for the other. If the obligations between the parties are unequal, and one party has no further obligations to perform, then there could be a problem and new consideration may be necessary to discharge those obligations. You have encountered this imbalance in the concept of accord and satisfaction in *Pinnel's Case*. And in *D & C Builders v Rees*, (Supra) the agreement for release was not binding because among other things, there was no consideration for the 'release alleged by Rees.

Remember that an agreement to vary 'the parties' obligations, or to relieve them of existing obligations, is in itself a binding contract. Therefore, you will need all the essential elements of a contract: offer, acceptance, intention and consideration being the most important. If the agreement is to terminate while obligations remain outstanding, then the parties will normally execute a release whereby all the original obligations are extinguished. Also do not forget that agreements to vary or discharge an existing contract can, like any other contract, be oral, or in writing, or by formal deed. In the latter case, one party can release the other unilaterally, without consideration, as it is formalised by deed.

It is consideration, not surprisingly, which can create the most serious impediments to agreements by the parties to vary the terms or discharge an existing contract, particularly when one party has extended more effort than the other in its completion. Take a hypothetical example, Chidi and Christine, in a land contract, Chidi will not enforce part or all of her contractual rights against Christine in the event of a breach. She reneges on that agreement and proceeds against Christine on the basis that it had not been expressed in writing (all agreements regarding land must be in writing). *U.a.C. v John Argo* (1958) 14 NLR 105

Hence, contracts that need to be in writing may be discharged orally; but a *variation* would require it. In this scenario then, the concept of ***equitable estoppel*** may potentially cover the lack of writing as it could equally account for the lack of consideration. Christine acted on the belief induced by Chidi (she agreed not to proceed against Christine), and the doctrine would prevent her succeeding with her argument because Christine can meet its requirements for establishing his defence. See the case of *Emmanuel Ayodeji Ajayi v R T. Briscoe (Nigeria Ltd, 1964)*.

Admittedly, these are somewhat abstract points of law and they are presented here principally as an example of the common law 'in action'. Also, in examples like this, when the unit returns to concepts previously covered (here, promissory estoppel), and which you may not have fully

understood or forgotten, it is a good idea for you to get into the habit of referring back to relevant material in the earlier units.

Now, before moving on to the next reason for discharging a contract, complete this activity.

### SELF ASSESSMENT EXERCISE 1

1. How is a contract discharged by 'performance' and what is the doctrine of 'substantial performance'? Write a brief summary of the difficulties surrounding these concepts, with reference to specific cases.
2. What is 'unjust enrichment'? Give an example by citing an appropriate case.

### 3.3 Discharge by Frustration

Discharge by frustration is yet another example of a rigid common law principle which has been modified both by a more modern approach to outdated thinking and by statutory modifications. As you have seen with the concept of the entire contract in the preceding section, an obligation to perform a contractual duty was generally considered absolute. That remains true but under certain circumstances may become, as lawyers say, 'subject to adjustment'. Briefly put, frustration occurs when a party's contractual obligation is incapable of performance, normally as the result of some circumstance or event which is totally beyond their control, and for which no provision was made in the contract. And it is also defined in *Nigerian Bank for Commerce and Industry v Standard (Nig.) Eng. Co. Ltd* (2002)8 NWLR (pt 768) 104 as the premature determination of an agreement between parties; also *Maxim Eng. Ltd v Tower Aluminum* (1993) 5 NWLR (Pt 295) 526.

Therefore, if it became physically impossible for a party to comply with his obligations, he would, at common law, be liable to pay damages for breach of contract.

In *Paradine v Jane*, a lessee of premises was evicted during the Civil War but still had to pay the rent; the fact that events were beyond his control was irrelevant. The court held that he should have provided for "accidents by inevitable necessity" by expressing it in his contract. An obligation to pay rent is simply that, an obligation - no excuses. This line of judicial thinking was modified two centuries later, when in *Taylor v Caldwell*, (1863) a contract for the hire of a music hall, to stage a series of concerts, was held to be 'frustrated' by the court as the result of a fire, and the parties were released from their obligations. Note that

the destruction of the premises did not have to be *total*, but its commercial viability was no longer possible.

To a certain extent, the harshness of the rule still remains, but we will try to demonstrate in this section of the unit that the law has matured to the extent that exceptions have developed. Even in the 1860s, in *Taylor v Caldwell*, the court acknowledged that subsequent physical impossibility (the fire) had rendered the contract impossible to perform through no fault of the parties. What you must remember at the outset, is that the frustrating event, or the impossibility, must arise *after* the contract has been made; if it existed at the time the contract was made, then clearly it is void from the outset.

### **Frustrated or Impossible to Perform?**

Since *Taylor v Caldwell*, the courts have developed the doctrine of frustration as an *exception* to the rigidity of the principle that a contract is a contract and a person is bound by the terms of his agreement. That said, the principle persisted until about 1943 and the important case of *Fibrosa v Fairbairn Lawson & Co*, (1943) to which we will refer later.

Traditionally, the common law held that non-performance of contractual obligations - even if they were impossible to perform - would lead to liability in damages, unless the parties (or their lawyers) had the foresight to insert in the agreement a clause that would anticipate such a happening. Although the courts on occasion would recognise circumstances that would change the binding nature of the parties' obligations, they failed to enunciate a clear-cut rule.

The House of Lords provided assistance in *Dams Contractors Ltd v Fareham UDC* (1956) in a contract entered into a decade before, it took the builder, Davis, 22 months to complete construction of 78 houses, instead of eight months pursuant to the contract. No provision in their contract provided for the fact that building materials were in short supply.

Davis, the Plaintiff, incurred additional costs of £17,651 to complete, and claimed the full contract price, as the contract with the UDC had been frustrated and he was entitled to the full amount on the basis of *quantum meruit*. The House of Lords held that although the shortage of building supplies had made the contract more difficult to complete for the Plaintiff, the contract had not been frustrated, hence *quantum meruit* was not available. The Lords declared:

Frustration occurs whenever the law recognises that without fault of either party a contractual obligation has



become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

The following line of cases outlines situations in which the courts have deemed the following fundamental changes as constituting a frustrating event. Note that not every circumstance in which the court might rule likewise is included.

### **Subsequent Physical Impossibility**

The music hall that was destroyed after the parties entered into the lease agreement in *Taylor v Caldwell*. Or in *Robinson v Davison*, (1861) when a concert pianist was unable to appear due to illness.

### **Subsequent Illegality**

Where some change in the law renders the contract illegal. In *Avery v Bowden*, (1855) within a 45-day period, the Plaintiff's ship, chartered by the Defendant, was scheduled to load the Defendant's cargo in Odessa. Before the end of the contractual period, the Crimean War broke out, thereby rendering the contract illegal (to trade with the enemy).

Basis of the contract is removed: where the agreement is founded on some future event that does not take place, as in *Chandler v Webster*, (1904). There, the Defendant rented a room with a prime view, to watch King Edward VII's coronation which did not take place due to illness. The Court held the contract was frustrated and the Plaintiff, who had sued to recover his rental deposit, was obliged to pay the full amount due under the contract as his obligation to pay had occurred *before* the frustrating event.

### **Where the Commercial Purpose of the Contract is Frustrated**

In a World War I case, *Metropolitan Water Board v Dick, Kerr & Co*, (1928) the construction of a reservoir was halted by the Government, pending suspension of hostilities (not trading with the enemy, as in *Avery v Bowden*). Here the work could have been completed after the war, and the enforced delay in construction for what, at the time, was an indefinite period, amounted to a fundamentally different contract. However, the court may not rule this way if an *alternative* solution to the difficulty can be found. During the Suez Canal international crisis of 1956, the canal was closed and the Middle Eastern seller was obliged to take a long route around the Cape of Good Hope. The Court held this

inconvenience did not frustrate the contract: *Tsakiroglov Ltd v Noblee & Thorf GmbH*; (1962).

### Developments in the Law

In essence then, prudent parties in a contract should make appropriate provision in their agreement to anticipate what frustrating events might occur - not an easy task! Arguing that the potential frustrating event is 'not my fault', will not receive much sympathy from the courts. At common law, frustration in the strictest sense, and not some mere difficulty or inconvenience, renders the contract void. As we will now see, all sums previously paid prior to the event could be recoverable, and all sums that were due to be paid under the contract cease to be payable.

The harsh outcome that resulted from these principles is demonstrated in the case *Fibrous v Fairburn Lawson & Co* (1943). There, an English company had agreed to supply machinery to a Polish company, a contract frustrated by the 1939 outbreak of World War II. Although the buyer had paid a £1,000 deposit to the English company which had completed some of the work and had incurred expenses in meeting their obligations, the company was obliged to refund the deposit.

The Court of Appeal applied *Chandler v Webster* and declared the contract frustrated and the Polish company's claim for the £1,000 was dismissed. The House of Lords, however, held that the money was recoverable, not because the contract was void but on the basis of *quasi-contract* and a total failure of consideration. You will recall from your study of this topic that a promise must support a promise but when consideration has failed, a promise in itself is not enough: the performance of the promise must be taken into account. In **Fibrosa**, the £1,000 had been paid to secure performance and there had been no performance, even though the English company had carried out some work under the contract.

### Statutory Intervention

Following the *Fibrosa* decision, in 1943 England passed the *Law Reform (Frustrated Contracts) Act* in which the common rule in the case was modified to mitigate (or minimise) any inequity. Unless there was total failure of consideration, in which case money paid or property passed was recoverable (i.e. the £1,000), then the loss lay where it fell. Consequently, the *Act* gave the court the discretion to allow full or partial recovery for any party who had incurred expenses before the date of discharge, or all or any part of sums which are due.

Also, if the court considers it just, it may order the recovery of any valuable benefit, in circumstances where one party has obtained a valuable benefit from the other on account of its actions. In other words, there is provision for the courts to essentially return the parties to their original position, subject to discretionary adjustment for expenses incurred and benefits received. These measures do not apply of course, where the parties have made due allowance in their contract for the consequences that might arise from a frustrating event.

Following this development, some jurisdiction have shifted grounds, and have by statute provided as follows:

- i) all money paid before the frustrating event is recoverable,
- ii) all money payable but not in fact paid, ceases to be payable.
- iii) where a party has incurred expenses before the frustrating event, he may retain or recover in respect of those expenses a sum not exceeding any amounts paid or payable before the frustrating event.
- iv) where a party has obtained a valuable benefit under the contract, he may be required to pay a proper sum in respect of that benefit.

This amendments exclude certain types of contract such as insurance, charterparties and carriage of goods by sea. And in sale of goods Acts states that if goods perish before the risk passes to the buyer, then the contract is frustrated unless the parties have agreed otherwise.

Now complete the following activity.

### **3.4 Discharge by breach**

The fourth way in which a contract can be discharged is by breach. Upon completion of this section, you will go on to this unit's final section: the second part of *Remedies*. This is an important topic to which you have already been introduced. Let us first examine the concept of discharge by breach.

You have examined how contracts can be discharged by performance, agreement and frustration. Now you will examine breach. You have also studied several cases earlier in which a party to a contract has not completed his obligations. More case examples are to follow. Breach of contract can occur in many ways. A party may repudiate (or refuse to be bound) by his contractual obligations, either before or at the time performance is due; the former is frequently referred to as anticipatory breach. Or a party's obligations may be rejected by implication: a seller is obliged to sell goods to a buyer but renders the sale impossible by selling the goods to a third party.

As you have seen, a contract may also be partially or substantially performed (often a difficult distinction), or it may *be* performed badly, or not in accordance with the terms of the contract. In any event, if the contract is breached, within the strict meaning of the word, the innocent party has the right to claim damages and is released from performance of his future obligations. *Nigerian Merchant Bank Plc v Aiyedun Investment Ltd* (1998) 2 NWLR (Pt 537) 221 CA.

### **What is a Breach?**

There are varying degrees of breach, ranging from the trivial to the serious. If it is sufficiently serious, then the injured party can avoid the contract completely and bring it to an end. In this case one could describe the breach as 'total'; for example where the other party has clearly repudiated the contract, or there is a breach of condition. Of course, there are also minor, or partial, breaches, such as breach of warranty, in which case the injured party must continue with the contract although he may be entitled to compensation for any loss suffered. Even if the breach is total, the injured party may exercise his choice to continue the contract and accept defective performance, with compensation, or insist upon performance, even if it has not been forthcoming. Hence, a breach of condition may not necessarily mean the contract is terminated if the injured party thinks otherwise, and may be treated as only a breach of warranty *UBN Plc. v Jeric (Nig.)* (1998) 2 NWLR (Pt 536) 63.

### **Anticipatory Breach**

In an anticipatory breach, in which one party knows in advance that the other is renouncing his obligations, the injured party has two options. Firstly, he can treat the contract as being terminated and bring an action immediately without waiting for the date set for performance. In *Hochster v De La Touf* (1853) the Plaintiff was hired by the Defendant to work as a travel courier, effective June 1. In May, the Defendant repudiated the contract and the Plaintiff was allowed to commence proceedings *before* 1 June. This may be the Plaintiff's only option if, say, the subject matter of the contract has been destroyed or the other party has sold it to a third party. Note also, that a 'benefit' to the Plaintiff in this situation (sometimes called a 'prospective' breach) is that as he has advance notice of the breach, he can mitigate (minimise) his losses by making alternative arrangements: finding another job in *Hochster's case*.

The second option arises from the fact that renunciation in advance does not normally discharge a contract automatically, as the injured party can continue to 'wait and see' and press for performance until the due date

arrives. He can then take action if the party defaults, in which case the contract still remains in place, together with attendant benefits and risks of both parties. However, as you saw in *Avery v Bowden*, if, before the due date, performance becomes impossible (war prevented performance of the ship loading contract), the contract will be discharged, and the party who renounced the contract will not have to pay damages. On the other hand, if one party makes the contract impossible to perform, then he is potentially liable in damages: *Omnium D'Enterprises and others v Sutherland* (1919), in which a contract involving the charter of a steamship was repudiated when the Defendant sold the ship to a third party. *NEPA v Isieveore* (1997) 7 NWLR (Pt 511)135 *Tewogbade & Sons Ltd v Funsho Adeolu* (unreported).

### **The Implications of a Discharged Contract**

In preparation for your continuing examination of contract remedies in general and damages in particular, the following points can be made regarding the rights and obligations of the parties in a contract that has been discharged. A discharged contract involves consideration of the primary obligations of the parties (those that were agreed to in the contract) as distinct from secondary obligations (which arose as the result of the discharge). Consider these two concepts carefully because they raise interesting considerations as to how both the innocent, or injured party, and the defaulting party emerge financially from a discharged contract. In this regard, review again the implications and complexities of partial and substantial performance, *quantum meruit*, and how the parties' financial problems arising from a frustrated contract have been mitigated somewhat by statutory intervention.

If one party to a contract refuses or fails to perform one or more of his obligations, then the effect of his breach is that the innocent party is relieved of all his unperformed primary obligations. However, as you are aware, whether or not the innocent party can reject or repudiate the contract, thereby discharging it, will depend on the nature of the breach: is it major or minor? A breach of a condition or a breach of warranty? If the contract is discharged then it affects obligations in the future which are secondary. It does not, for example, as in rescission for misrepresentation, have the effect of cancelling the contract from the outset. Breach of contract then, by one party does not *per se* discharge it. The innocent party, therefore, may often be obliged to make a decision as to whether he should reject the contract and hopefully obtain damages for breach, or affirm and 'live with' the breach and claim damages based on his loss. This choice can be made expressly, or by his conduct.

## Unjust Enrichment

One interesting side effect that can arise from these complex considerations is that the defaulting party may in some circumstances, emerge from his contractual obligations in a better position than the innocent party; in other words, he has been 'unjustly enriched' at the latter's expense. This concept has appeared in this course before, and you will consider again the principle that refers to the unjust obtaining of money benefits at another person's expense.

This is a highly technical area of the law; but you must be aware of the concept, as there are remedies associated with benefits by a party to a contract which have been unjustly retained. Indeed, these remedies have attained the status of their own individual category as distinct from those in contract and tort. As Lord Wright observed in the ***Fibrosa case***: '[they] are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution'.

It is also important to remember that equity will not always rescue a less than diligent party from commercial contracts with whose terms the party has failed to comply. Nor does 'unfairness' necessarily make a contract unconscionable, which means that the court might not be receptive to arguments based on unjust enrichment, despite Lord Wright's view. Balance these considerations with the results the courts concluded in the *Craven-Ellis and Guinness Plc v Saunders*; (1989) both of which examined the doctrine of *quasi-contract*.

In conclusion then, the remedies for a breach of contract can be briefly summarised as follows and will lead you naturally into the final section in this unit. The remedies for breach are:

- a common law right to damages (usually the most typical remedy);
- a right to request rescission of the contract (common in actions based on innocent, fraudulent or negligent misrepresentation);
- an action based on ***quantum meruit***;
- an equitable remedy to sue for specific performance or for an injunction;
- rejection of any further performance by the injured party;
- a common law right when paying the contract price, that the

injured party can deduct damages due to the breaches committed by the other party and, if these damages are objected to by that party, they can be set off against the price of the monies represented by the breach.

#### 4.0 CONCLUSION

A Contract may be discharged by performance or agreement, breach and Frustration. The problems arise when one party performs below standard, or refuses to perform, disables himself from performing or where there is a supervening event. Performance may be total or substantial. The *de minimis* principle applies. Discharge by agreement may be unilateral, express or implied, accord and satisfaction, repudiatory (anticipatory or actual). Frustration arises from subsequent physical impossibility or illegality. The court decides when a contract can be said to be frustrated and it may so decide in the face of outbreak of war, official interrupted or upon evidence of destruction of subject matter, it is important that you consider the nature of term of contract. The facts and decision in *Chandler v Webster* (1940), the *Fibrosa case* (1942), *Taylor v Caldwell* (1863) and the Lagos Law Reform (frustrated Contracts) Act.

#### 5.0 SUMMARY

We discussed the three ways in which a contract may be discharged. There are certain limitations you need to note, examples: Self induced events, express provisions in contracts, temporary impossibility. The standard of performance may be of strict liability (e.g. Contract to supply specific quality and quantity of goods); or subject to standards of reasonable care and skill. Discharge may be divisible and serviceable. At law, 'it is not my fault' is no defence to breach arising from frustration. The harshness of this rule, led to (a) fiction: Implied condition in contract that the subject matter would not cease to exist; (b) Quasi contract and (c) *Quantum meruit*. Do not forget the concept of freedom of contract. Parties are free to insert in their contracts "force majeure clauses" prescribing what should happen if performance becomes impossible. It cannot be over emphasized that one has to look into the contract itself and determine what obligations each party agreed to shoulder in order to appreciate whether or not the change in circumstances has made any of them impossible to perform or radically different.

## 6.0 TUTOR-MARKED ASSIGNMENT

1.
  - a. Outline four ways in which a contract can be discharged.
  - b. Dand Mark is building a hotel in Eagle square, Abuja. Nnamani is contracted to install the air-conditioning for N200 million, payable upon completion. Ten months into the one-year contract, the hotel is destroyed by a freak fire.
  - c. Will Nnamani recover all or part of the contract price?
2. What is 'anticipatory' breach of contract? Give two examples.
3. What is the object and limitation of Lagos Law Reform (Frustrated Contract) Act, 1994.

## 7.0 REFERENCES/FURTHER READINGS

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## UNIT 2      REMEDIES (II): LEGAL AND EQUITABLE

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
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- 4.0 Conclusion
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### 1.0 INTRODUCTION

As you have seen, a party who has suffered a loss by breach of contract has a right to seek redress in the courts for, among other things, compensation by way of damages. As you will study in the final part of this unit, the general object of damages is to place the injured party, as near as is possible, in the position he would have been in if the breach had not occurred or, in other words, if the contract had been performed. Bear this concept in mind as the underlying foundation of this topic when you examine civil remedies in the law of contract.

You have read a considerable number of cases involving contractual disputes. That does not imply that contracts tend to get broken. Indeed, the reverse is true. You have already learned that in the commercial world, the vast majority of contracts are performed without difficulties. It is only the broken contracts, if they are litigated, that raise legal issues which are worth recording. This unit, until its completion, will concentrate once more on damages, which, as you know, is the common law remedy for a breached contract. The Plaintiff demonstrates and proves to the courts that the Defendant has breached, as a result of which there has been a loss, in which case an award of damages, generally speaking, will be awarded.

You will examine just how much (the '*quantum*') will be awarded. In some cases it is relatively simple to calculate: for example, 'as the result of your actions, I have lost N50,000'. The measure is clearly N50,000. But what is the loss when you are unhappy about the quality of a tour that you signed up for, from the hotel to the food to the side trip, and, as a result, suffer disappointment, distress and frustration. How do you measure that? You will examine this shortly.

## 2.0 OBJECTIVES

At the end of this Unit, you should be able to:

- explain the aim, categories and measure of damages
- explain the nature of equitable remedies and when available
- distinguish restitutionary remedy, and expectation and reliance measure of damages
- indicate the limitation of measure of damages and the circumstances in which damages are too remote to be recovered.

## 3.0 MAIN CONTENT

### 3.1 The Categories of Damages

Before attempting to analyse the question of damages, their types, and calculation of an award that matches the loss, it is possible to classify various types in a list which, again, is not exhaustive. Consider the following:

#### **General or Ordinary Damages**

Assessed by the court as the loss which arises *naturally* from the breach of contract. Losses in tort may be harder to quantify. And the remedy in certain cases may be founded in either contract or tort.

#### **Special Damages**

Awarded when the loss can be precisely calculated: lost wages, damage to a motor vehicle, medical and transportation expenses. These costs become more difficult to calculate when the Plaintiff claims loss of business profit. The court will be obliged to arrive at some fair valuation. If the costs do not arise naturally from the breach of contract, then they will not be recoverable unless they were within the contemplation of the parties.

#### **Nominal Damages**

Arise when the Plaintiff, despite the breach, has not suffered any loss. In such a case he will be compensated a 'token' amount because the Defendant is in breach. This raises consideration of situations in which although the Plaintiff has suffered a loss, the Defendant may have gained or made a 'windfall'. In this case, damages are based on the Plaintiff's loss and not the Defendant's gain. In *Teacher v Colder (1889)* the Plaintiff sued the Defendant who was contracted to maintain £15,000 in the Plaintiff's business. Instead he invested it in another

business and made a profit. The Plaintiff was only entitled to damages for the loss in his business and not the profit the Defendant made in his. *Nigerian Advertising and Publicity Ltd. v Nigerian Airways Ltd* (unreported).

### **Exemplary or Punitive Damages**

Our common law system as you have read, is designed to compensate the loss suffered by the Plaintiff as the result of the Defendant's conduct. You are also aware that in civil matters under the common law, punitive damages may only be awarded in limited circumstances, such as where there is some element of deceit. In other words, the Defendant is not, generally speaking, punished because he has not kept his promise. Indeed, the court will try to match the Plaintiff's loss, but it will not award additional damages by way of a fine (as in criminal law which, as you know from *Unit 1* is essentially punitive by nature). This blurring of the functions of civil and criminal law exists and, as noted, exemplary damages are only awarded in special cases; for example, where a Defendant's conduct is oppressive or arbitrary. This principle, as you will see in the next section, manifests itself in the distinction between liquidated damages, which the courts will approve, and penalty clauses, which they will disallow. *Rookes v Barnard* (1964) AC 1129.

### **Liquidated Damages**

Under the freedom of contract approach, it is quite common for the parties to a commercial arrangement to include clauses which give a genuine pre-estimate of the damages which are to be paid by one party to another in the event of breach. However, the philosophy of awarding damages in compensation, not punishment, leads in some cases to problems in predetermining the amount of damages. Thus, if there is a dispute which is litigated, the courts will not strike it down as a penalty if the amount stated *is* excessive. That said, it is a particularly useful device in construction contracts, where it may be easier to estimate the loss the injured party will suffer if, for some reason, work is delayed or stopped on site. And if the liquidated damages clause has been agreed on, the courts may enforce it even though it can be shown the actual loss is greater or smaller.

In *Cellulose Acetate Silk Co Ltd v Widnes Foundry Ltd* (1925), (1933) Widnes agreed to pay Cellulose Acetate £20 a week for each week they delayed in erecting the latter's factory, past the agreed-on completion date. Delay occurred for 30 weeks at a loss calculated at £195 a week, totaling £5,850. The Court held Widnes was only liable to pay £20 a week as agreed.

In *Philips Hong Kong Ltd v Attorney-General of Hong Kong*, (1993), a contract involving the construction of Route 5 from Tsuen Wan to Shatin, included a liquidated damages or 'agreed damages' clause. This calculated the amount Philips would have to pay on a daily basis if construction was delayed. When sued by the then Attorney-General, Philips argued that the liquidated damages clause was a penalty and not a genuine pre-estimate of the loss suffered. If the courts had considered that the so-called genuine pre-estimate of loss suffered was a penalty for non-performance, then it was probably not enforceable. This may sometimes occur where one sum can compensate for a series of possible breaches (where the progress is linked to certain key dates which may or may not have been met).

The Privy Council did not rule that way in this case. Although a single lump sum was payable on the occurrence of certain events, and might well yield a sum to the injured party that was larger than his actual loss, the contract sum estimated was not excessive and was a genuine pre-estimate of the loss. In summary, the courts' dislike for penalty clauses is based on the theory that they are inserted into the contract *in terrorem*, that is, to frighten the potential defaulter. The law in this area can be complex and, in practical terms, great care needs to be taken in drafting liquidated damages clauses that, at the end of the day, might be interpreted as a penalty to the party in breach, rather than compensation to the innocent party.

### **Unliquidated Damages**

No damages have been fixed in the contract, so the court decides the amount payable, subject of course to the Plaintiff proving his loss, as indeed he would have to do in a tort action. As you saw in the preceding paragraphs, the courts will not enforce a penalty, but will award damages on normal, contractual principles.

### **Damages for Injured Feelings**

This is a complex area of the law, as its underlying foundation is predicated (based) on trying to place the injured party in the same position as if the contract had been performed. So where does that leave the potential Plaintiff in our tour example, in which he has suffered disappointment and perhaps physical discomfort or injured feelings? The early judicial view was that such compensation would not be awarded in cases involving, among other things, mere inconvenience, annoyance, disappointment and without any resulting real physical inconvenience; *Hobles v London & South Western Rowley Co* (1875).

This approach was based on policy considerations, in that the courts did not want to open the floodgates to damage claims in such circumstances. However, judicial thinking has advanced since then and does not necessarily disregard the fact that such feelings can arise from a breached contract. In *Jarvis v Swan Tours Ltd* (1973), where Jarvis experienced disappointment, distress, upset and frustration resulting from glowing promises made by Swan Tours for his Swiss holiday package, Lord Denning and Davis L J acknowledged the difficulties in assessing damages in these types of claim and the inherent policy considerations, but noted that emotional distress has been satisfactorily awarded in tort claims.

This general approach was followed in *Jackson v Horizon Holidays*, (1975) Jackson and his family were hoping to get a holiday in Ceylon (Sri Lanka) in which everything was 'of the highest standard'. The advertised amenities — mini golf course, pool, beauty and hairdressing salons — did not materialise and the food was mediocre. Jackson obtained damages in contract for *both himself and his family*, on the basis he had contracted with Horizon Holidays for their benefit. Consequently, the damages awarded by the court of £1,100 could be deemed excessive. Criticism of this judgment has come from the House of Lords, See *Woodar v Wimpey*, (1980). As nominal damages for the family would have been more appropriate. In English contract law, if A (Jackson) contracts with B (Horizon Holidays) in return for B's promise to do something for C (Jackson's family) and B repudiates the contract, C has no enforceable claim and A is restricted to an action for nominal damages by reason of having suffered no loss. The *Jackson* award does not seem to follow this principle.

However, the awarding of damages by the courts for mental stress remains generally only applicable to the *Jarvis* and *Jackson* leisure-type situations. In the Australian case of *Baltic shopping Co. v Dillon (The Michkail Lermontor)* (1993), the appellate Court limited the award of similar damages only in contracts involving relaxation, pleasure, entertainment and so on, but *not* in commercial contracts generally.

### 3.2 Assessment of Damages

By now, you should fully appreciate the difficulties inherent in clearly identifying a particular loss that a party has suffered in a contract which has been breached, and in asking did that loss result from the Defendant's conduct? Furthermore, we may encounter problems in calculating the injured party's compensation for that loss. Just how much is a spoiled holiday worth? Notwithstanding the occasional flurry of judicial generosity, the fact remains we must not lose sight of the principle that an injured party cannot recover damages for all the

consequences which might arise from breach; to do otherwise would put the courts in the floodgate zone and, potentially, there would be no end to liability. Put briefly, the damages a person claims must not be too *remote*. *Mobil Oil(Nigeria) Ltd. v Abraham Akinfosile* (1969) NMLR 211.

### **Damages in Contract**

The leading case of *Hadley v Baxendale* (1854) laid the common law foundation for the assessment of damages arising from a contractual breach. Hadley was a mill operator who contracted with Baxendale to have the latter deliver a broken mill shaft to the manufacturer for repair. The term of the contract was that Baxendale was to transport the shaft the next day. He delayed several days, so Hadley's mill remained closed for a longer period of time. Hadley claimed damages for the profit the mill would have made had it been delivered on time. The only information Baxendale received was related to carrying the shaft on the Plaintiff's behalf. He had not been told that the mill would be closed until the shaft was returned. Furthermore, Hadley may well have had a spare shaft, as is common practice in the business (do you recall trade usage: see earlier?). Hadley's action failed and Baxendale was not liable for the loss of profit.

The principle arising from that decision is now the basis for the concept of remoteness in damages, which lays down two categories of compensation which can be recovered, and which are often described as the 'first' and 'second' limbs of the *Hadley v Baxendale* rule:

- 1) losses which arise in the normal course of things and are a natural consequence of the breach;
- 2) losses which arise as the result of special circumstances (not being natural consequences) which were either *known* to the parties or may reasonably be supposed to have been in the contemplation of the parties when the contract was made.

The concept of foreseeability in tort, which you have already encountered, is equally applicable here as both categories of damages shown above are foreseeable: the first because they flow naturally from the breach, and, secondly, if the other party (Baxendale in this case) had been told what would result from the breach as a result of the late arrival of the mill shaft.

Applying the above principles to the case, the court found on the facts that the only way Hadley could succeed in his claim for damages was to show that Baxendale would reasonably foresee that the mill would be

closed because there was no shaft, and that some special circumstances had been made known to him. He failed on both points. Hence the claim was too remote.

How far one can expect the parties to have sufficient knowledge of each other's business is often difficult to determine in a commercial sense, particularly if such knowledge is outside the normal course of business. In *Victoria Laundry (Windson) Ltd v Newman Industries Ltd* [1949] the Defendant was installing a new boiler in the Plaintiff's laundry and that installation was needed as soon as possible; but the Plaintiff gave the engineers no further information. Due to faulty work by the Defendant's sub-contractors, completion was delayed for 20 weeks and the Plaintiff sued for what was clearly breach of contract. This issue was *quantum*: how much?

The Plaintiff claimed damages in excess of the lost revenue resulting from the closure of the laundry, and this amount was based on the fact that the new boiler was 'state-of-the-art' at the time, and would have been more profitable than the old model it replaced. On the basis of *Hadley v Baxendale*, the court rejected the claim for additional profits arising from the new dyeing process as they were not foreseeable, and not a natural consequence (the first 'limb')- Furthermore, there were no unnatural consequences pointed out by the Plaintiff to the Defendant at the time the contract was entered into (the second 'limb'). It was held therefore, that the normal business profits lost during the period of delay were recoverable, but not the profits the Plaintiff might have received as the result of the increased efficiency of the new boiler.

As the result of the *Victoria Laundry* decision, it can be argued that a third 'limb' can be added to the two previously stated:

- losses will also be foreseeable and recoverable when the party in breach actually possesses knowledge of special circumstances outside the ordinary course of business (the profit-making attributes of the new boiler) and which would be liable to cause more loss. It can further be argued that knowledge in itself may not necessarily be sufficient, but there must be some form of acceptance of the liability.

As a final example, assume A breaches his contract with B and, in so doing, causes B to be in breach of his contract with C. B mitigates, or minimises his losses, by selling the goods which formed the contract with C to a third party D, at a loss. Then the measure of B's claim in damages against A will be the difference between the market price of the goods and the re-sale price to D. In other words, if B's contract price with C was exceptionally high, so that his loss on re-sale is

correspondingly higher, he will be unable to claim this from A, unless A was aware of the above-market price that B was obtaining from C: *Home v Midland Railway Co.*, (1873)

### **Duty to Mitigate**

In the last paragraph, you encountered the word 'mitigate', which is a foundation of the common law of damages. It says that irrespective of the surrounding circumstances, when a contract is breached, the injured party is obliged to mitigate or minimise his losses. He cannot sit back and assume his lawyer will obtain a fine settlement by way of damages. In other words, the wrongfully dismissed employee must immediately seek a new position. The vendor of a flat in which the purchaser has 'walked away' on the completion date, is similarly obliged to immediately place his flat on the market. Loss therefore will not be recoverable for that part for which the injured party has failed to mitigate.

### **SELF ASSESSMENT EXERCISE**

Yinka operates a company called 'Boots for the Boys Ltd' with a manufacturing branch in Aba. He obtains an order to supply 5,000 military boots to the Boys Oye garrison in the Bight of Benin. The price for the shipment was 20% higher than the market price, provided delivery could be made on June 15, two weeks ahead of annual jambor. Yinka completes the manufacture and delivers it to Abia State Transport Company (ASTC) for delivery on or before June 15. He tells the manager that the delivery date is important but not that he is receiving an above average market price. ASTC's delivery vehicle breaks down and the boots arrive in on June 17. The Boys Oye garrison refuses to accept delivery.

Advise Yinka on what action he should take and what measure of damages, if any, he might expect to recover in the courts.

### **3.3 Equitable Remedies**

As you have gathered from the cases you have read thus far, the court may award damages to the injured party depending on the circumstances, apply more equitable considerations. These remedies are briefly outlined in the following reading.

In addition to rescission, the other important remedies are specific performance, and the granting of an injunction or restraining order. The former is *positive* in that the defaulting party may be ordered by the court to complete the sale transaction upon which he intends to default



(this remedy to the injured party would be in lieu of damages, if the court considers it equitable that the defaulting party be ordered to complete). This remedy is particularly common with real estate transactions because of the special place land occupies in our economy. *African Songs Ltd v Sunday Adeniyi*.

On the other hand, an injunction, again ordered by the court, is *negative* in that the Defendant will be obliged to refrain from some act or conduct which harms the legitimate interest of the Plaintiff. This relief is not easily obtained but it may however be granted quickly; for example, the Defendant opens a business using a name identical with a well-established enterprise in which confusion arises as the result of two businesses conducting similar operations, with the latter suffering immediate financial loss. Often the court will grant an 'interim injunction' (temporary) pending the court allowing the Defendant to be heard, as it is possible to obtain an order on an *ex parte* basis (where the injured party alone requests the order). Consequently, the Plaintiff under these circumstances will have to undertake to pay damages in the event that if and when both parties are heard, the court ultimately decides that granting the injunction was unjustified.

Rectification is another equitable remedy whereby it can be proven that the written document does not adequately reflect a prior oral agreement which has been made. The court therefore effectively re-drafts the agreement to give effect to the true intent of the parties; for example, if it can be shown that the consideration had not been given when the document indicated that it had. Rectification as a remedy is a device that is an exception to the parole evidence rule. The parole evidence rule, as you have learned, states generally that a contractual document will not be altered or varied by the admission of extrinsic oral evidence.

## 4.0 CONCLUSION

Generally, the party – the innocent party – who is injured by any breach of contract is entitled to claim damages and/or equitable reliefs. Damages are a form of compensation; not meant to punish any party, but to put the innocent party in the position he/she would have been but for the breach. Damages may be nominal, special, exemplary, liquidated or unliquidated. Try to understand these terms. At Common Law, contractual obligations are absolute: *Paradine V Jane* (1647): the 'Entire Contract Rules' applies. Equitable relief range from injunction, specific performance, to *quantum meruit* and rescission. Not that rescission breach terminates future obligations, not past ones. This in contrast with rescission for misrepresentation which terminates all obligations. The injured party has a duty to mitigate loss. There are problems in the area: where to draw the line between damages that are

too remote to recover and those that are foreseeable and refutable; See *Hadley v Baxendale* (1854); assessment of damages and what the court may consider in awarding damages. It appears that damages are not available for a non-pecuniary damage, e.g.; injured feelings distress caused by breach except where it is a major object of the contract to give pleasure relaxation or peace of mind. See *Watts V Morrow* (1991) and *Farley v Skinner* (2001) the basic measure of contractual damage is the common law rule that “where a party sustained 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 damage, as if contract had been performed. It is the expectation loss and this is to be distinguished from “cost of cure” reliance the loss of expenditure.

## 5.0 SUMMARY

You have now completed the modules which have been devoted exclusively to the law of contract. You had an overview of the essential elements of a legally binding agreement and their relevance in trade, business efficacy and previous business dealings. You have examined terms and conditions and other clauses that the parties may agree upon, including those that may restrict or eliminate a party's liability when he is in breach.

Misrepresentation constituted a significant section of your study and you have studied it in its three forms: innocent, fraudulent and negligent. Underlying this, as you have encountered in many other areas of contract law, the 'law' is a blend of common law and equitable principles, that are subsequently confirmed or modified by statutory intervention. With your foundation in what the parties need in order to 'implement a legally binding contract, you examined factors other than misrepresentation. These are described as 'vitiating' factors: elements such as duress, undue influence and unequal bargaining power. All of these can make an otherwise valid contract defective.

Those topics progressed to the ways in which a contract can be discharged, or terminated, and we placed particular emphasis on breach and the consequential remedies which may flow from this event. You were then given a brief analysis of damages, the normal common law remedy for breach of contract, and examined the various 'heads': nominal, compensatory, punitive and liquidated, to name a few.

The section concluded with a brief review of equitable remedies which, depending upon the particular circumstances of a case, may be awarded on a discretionary basis by the courts; for example, specific performance and the granting of an injunction.

You have now completed your course on law of contract; but remember, you never 'complete' your consideration of, and exposure to, the contracting process. As you are well aware, we are engaged in various forms of contract in our daily lives in general and in our professional occupations in particular. In short, all of us — including lawyers and judges — can never cease our continuing study of the law of contract as it unfolds through new cases and a wave of legislation that never seems to stop.

Contract manifests itself within the corporate setting: principally contractual disputes between corporate entities, and between corporate entities and individuals, and of course between individuals. With your knowledge of the contracting process you are equipped to tackle, among other things, the various forms of business enterprise - sole traders, partnerships and corporations - and the important common law concept of the separate legal entity, as they arise.

## **6.0 TUTOR-MARKED ASSIGNMENT**

1. Distinguish:
  - a. Remoteness of Damage
  - b. Measure of Damage
  - c. *Quantum Meruit*.
2. Explain the rule of Hadley V Baxendale.
3. Explain the Principles applied by the court in awarding damages.

## **7.0 REFERENCES/FURTHER READINGS**

Sagay I.E. (1999). *Nigerian Law of Contract*. Treitel

(1979). (5<sup>th</sup> Ed.). *The Law of Contract*. Olusegun

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