SCHOOL OF LAW

UGANDA CHRISTIAN UNIVERSITY

LECTURER MANUAL

ON

LAW OF CONTRACT - 2

PREPARED BY

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LAW OF CONTRACT

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VITIATING ELEMENTS

While the contract is concluded when all the elements thereof are established in any given transaction, there are situations which may arise and destroy the basis upon which that agreement was reached so that the contract is discharged or in some other way vitiated. There are five. vitiating factors, misrepresentation, mistake, duress, undue influence, and illegality:

Section 13 of the Contract Act, provides for **'free consent of parties to a contract'.** That consent of parties to a contract is taken to be free where it is not caused by-(a) coercion; (b) undue influence, (c) fraud; (d) misrepresentation; or (e) mistake.

Under ***section 16 (1) of the Contract Act***, where consent to an agreement is obtained by coercion, undue influence, fraud or misrepresentation, the agreement is voidable contract at the option of the party whose consent was obtained by coercion, undue influence, fraud or misrepresentation.

An otherwise valid contract can become invalid in the following ways;

i. Mistake
ii. Misrepresentation
iii. Duress
iv. Undue Influence

A. MISTAKE

Mistake may be defined as a misapprehension or misunderstanding of the state of affairs relating to the substance or subject matter of a contract. Mistake is one of the vitiating elements of a contract and at Common Law; it has the effect of making the contract ***void ab initio***. According to Lord Atkin, mistake as to the identity of the contracting parties or the existence of the subject matter will operate to negative

or nullify consent.[1] In other words, as contract thrives basically on the mutual consent of the parties, the absence of that *"consensus ad idem"* on account of mistake - whether of one or both parties - vitiates the contract between the parties. However, it is salient to point out that Mistake in Law has a more limited **usage than in ordinary** or layman's usage. Accordingly, what the layman sees as mistake may not amount to a mistake in Law.[2] In this wise, Mistake in the Law of Contract is a strictly legal construction and it is only what the law recognizes as mistake that would confer remedies therefor on the mistaken party.

In the course of this work we shall consider the different types of mistake, namely Common Mistake, Mutual Mistake and Unilateral Mistake. We shall also consider Mistake in Equity, as well as Documents Mistakenly signed by a party (***Non Est Factum***).

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[1] See Bell v. Lever Bros. ltd. (1932) AC 161 at 218.
[2] See the illustration of Lord Atkin in Bell v. Lever Bros. Ltd., Supra, at page 324.

Section 18 of the **Contracts Act** provides that where a contract is entered into by a mistake in respect of any law in force in Uganda, the contract is void. It may be defined as an erroneous belief concerning something. Mistake can be divided into three types forms.

The effect of a mistake on the validity of a contract depends on the type and nature of the mistake made. In general, the contract entered into or induced by mistake can be void or voidable depending on the type of the mistake. The law of contract recognizes three types of mistakes;

1. Common mistake - Where both parties make or operate under the same mistake.

2. Mutual mistake-Where the parties are at cross-purposes with regards to the contract.

3. Unilateral mistake - Where only one party to the contract is mistaken with regards to the contract.

1. COMMON MISTAKE

Common Mistake operates when both parties to the contract concluded it under the same (common) mistake or misapprehension of some state of affairs fundamental to the contract. They were both ruled by some erroneous belief as to the subject matter of the contract at the time of the agreement. The parties are both mistaken and about the same thing.

A contract is void where there is a Common Mistake as to the existence of the subject matter of the contract. In the old English case of

Couturier v. Hastie,[3] the House of Lords held that the contract was void where the plaintiff sold a cargo of corn on board a ship at sea to the defendant, but unknown to both parties the cargo of corn had become over-heated and fermented due to bad weather condition and was sold in a port along the sea route. **Lord Cranworth, LC,** held that,

> *the contract plainly imports that there was something which was to be sold at the time of the contract and something to be purchased. No such thing existing, I think the Court of Exchequer Chambers has come to the only reasonable conclusion upon it."*[4]

Thus, the action of the seller for the price of the goods could not succeed as the contract was void for mistake.

A common mistake in Contract Law is one shared by both parties to the contract. Where a common mistake occurs, the parties appear to be in agreement, but have entered into the contract under the same misapprehension of the true nature of the facts.

A common mistake is made when or where both parties assume some particular state of affairs whereas the reality is the other way round. In fact, both parties make exactly the same mistake. Contracts affected by common mistake are void at common law e.g., where parties make a contract believing that there are goods and yet the goods have already perished.

This as illustrated in the case of **Counturier Vs Hastie;** A contact was concluded between the two parties for the sale of corn, which at the time of the contract was believed to be the cargo on the ship. Unknown to both

[3] (1956) 5 HLC 673
[4] At pp 681 - 682

parties the goods had deteriorated in condition and sold on the way to mitigate the loss. Court held that there was no contract concluded because the contract contemplated the existence of the subject matter of something to be sold and bought, but at the time of the contract no such goods existed.

Section 17 (1) of the **Contracts Act** provides that a where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void.

Kinds of Common Mistake

There are basically two kinds of common mistake, namely, ***Res Extincta*** and ***Res sua***.

a. RES EXTINCTA

Res Extincta simply means non existing thing. A contract is void where the subject matter of the contract had become nonexistent or extinguished at the time of the conclusion or the contract.

Mistake as to the existence of the subject matter

Sometimes the parties enter into a contract when they are not aware that the subject matter of the contract does not exist. Where the subject matter of the contract does not exist or ceases to exist, there is no contract to talk about- the contract is void.

In the case of **Galloway v Galloway (1914) 30 TLR 531**, The two believing that they were legally married parties, made a separation agreement - (an agreement between husband and wife to stay a

part). It was later discovered that the man's first wife was alive and therefore the second marriage was invalid.

It was held that the separation agreement was void as it had been entered into on the basis of the common assumption that the parties were married to each other.

Further, a common mistake arises when unknown to the contracting parties, the subject matter to the contract is destroyed or perishes. Refer to Section 7 of the SOGA deals with a situation when the goods which are the subject matter of the contract is destroyed without the knowledge of the contracting parties the contract is void.

In the case of **Couturier v Hastie [1856] 5 HL** Case 673,

A cargo of corn toas in transit being shipped from the Mediterranean to England. The owner of the cargo sold the corn to a buyer in London. The cargo had however, perished and been disposed of before the contract was made. The seller sought to enforce payment for the goods on the grounds that the purchaser had attained title to the goods and therefore bore the risk of the goods being damaged, lost or stolen. The court held that the contract was void because the subject matter of the contract did not exist at the time the contract was made.

The locus classicus on this is the earlier cited case of ***Couturier v. Hastie***,[5] in which the parties concluded a contract for the sale of a cargo of corn aboard a ship, which unknown to both parties had been sold out before the contract was concluded.

[5] See note 3 Supra

In ***Strickland v. Turner***[6] the man on whose Life an annuity was bought and paid for had died before the contract was entered into, but unknown to both parties. The plaintiff was allowed to recover his purchase money.

Also, in ***Galloway v. Galloway***[7], a deed of divorce between a man and a woman who mistakenly thought they were married to each other was held to be void as the marriage never existed between them at all.

Furthermore, in ***Barrow, Lane v. Philips & Co. Ltd***.[8] the contract was for the sale of an indivisible parcel of 700 bags of nuts but unknown to them only 591 bags were existence as others had been stolen. The contract was held to be void.

In the Nigerian case of ***Knight, Frank & Rutley v. Attorney General of Kano State***[9] the government engaged the services of the plaintiff estate valuating firm to assess the rateable value of private residences in the State for the purpose of levying tenement rates on them. Unknown to both parties at the time of contract, the 1979 Constitution of the Federal Republic of Nigeria, as well as the Kano State Local Government Edict (No.5) of 1977, vested the powers to levy such rates on the Local Government. The government had paid an initial mobilization fee of N100,000 and the firm had began its work. Subsequently this fact of lack of powers was discovered and the government repudiated the contract. The firm challenged the repudiation, and lost, both at the High Court and at the Court of Appeal, on the ground that the contract was void for Common Mistake

[6] (1952) 7 Exch. 208, see also Scott v. Carlson (1903) 2 Ch 219
[7] (1914) 30 TLR 531
[8] (1929) 1 KB 574
[9] (1990) 4 NWLR (pi. 143)210 Sec also N1CON v. Power & Ind. Engineering Ltd. (1986) 1 N.WLR (»(14) I at 24

as the subject matter of the contract was non-existent at the time of contract.

Furthermore, in ***Griffin v. Brymer***[10] the ceremony, the subject matter of the contract for the hire of a room to watch the coronation ol' King Edward, VII, had been postponed before the conclusion of the contract. It was held void for common mistake.

Note that this Common Law Principle was given statutory flavour under section 6 of the Sale of Goods Act, 1893[11], which provides to the effect that:

> *"Where there is a contract for 'tire sale of specific goods and the goods without the knowledge of the seller, have perished at the time the contract is made, the contract is void".*

Similar provision under S.7 relates to agreement to sell.

Any contract the subject matter of which, unknown to the parties had perished or is no longer in existence at the time of the contract is therefore void for res extincta, as a breed of Common Mistake.

b. RES SUA

Res Sua technically means the thing already belong to the buyer. A contract of sale of a property is void for res sua, where unknown to the parties, the property, the subject matter of the contract of sale, already belong to the buyer. In such circumstances, the seller would be

[10] (1930) 19 TLR 424. Cf. the Australian ease of McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 the Court held that each case must be treated on its merits based on the facts & circumstances.

[11] A Statute of General Application applicable to both Nigeria and Uganda.

unable to transfer the title and the property in the goods to the buyer, since the title and the property in the goods already belong to the buyer thereof.[12]

Thus, in ***Cooper v. Phibbs***[13], a person agreed to take a lease of a fishery from another, though unknown to the two, the fishery already belonged to the leasee. The House of Lords held that the lease should be set aside for the Common Mistake of res sua.

Also, in the Nigerian case of ***Abraham v. Chief Oluwa***[14] the plaintiff brought an action to set aside as void, the transaction for the sale of land which he bought from the defendant on behalf of the Old Fellows Faith Lodge for £68, and the refund of the purchase price thereof. The transaction was set aside as void for Mistake.

This breed of Common Mistake also stem from the Common Law principle of "***Nemo dat quod non habet***" (you cannot give what you do not have). In other words, the seller cannot pass any title to the buyer since the title and the property in the goods already reside in the buyer.

This principle seem to have been statutorily codified (though with some exceptions) in the Sale of Goods Act, 1893.[15]

[12] See Saggy, I.E.: Nigeria Law of Contract, 2nd Ed., (Ibadan: Spectrum Books Ltd., 2000) p. 244
[13] (1867) LR 2 HL 149
[14] (1944) 17 NLR 123
[15] See S. 21 (1) SGA 1893

2. MUTUAL MISTAKE

Where a mutual mistake occurs, there is a misunderstanding between the parties and are said to be at cross-purposes. A mutual mistake negates consent and therefore no agreement is said to have been formed at all.

As the name suggests, mutual mistake operates when the parties to a contract are mutually mistaken, as to the subject matter of the contract. But unlike Common Mistake which is a mistake by both parties on the same issue, in mutual mistake, both parties are mistaken but on different or fundamentally different issues. In other words there was no "*consensus ad idem*" or meeting of the minds between the parties For instance Mr. Kafeero offers to buy Dr. Wasike's car for Ushs. 5m and Dr. Wasike accepts the offer. However, Dr. Wasike has two cars - a Toyota Corolla and Mercedes Benz C class. Dr. Wasike thinks, the offer he accepted is for the sale of the Toyota Corolla, whereas Mr. Kafeero wanted to buy the Mercedes Benz C' class car.

Here, both parties are mistaken as to the subject matter of the contract of sale – the acceptance is fundamentally different from the offer made. Such contracts lacking the requisite '*consensus ad idem*' would be vitiated or voided for mutual mistake.

NOTE:

This occurs where in relation to a particular matter one party assumes one thing while the other party assumes a totally different thing, so that they both misunderstands one another. Where each party is mistaken as to the intentions of the other, there is no consensus ad idem and hence no contract.

Section 17 (2) of the **Contracts Act** a contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.

Mutual mistake as to the identity of the subject matter.

This happens when the two contracting parties are mistaken as to the identity of the subject matter of the contract.

> *Assuming **A** has two vehicles a Mercedes Bez ML32 and Toyota Corona. A offers to sell his car to B and B accepts lo buy the same at Ug. Shs. 40,000,000/= and the contract is concluded. Later it transpires that A was offering to sell his Corona while B in accepting the offer thought that A was selling ML 32. The question is whether there is any contract. Such contract is void due to the operation of a mutual mistake.*

The Court adopts an objective test in determining whether there was mutual mistake capable of rendering the contract void, taking into account the statements and conduct of the parties and indeed all relevant documents. Again, such mistake must be fundamental to the contract otherwise it would be treated as inconsequential and therefore immaterial. The parties must be seen to be at cross-purposes.

Accordingly, in ***Raffles v. Wichelhaus***[16] the plaintiff sold to the defendant a consignment of cotton which was to arrive "ex peerless from Bombay". Two ships called Peerless sailed from Bombay, in October and December respectively. The defendant was given the December consignment but he refused to accept the goods on the

[16] (1864) 2 H & C 906

grounds that he had intended the cotton from Peerless which left in October. The Court held that there was no agreement between the parties and thereby dismissed the plaintiff's suit.

This ratio was followed in the case of ***Tamplin v. James***[17] where the defendant bought an inn at an auction sale. The sale was exclusive of the adjoining garden but because the defendant had always seen the initial occupier of the building use the garden he then concluded that the garden was part of what he bought. The garden was never included in the plan that was displayed at the auction. The Court held that there was no ambiguity on the contract and that the defendant was only careless in not verifying the details of the property he was buying. He was then compelled to perform his own part of the contract by paying for and executing the contract.

3. UNILATERAL MISTAKE

Unilateral mistake is a contractual mistake of one of the parties. Only one party is mistaken, the other is not and he basically induces the other party into the contract on the basis of fraud. Such contracts are void for mistake. The other party might be aware that the other is labouring under a mistake and even if he was not aware, the law still *presume* that he knew that the other party was mistaken, "it would have been obvious" to a reasonable man in the circumstances.

A unilateral mistake occurs when just one party is mistaken as to some aspect of the contract, and the other is or is presumed to be aware of this mistake. Examples of unilateral mistake are common in fraud cases where one misrepresents his identity to the other thereby inducing the other party into contracting with him in the false belief that he is contracting with the person whose identity has been given.

[17] (1879) 15 Ch. D 215

Section 17 (3) of the **Contracts Act** provides that a contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.

A unilateral mistake occurs where only one party to the contract is mistaken and the other party knows about such a mistake and takes advantage of it. A unilateral mistake also negates consent and the existence of an agreement and renders the contract void. ***Section 17 (2)*** of the Contract Act provides *that a contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.*

a. Mistake as to identity of the contracting party

Where a mistake is to the identity of the other party to the contract, the contract will be deemed void if the identity of that person is central to the contract. However, where the parties negotiate in person, there is a presumption that there is an intention to do business with the person in their presence, in which case it is unlikely that a contract will be void.

As regards mistaken identity of the parties even where identity is concerned, the general rule is that identity of contracting parties is immaterial. It is assumed that what the contracting party is interested in is the subject matter of contract and not the contracting party.

Given the above rule, it follows that in order for identity of contracting parties to affect the validity of the contract, the burden is on the party seeking to vitiate the contract to prove that identity of the other party was crucial.

A party relying on mistaken identity must prove that:

(a) He intended to deal with somebody else other than the person he dealt with.
(b) The party he dealt with knew that he was not the one intended to be dealt with.

(c) He would not have dealt with the party he dealt with if he knew the true situation.

(d) He took reasonable steps to verify the identity of that other party.

In **Candy v Lindsay** (credit transaction), a fraudster called Blenkarn ordered goods from Lindsay and Co. and gave his address as 37 Wood Street. He signed his name in such a way to look like Blenkiron and Co. The Plaintiff had not dealt with that company but knew of it by reputation as having a business at 123 Wood Street. The goods were duly delivered for the rogue's address at 37 Wood Street. The rogue resold them to Candy and did not pay Lindsay and Co. who then sued to recover the goods from Candy.

It was held that the contract between Lindsay and the rogue was void because the Plaintiff never intended to deal with him and being a credit sale, identity of the rogue was crucial. Accordingly, the rógue never acquired title to the goods and could not pass any to Candy.

Under the sale of goods and supply of Services Act 2017 the principle is expressed in the latin maxim, ***nemo dat quod non habet***, that is, no person can pass what he does not have, applies.

Similarly, In **Ingram v Little**, a rogue (Swindler) claiming to be Hutchinson visited the Plaintiff's residence in response to an advert and offered to

buy a family car. They refused to accept a Cheque. He told them he was P.G.M. Hutchinson with a business at Buildford and a residence at Stanstead House, Caterham. Hearing this, one of the ladies quietly went to a separate room and searched a directory which showed that P.G.M. Hutchinson lived at that address. The rogue issued to the Plaintiffs a cheque which bounced. In the meantime, the Rogue had sold the car to the Defendant who bought in good faith.

It was held, that the offer was only intended for P.G.M. Hutchinson and a rogue was incapable for of accepting it. So, there was no contract, the rogue never acquired title and he could pass none to the Defendants who were thus ordered to return the car.

Documents mistakenly signed and the plea of non-est factum

Unilateral mistake may arise as to the nature of a document signed or sealed. As a general rule, a person is bound by his or her signature to a document, whether or not they have read or understood the document. Where a person has been induced to sign a contractual document by fraud or misrepresentation, the transaction will be voidable.

However, courts are generally hostile towards reliance on this plea. They take the position that persons of full age and sound mind who voluntarily sign documents should not be lightly allowed to avoid of consequences of so doing. Consequently, the Courts have imposed stringent conditions which must be met for *non-est factum* to operate.

- The plea is only available to a limited group of people i.e., persons who may be unable to read and understand documents e.g., illiterates, minors, persons of unsound mind, persons who at the time of signing are intoxicated, the blind and the senile.

- The mistake must be a serious one in a sense that it must relate to the character of the document and not merely to its exact contents. The distinction was expounded in **Saunders v Anglia Building Society. (1971) AC 1004**. A 78-year-old lady wanted to transfer the title of her house to the nephew. A clerk who was a friend of the nephew knew of the intention. He prepared a document by which the house would go to himself (the clerk). He brought the documents to the lady for signing.

The lady's eye sight was bad and she had lost her glasses. She asked the Clerk to read it to her and he assured her that it was a transfer of land to her nephew and she signed. The clerk used the document and title deeds of the house to borrow money from Anglia Building Society and then defaulted. The Building Society sought to take over the house and the old lady pleaded *non-est factum*

It was held that the document she intended to sign was not fundamentally different from the one she signed because she intended 'to sign the document by which she would lose the house. The mistake was to the exact content not character of document. The Court clarified that to benefit from *non-est factum*, she had to show that the document was radically, fundamentally, basically, totally, and essentially different from the one she intended to sign and this was not the case.

On the other hand, in **Lewis v Clay**, Lord Neville produced a document before Clay and asked him to sign on the document. The words on the document had been covered with blotting paper except for some small spaces which had been cut in the. blotting paper through which Clay would sign.

He told Clay that the document concerned a private family matter when in fact it was a promissory note and by signing it, Clay was promising to pay € 1,113. Neville then used the promissory note to obtain a loan from Lewis. Lewis gave the money but Clay could not pay. Clay pleaded *non-est factum*. It was held that the document to which Clay put his sign was entirely different in character from the one he intended to sign. He could plead *non-est factum* to escape liability.

Note:

Mere ignorance of the contents of the document as opposed to inability to read and understanding may not protect the person.

The illiterate will not benefit from *non-est factum* if it is shown that he would have known the true contents of the document if he was not careless hence in **Kakande v Nsimbi,** an illiterate seller of land could not take advantage of *non-est factum* because he never bothered to ask his lawyer to translate the document he signed.

For the mistaken party the test is subjective; i.e., the law considers what was his actual belief and intention, "and not what; a reasonable man in his position would have thought or believed.[18]

Unilateral mistake may take the nature of mistake as to the identity of the party or subject matter of the contract or the quality of the subject matter

From the above the effect on innocent third parties is so devastating and unthinkable. Consequently, this brand of mistake has been given a restricted application. In fact, judicial pronouncements on it, now

[18] See Abdul Yusuf v Nigerian Tobacco Co. Unrept. S/N. CAS/30/74 W/N CA See Hartog v. Collin & Shield (1939) 3 AER 566.

suggest the apportionment of losses arising out of mistake between the victims, i.e., the mistaken party and the innocent third party This was the ratio in the case of ***Ingram v. Little***.[19]

However, to succeed in nullifying a contract on ground of mistake of identity, four (4) conditions must be satisfied, namely:

i. The mistaken party must show that he intended to contract with some other person than the person he actually contracted with;
ii. The intention must have been known to the other party.[20]
iii. The identity of the other party must have been very crucial to the innocent party.[21] If the identity is not so important then it is irrelevant (as for instance a sale in a market overt, provided the price therefore was paid).
iv. The innocent or mistaken party must have taken steps to verify the identity of the other party, as was the case by the Ladies in Ingram v. Little.[22]

b. Mistake as to Quality of Subject Matter

Where '*quality*' is an essential part of the contract, then the person giving the description is liable for the defect in quality. However, generally mistake as to quality does not and cannot invalidate a contract, unless as stated above, the substance of the contract is predicated on it.[23] Where, as stated by Lord Atkin in ***Bell v. Lever Bros Ltd***.,[24] the mistake *"is as lo the existence of some, quality which makes the thing without the quality essentially different from the thing as it was believed*

[19] (1961) 1 QB 31, (1960) 3 AER 332 (Lord Delvin).
[20] Boulton v Jones (1857) 2 H & N 564.
[21] See Ingram v. Little, Supra & Cundy v. Lindsay, Supra. Contrast Philips v. Brools (1918-19) AER 246 and Lewis v. Averay, Supra
[22] Supra
[23] Bell v. Lever Bros Ltd. (1932) AC 161 at 218 per Atkin LJ.
[24] Ibid. see also Boshali v. Allied Commercial Exporters (1961) 1 ANLR 917, PC.

to be ", the contract would be avoided for the unilateral mistake as to quality.

c. MISTAKE IN EQUITY

The principles discussed above are essentially Common Law principles *is,* and as usual they tend to work hardship against some parties, especially the innocent party, as in ***Cundy v. Lindsay***[25] where the innocent purchaser for value of the goods obtained through the fraud of another was made to incur an unforeseen and inexplicable loss by returning the goods purchased to the original owner. Thus, Equity intervenes to mitigate the hardships inherent in these Common Law rules and principles.

Equitable Reliefs would be granted by the Courts for mistake in contracts in the following circumstances:

i. Where the mistake is common or mutual, then it must be of <1 material nature and not trivial;
ii. Where the mistake is unilateral, then it must have been induced by the misrepresentation of the other party or at least he had a constructive notice of the mistake and;
iii. It must be unequitable for the party seeking to uphold the contract to rely on his strict rights at Common Law.[26]

Now, where the above circumstances exists the Courts would grant any of the following Equitable Reliefs as may be appropriate, namely - Rescission, Refusal of specific performance or Rectification.[27]

[25] Supra
[26] See Sagay, I.E., Id., p. 271
[27] See generally Sagay, I.E., Id., pp. 271 – 276.

THE ILLITERATES PROTECTION ACT.

The Act is intended to protect illiterate persons from the effect of documents. purportedly written or signed on their behalf. To invoke the Act, one must be an illiterate person. It defines an illiterate person as one who is unable to read and understand the script or language in which the document is written or printed.

S.3 provides that any person who shall write any document for or at the request or on behalf or in the name of any illiterate shall also write on the document his full names as the writer thereof and his full and true address. By so doing, the writer implies that he was instructed by the illiterate to write the document, that the document accurately represents the instructions, that it was read over and explained. to the illiterate.

Under **S.4**, any person who signs or writes a document on behalf of an illiterate person without complying with the requirements above commits an offence and on conviction is liable to a fine of 300/= or in default of payment to imprisonment for a period not exceeding 3'months. In addition, such a person could be liable to other civil or criminal consequences for fraud, forgery, misrepresentation etc.

DOCUMENTS MISTAKENLY SIGNED: 'NON EST FACTUM'

This is an equitable defence allowing a person to deny a document he executed in ignorance of its real nature by pleading non est factum (it is not my deed). The defence is usually allowed if it is proved that the document signed is fundamentally different from what the defendant reasonably contemplated it to be.[28]

[28] See Nehi S.E: The Nigerian Law Dictionary 1st Ed. (Zara: Tazama Publ. 1996) p. 228.

As a general rule, a person is bound by the contents of the document he signed whether he read it before signing it or not,[29] save where it was signed as a result of fraud or misrepresentation.[30]

Where the signature was obtained by fraud or misrepresentation, it is ineffectual and void. The rationale for this rule was staled succinctly by Byles, J. in ***Foster v. Makinnon***[31] to the effect that the contract is invalid as,

> *"…the mind of the signer did not accompany the signature...he never intended to sign, and therefore in the contemplation of the Law never did sign the contract lo which his name is appended."*

Initially the plea was available to blind or illiterate persons alone but has been widened to cover even literate or full sighted persons. In the ***Thoroughgood's* Case**[34a] an illiterate landlord signed a deed by which he intended to waive the arrears of rent for the tenant. The tenant prepared, read and interpreted the deed to the landlord, but the real purport of the deed drawn by the tenant was not only to waive the rent arrears but to give up the entire property to him. It was held void for '***non est factum'***.

This plea may have little use in the western world (developed countries) where nearly everybody is literate. But in predominantly illiterate societies like Africa, the importance of the plea cannot be over emphasized.

[29] L'Estrange v. Groucob (1934)2 KB 394.
[30] See Thoroughgood's case (1584) 2 Co. Rep. 99.
[31] (1869) LR 4 CP. 704. See also Adegbokun v. Akinsanya & Ors., Inira, note 35.

In the Nigerian ease of ***Adegbokun v. Akinsanya & Others***[32], the plaintiff and the second defendant bought parcels of land from a common vendor in 1971 and 1965 respectively. In the conveyance of 1965 to the second defendant the vendor intended to convey plot 73 Afariogun Estate, Oshodi, Lagos, but the deed drafted for his execution conveyed plot 80A (which he had subsequently and validly conveyed to the plaintiff). There was sufficient explanation of the 1965 deed to the vendor, but it was clear that at all times lie had intended to convey plot 73 and not the purported plot 80A. The Court held that the plea of non est factum availed the vendor thus nullifying or rendering void the purported conveyance to the 2nd defendant of plot 80Ain 1965.

It is important to state that before the plea can be invoked, the test of *"a man of fall age and understanding who can read and write*"[33] would first be applied. If it is established that he can read, write and understand the language of the document, then he shall bear the consequences of his negligence or inadvertence. His literacy here is not general literacy but literacy in the language used in drafting the document.

In essence, for the plea of non est factum to succeed, two primary conditions must be satisfied, namely:

- **i.** The document signed by the defendant must have been radically different in content from that which he intended to sign; and,
- **ii.** The defendant must not have been negligent in signing the document.[34]

Under the second requirement if the defendant was negligent in signing the document, he would nonetheless be bound even though he may be illiterate. This was the situation and indeed the holding of

[32] Unrept. 1 K/221/72. See alsoOluwo v. Adewole (1964) NMLR 17.
[33] See Gallie v. Lee (Saunders v. Anglia Building Society) (1971) AC 1004, per Lord Denning.
[34] See Foster v. Mackinon, supra.

the High Court of Uganda in the case of ***Kakande v. Nsimbi***.[35] Here the deed of assignment of the defendant's piece of land was prepared by his solicitor and signed by the defendant and the plaintiff while the defendant's solicitor signed as witness thereof. The plaintiff later approached the defendant to sign on a mutation form to enable him register the property in his own whereupon the defendant repudiated the contract, alleging that he had only the property to the plaintiff for ten (10) years and not an outright sale. He also argued that as an illiterate the document was not read over to him by his solicitor before he signed it and that under the circumstances, he was protected under S.4 of the Protection Act[36] since the solicitor never certified **that** he read over and interpreted **the document** to **the defendant before he signed it. The Court rejected his** argument, holding that the plea of non est factum did not avail him, since he did not himself ask his solicitor to read over and interpret the document to him in Luganda language.

Similar ruling was handed down in the earlier Nigerian case of **Barclays Bank of Nigeria Ltd. V Okotie-Eboh**[37] involving a guarantee contract and in which the 1st defendant claimed she was informed by the officers of the plaintiff-bank that it was just for a lean facility, and that she was not aware it was a *'guarantee'* contract. The Court rejected her argument holding that she was sufficiently literate enough to understand the meaning *'guarantee'*.

[35] (1984) HCB 37.
[36] Now Chip 73 Laws of the Republic of Uganda, 2000.
[37] Unrept. S/N LD/1233/71 Casebook, p. 62

B. MISREPRESENTATION

DEFINITION A GENERAL INTRODUCTION

It often happens that the actual conclusion of a contract is preceded by negotiations between the interested parties. During the course of negotiations, each party gives assurances to the other with a view to inducing the other to enter into the contract which eventually forms the basis of the contract. Sometimes such assurances may turn out to be false which may make the innocent party aggrieved. This false statement is what is known as misrepresentation.

Section **13 (d)** of the **Contracts Act**.

A misrepresentation is an untrue statement of fact, which induces a party to enter a contract, but which is not itself part of the contract. There must therefore be a statement. Mere silence cannot constitute misrepresentation even when it is obvious that the other party is mistaken as to the facts, subject to some exceptions.

> *"A misrepresentation is an untrue statement made by one party (to a contract) to the other before or at the time of contracting with regard to some existing fact or to some past event which is one of the causes that induced the contract.''*[38]

Misrepresentation may also be seen as a misleading statement which induces another to enter into a contract.

[38] See Sagay, I.E., op. cit., p.295.

Conditions for the misrepresentation.

A misrepresentation is relevant in the law of contracts only is the following conditions are present;

1. It must be a representation of material fact.
2. It must have been made before the conclusion of the contract with a view to inducing a party to enter into the contract.
3. It must have been made with the intention that it should be acted upon by the party to whom it is addressed.
4. It must actually have been acted upon and must have induced the contract, and;
5. It must have been false to the knowledge of the person making it.

Misrepresentation is also a vitiating element capable of rendering a contract void or at least voidable at the instance of the representee. A plaintiff may be able to claim relief if he was induced to enter into the contract by the representations of the other party. However, such representation must have been part of the contract or have induced the represented to enter thereto: before or at the time of contracting.

The general rule is that for the misrepresentation to ground a relief it must be a statement of existing facts, and not of opinion, intention or law[39]. However, in some cases, statements of opinion, intention or law, may constitute a misrepresentation where it is proved that the representor did not honestly hold it or could not as a reasonable man have honestly held it.[40]

[39] Id., p. 298.
[40] See Edgington v. Fitzmaurice (1885) 29 Ch. D 459 at 483, Bowen, L.J.

It is important to point out that where the statement of opinion was made in good faith, the representor cannot be held liable for misrepresentation.[41]

Misrepresentation is governed by a mixture of the rules of both Common Law and Equity. The effect is that Common Law and Equitable Remedies are available to the parties to the representation. For instance, at Common Law, damages may be awarded as a remedy for fraudulent or negligent misrepresentation, in addition to Rescission. A victim of innocent misrepresentation however has no remedies at Common Law, but has an equitable remedy of rescission available to him.

It is also important to stress that while misrepresentation is predicated on false statement of fact by the representor, it is altogether different if the representor was merely silent and the representee was acting on a wrong assumption.[42] This is on the fact that a contracting party is under no duty to disclose material facts known to him, but not to the other party. This was the ratio in ***Perevial v Wright.***[43]

However, the issue of no obligation to disclose material facts should not be used as a sword but merely as a shield, and is therefore subject to the following exceptions:

i. Partial non-disclosure - If the representor makes a partial disclosure and holds back the rest, it would amount to misrepresentation if what was held back has the effect of

[41] See Bisset v. Wilkinson (1927) AC 177.
[42] See Sagay Id., p. 300.
[43] () 2 CH. 421.

distorting what was disclosed, as was the, case in ***With v. O'flanagan***.[44]

ii. Misrepresentation by conduct - As noted earlier, silence does not amount to misrepresentation but if a person conducts himself in a manner which suggests that a particular state of affairs exists, he would be guilty of misrepresentation if the conduct turns out to be misleading.[45]

iii. Contracts Uberimae fidei - Contracts of which one party has knowledge of material facts requires that party with full knowledge to disclose in good faith all such facts so that the other patty may not be put on a disadvantaged position. This imposes a duty on him to disclose material facts available to him to the other party, otherwise the contract may be rendered voidable for misrepresentation at the instance of the other party. Such contracts of Uberimae fidei (utmost good faith) includes insurance contracts, family arrangements, sale of land, partnership and companies' contracts.

iv. Fiduciary relationships - Contracts between persons who stand in a fiduciary (confidence/trust) relation to each oilier carries with them the obligation to disclose all material facts, failing which the contract become: voidable and susceptible to rescission. The law usually presumes against the person superior to the other, who may be liable for *Constructive Fraud.* This was the ratio in the case of ***Tate v. Williamson***.[46] Here a tutor advised his student who was

[44] (1986) CH. 575. See also Curtis v. Chemical Cleaning & Dying Co. Ltd (1951) 1 KI 805; 1 AER 631.
[45] See R v. Bernard (1837) 7 C & P 784 – the prisoner entered a shop and ordered for goods on credit. He was wearing the academic gown of Oxford University though he was not a student of the institution.
[46] (1886) LR 2 Ch. App. 55

cash-stripped to sell his land. The land contains some minerals but the tutor did not reveal this to the student. He bought the land himself at half the cost had disclosure been made. The contract was held voidable at the instance of the student's executors.

Misrepresentation must be the statement of fact and not an expression of the opinion. A false statement of opinion is not a misrepresentation of fact.

In the case of **Bisset Vs Wilkinson [1927] AC 177**, A purchased a piece of farm land from B to use as a sheep farm. Before purchasing the land, A asked B as to how many sheep the land would accommodate. B who had not used it as a sheep farm, estimated that it would accommodate 2,000 sheep. A relied on B's statement and went ahead to purchase the land. The estimate turned out to be wrong and A, brought an action for misrepresentation against B.

The court held that the statement was only an expression of opinion and not a statement of fact and therefore not misrepresentation and dismissed the case.

Smith v Land and House Property Corp (1884) 28 Ch D7

A purchased a hotel from B. Before the sale was concluded; B. described the business as the 'most desirable'. In fact, as the seller knew, the business was on the verge of bankruptcy. This was held to be a statement of fact rather than opinion as B was in a position to know the facts.

TYPES OF MISREPRESENTATION

There are basically three (3) types of misrepresentation, namely.

(a) Fraudulent
(b) Negligent
(c) Innocent Misrepresentation.

As noted earlier, misrepresentation is governed by a -mixture of the rules of both Common Law and Equity; as such different incidences follow each type, and different reliefs are available for each type of misrepresentation. We shall therefore briefly consider each type in turn for purposes of comprehension.

FRAUDULENT MISREPRESENTATION

Fraudulent misrepresentation occurs when a party makes a statement, which he knows to be false, or has no belief in its truth. In such a case the innocent party may rescind the contract and claim damages for the tort of deceit.

A misrepresentation is regarded as fraudulent if it was *made with a clear knowledge of its falsehood and which is intended to deceive and cause loss.*[47] In other words, a fabricated statement intended to induce a person to a contract. The phrase has been succinctly defined by **Lord Herschell** in ***Derry v. Peek***[48] as a false statement made knowingly or without belief in its truth, or reckless, carelessly, whether it be true or false. The whole concept is predicated on the lack of honest belief in the truth of what is being asserted and knowledge of the falsity of the assertion. It is immaterial that there was no intention on the part of the misrepresent or to cheat or injure the person to whom the statement was addressed.

[47] See Nehi S.1., p. 215
[48] (1889) 14 AC 337. See also Abba v. Mandilas & Karaberis Ltd. 2 ALR Comm. 241.

Section 15 of the contract Act contract is induced by fraud where any of the following acts is committed by a party to a contract, or with the connivance of that party, or by the agents of that party, with intent of deceiving the other party to the contract or the agent of the other party, or to induce the other party to enter into the contract-

(a) a suggestion to a fact which is not true, made by a person who does not believe it to be true;
(b) the concealment of a fact by a person having knowledge or belief of the fact;
(c) a promise made without any intention of performing it;
(d) any act intended to deceive the other party or any other person; or
(e) any act or omission declared fraudulent by any law.

According to **Lord Herscell** in **Derry Vs Peek** (1889) 14 App Case 337, Fraudulent representation is proved when it is shown that a false representation has been made:

1) Knowingly, or
2) Without belief in its truth: or
3) Recklessly and carelessly without having regard to its truth.

It is not easy to prove fraud. To allege a fraud is a serious matter because fraudulent conduct can also result in a criminal charge.

Silent is not fraud.

However, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, it is the duty of the person keeping silence to speak, or unless the silence is, in itself, equivalent to speech. **Section 15 (2)** of the Act.

According to **section 16 (2)** of the Contract Act, where consent is caused by misrepresentation or by silence which is deemed fraudulent the contract is not voidable if the innocent party was not diligent in his failure to find out the truth.

In the case of **Fredrick Zabwe Vs Orient Bank Ltd & 50rs SCCA No 04** of 2006 [2007]1HCB. 24, the Supreme Court defines fraud as;

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture..."*

Remedies for fraudulent misrepresentation

Where there has been a fraudulent misrepresentation, the innocent party is entitled to rescind the contract and claim damages. The damages that are awarded are not based on contractual principles but the damages available in the tort of deceit.

Remedies for misrepresentation.

Remedies available for misrepresentation are dependent on the type of misrepresentation. For all types the remedy of rescission is available. This is putting the parties back in their pre-contractual position. Each

party gives back the benefit which they have received under the contract.

In line with the foregoing, *once fraud is proved, it is immaterial that the plaintiff would have discovered the truth had he been more diligent.*

In other words, it is no defence to say that the plaintiff ought to have discovered the truth if he were diligent. This was postulated by **Jessel, M.R.** in ***Redgrave v. Hurd***[49] and was followed in subsequent eases, such as the Nigerian ease of ***Sule v. Aromire***.[50] Here the defendant by a fraudulent representation sold a piece of land to another claiming Court had awarded him title thereto. It was discovered that the award was in respect of an adjoining land. His defence of caveat emptor was rejected by the Court which held that provided the plaintiff acted on the faith of the false representation of the defendant, it was no defence to assert that the plaintiff should have discovered the fraud if he had been more diligent.

It is salient to reiterate that even where apparently there is no fraud, it would still amount to *constructive fraud* under Equity if there was a fiduciary relationship between the parties, as was the case in ***Tate v. Williamson***.[51]

[49] (1881) 20 Ch. Ch. 113.
[50] (1951) 20 NLR defendant raised a defence of caveat emptor which the Court rejected.
[51] Supra no. 49, Njoro Ind. Ltd. (21 EACA 172) and Windxxxx v xxxxarrot (1976) HCB 28.

NEGLIGENT MISREPRESENTATION

Negligent misrepresentation may occur where the person making the false statement has no reasonable ground for believing the statement to be true. A person having a duty of care makes the false statement.

This is a false statement made by a person who had no reasonable grounds for believing it to be true. The innocent party may rescind the contract or may sue under tort for negligent statement and recover damages.

A Misrepresentation is regarded as negligent if it was made, carelessly or without reasonable grounds for believing it to be true. To amount to a breach, there must have been a duty of care owed by the representor to the representee giving rise to a liability. Such duty of care is usually owed between persons in fiduciary relations e.g. as between a client and his solicitor[52] or a student and his tutor[53] Bankers and customers,[54] and doctors and their patients.[55]

It is also extended to such class of persons as accountants, surveyors, valuers and analysts, as was expounded in the case of ***Candler v. Crane, Christmas & Co.***[56] However, it should be noted that the requirement of duty of care at Common Law is not restricted to "special" relationship between the parties, and has been broadened to cover a range of relations including professional relations which may not necessarily be contractual.

[52] See Nooton v. (1914) AC 932.
[53] Tate v. Williamson, Supra.
[54] See Agbornagbe Bank Ltd. V. CFAO Ltd (1967) NMLR 173; (1966) 1 ANLR 140.
[55] See Radeliffe v. Price (1902) 18 TLR 466.
[56] (1951) 2 KB 164

This was the reasoning in the locus classicus case of ***Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd***.[57] The facts briefly are that the appellants are an advertising agent who placed adverts on behalf of a client - Easipower Ltd - and wanted to know if the client was credit worthy. They consulted their bank (National Provincial Bank) who in turn consulted the bankers to Easipower Ltd. (the Respondents, i.e., Heller & Partners Ltd). The Respondents gave good remarks on behalf of Easipower Ltd. that they were credit worthy, whereupon the appellants placed further adverts on TV & Newspapers.

However, the Respondents in giving the good remarks raised a caveat or a disclaimer thus *"in confidence and without responsibility on our par"*. Shortly after the further adverts, Easipower went into liquidation causing a loss of over £17,000 to the appellants, who then sued the respondents for negligent misstatement. The House of Lords held that prima facie there was no liability on the part of the respondents on account of the disclaimer raised, but that otherwise there is a duty of care on the respondents.

The synopsis of this judgment is that although there was a duty of Care owed by the respondents to the appellants which is capable of creating a liability on the respondents, they are however protected from liability by the disclaimer raised in the transaction. Without the disclaimer they would have been liable.

This landmark case has been religiously followed by the Courts. It was applied in the Ugandan case of ***Kirima Estates (U) Ltd. v. Korde***[58] where a solicitor who negligently gave a wrong valuation of a property was

[57] (1964) AC 465; (1963) 2 AER 575; (1961) 3 AER 891
[58] (1963) EA 637 per Udo Udoma, CJ. See also Winther v. Arbon Langrish & Southern Ltd. (1966) EA 292.

held liable 'or not making inquiries or consulting an Estate valuer before making any statement in the value of the property.

The principles were applied in Nigeria in ***Imarsel Chemical Co. Ltd. v. National Bank of Nigeria.***[59] Here a pharmaceutical Company applied for credit facilities from the plaintiff who required a reference letter from its bankers. The reference letter was issued by the Manager of a branch of the defendant bank qualifying the company as a good customer who was credit worthy to the tune of N3.000. The statement was not true.

The defendant bank was held liable for negligence. Relying on the Hedley Byrne Case, the Court held that;

> "*a person exercising a profession or a calling is liable for failing to exercise due care and skill despite the absence of a contracts relationship.*"

Also, in the earlier case of ***Agbomagbe Dank Ltd. v. CFAO Ltd***.[60] Here, the plaintiff -respondents supplied goods to a customer at different times between July and October. The customer issued different cheques for these supplies. The plaintiff- respondents lodged the cheques with the defendant-appellants. But the cheques were neither cleared nor returned until October when they were all returned together. The plaintiff-respondents incurred losses from the supplies and sued the Bank for damages for negligence arguing that had the bounced cheques been timeously returned to them, they would have avoided the losses maximally. The Supreme Court confirmed the judgment of the High Court holding the Bank liable. It noted that it was not usual banking practice to hold unto a bounced cheque for well up to three

[59] (1974) 4 ECSLR 355.
[60] (1966) 1 ANLR 140; (1967) NMLR 173.

months without returning them to the presenter thereof, who would have thought that the cheque had been credited to his account.

The crux of the principle where by the statement or information or advise of the representor, the representee suffers economic loss or injury of any kind, the representor shall be liable for such negligent misrepresentation; and u is immaterial that there is no contractual relations between them. This is even more so where the relationship is fiduciary or professional in nature.[61]

INNOCENT MISREPRESENTATION

Innocent misrepresentation occurs when a person who has reasonable ground to believe that the statement is true makes a false statement.

Innocent misrepresentation may be regarded as misrepresentation that is neither fraudulent nor negligent, in other words, a representation without fault. At Common Law there is no remedy for innocent misrepresentation since it is innocent and never intended to defraud nor negligent. However, Equity has intervened to create remedies such as 'rescission and indemnity.[62]

Note:

Innocent misrepresentation occurs where the false statement has been made honestly without knowing the same to be false. Even innocent misrepresentation invalidates the contract. An innocent Misrepresentation exists where the representor can demonstrate reasonable grounds for belief in the truth of the statement.

[61] See Eso Petroleum Co. Ltd v. Mardon (1976) QB 801; 2 AER 5.
[62] We shall discuss these remedies where we treat remedies for breach of contract later.

In **Redgrave u Hurd (1881) 20 Ch D 1**, a lawyer wanted to buy the firm of another lawyer. The seller said that he earned about 300 pounds every year from his practice but advised the buyer to examine the books of account to verify this fact. The buyer did not examine any books of accounts and later found that the sum of300 pounds per year was untrue and sued the seller on account of misrepresentation. The court held that the contract was bad because of the misrepresentation. The seller had made a false statement although he had done so innocently. However, he was liable for the misrepresentation.

In general, a misrepresentation makes a contract voidable rather than void. On discovering the misrepresentation, no matter whether fraudulent, negligent or innocent, the other party may affirm or rescind the contract.

C. DURESS/COERCION

Duress has-been defined to mean violence or threat of violence to the person or his freedom, calculated to produce fear of loss of life or bodily harm or fear of imprisonment.[63] At Common Law such contracts obtained by duress is voidable and the victim may be entitled to a relief.

Duress at common law means actual violence or threats of violence to the person. These are threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal that is it must be a threat to commit a crime or a tort. Thus, in order to amount to duress or coercion, it must be shown that the threats were to commit an unlawful act and had the intention of causing or inducing the aggrieved party to enter the contract. It should be pointed out that at common law, for the plaintiff to successfully plead duress, it had to be duress of his or her

[63] Sagay, I.E., Id, p. 340.

person and not his or her property. However, under the Act, threats to detain his or her property may amount to coercion. (see section 2 of the Contracts Act).

Contrast section 2 of the contracts Act with the case of ***Skeate V Beale***

In the case of ***Skeate v Beale [1840] 11 Ad & El 983,*** a landlord was owed money by a tenant. He seized goods owned by the tenant and threatened to sell them immediately unless the tenant entered an agreement for repayment of the sums owned. The tenant agreed to the repayment terms but then sought to have the agreement set aside for duress. It was held that duress to goods will not suffice to render a contract voidable.

Undue influence exists where a contract has been entered as a result of undue pressure, the party subject to the pressure may set aside the contract on the grounds of undue influence.

Duress is an illegal threat applied to induce a party to enter a contract, and makes the contract voidable. It is limited to illegal violence or threats of violence to the person of the contracting party. This was illustrated in the case of **Cumming v Ince;** an old lady was threatened with unlawful confinement in a mental home if she did not transfer certain property rights to one of her relatives. The transfer was set aside because the threat of unlawful imprisonment amounted to duress.

In the case of **Barton v Armstrong;** the defendant threatened to kill the plaintiff if he did not buy his shares. Court set aside the sale because of duress. Section **13 (a)** of the **Contracts Act.**

To be a basis for an action for any relief, the duress must have emanated from the other party to the contract, and not from a third party. Where the duress emanated from a third party or a stranger to I he contract, no action shall lie. But there appear to be a liberalisation of this Common Law position to extend beyond just duress or threat to the person or to his freedom.

Accordingly, in ***Smith v. Charlick***,[64] Isaacs, J stated thus:

> *It is conceded that the only ground on which the promise to repay could he implied is 'compulsion'. ...Within the contemplation of the law ....'compulsion' in relation to a payment of which refund* is *sought, and whether it is called 'coercion', 'extortion', 'exaction', or 'free' includes every specie of duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property or any right of the person who pays."*

It remains to be stated that duress as seen above has been widened, in scope to encompass what is known as 'economic duress', i.e., where the compulsion or threat thereof has the potential of breaking the contract or cause economic loss, the contract becomes voidable and can be avoided and the excess money paid over recovered. Thus, in ***North Occan Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.***[65] the defendants who were ship builders forced the plaintiffs to pay extra 10% of the contract sum or they would abandon the construction of the ship midway. The defendants had learnt of the lucrative contract in respect of the ship that the plaintiff had secured with a third party. This was held to be economic duress. Thus, the Court allowed the plaintiffs to recover the excess money paid.

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[64] (1924) 34 CLR 38 at 56.
[65] (1979) KB 705; (1978) 3 AER 1170.

In ***Pao On v. Lau Yin Long***,[66] the Court[67] gave a rather vivid description of what amounts to duress as "a coercion of the will so as to vitiate consent." In other words, duress operates when the will of the plaintiff is coerced or forcefully obtained. It is the absence of the voluntariness of the will that grounds an action for duress. It may operate by way of actual violence or the threat of violence to the person or the freedom of a party to a contract. The presence of duress in a contract vitiates such contract, or at best renders the contract voidable at the instance of the victim or the person on whom the violence or threat was exerted.

Duress is a vitiating factor of a contract that prevents agreement being reached between the parties to the contract, due to some unlawful threat or illegitimate business or economic being brought to bear on party to the contract. Contracts tainted by duress are said to be voidable by the innocent person and thus able to set aside the contract in its entirety. The duress is must be such a character, and the circumstances must place the person in a position where they had no other choice other than to accede to the demand or threat and enter the agreement.

Duress is a common law doctrine which involves coercion. Traditionally, duress only related to duress to the person which require actual or threatened violence to the person, therefore other forms of duress were not recognized, including duress to goods. However, recent case law suggests that the courts may be inclined to take a more flexible approach, in particular with the development of economic duress.

[66] (1980) AC 614; (1979) 3 AER 65.
[67] Per Scarman, L.J. at 78

The case of The **Sibotre (1976)** stated;

> *"…that a person coerced into a contract by the threat of having his house burned down or a picture slashed could plead duress".*

Usage: The contract was set aside on the basis that agreement between the parties has been vitiated by duress.

D. UNDUE INFLUENCE

The term "Undue influence" eludes precise definition like most legal concepts.

A contract is said to be affected by un due influence if the relationship existing between the parties is such that one of the parties is in position to influence the will of the other and he uses the position to obtain an unfair advantage over the other. Where there is a confidential relationship existing between the parties undue influence is presumed. For example, Parent/ Child, Doctor and Patient, Trustee and Beneficially etc. Undue influence renders a contract voidable.

Section **14 (1)** of the **Contracts Act** provides that a contract is induced by undue influence where the relationship subsisting between the parties to a contract is such that one of the parties is in a position to dominate the will of the other party and uses that position to obtain an unfair advantage over the other party.

Undue influence operates where there exists a relationship between the parties which has been exploited by one party to gain an unfair advantage.

A party is taken to be in a position to dominate the will of another party, where-

a. the party holds a real or apparent authority over the other party;
b. the party stands in a fiduciary relationship to the other party; or
c. the mental capacity of the other party is temporarily or permanently affected by reason of age, illness, mental or bodily distress.

Relationships capable of giving rise to an automatic presumption of undue influence are those of a fiduciary nature and include:

a. Parent - child
b. Solicitor/Lawyer - Client
c. Religious advisor (Pastor) - member of the congregation (Sheep).
d. Doctor - Patient
e. Trustee-beneficiary

The law presumes undue influence where a party who is in a position to dominate the will of the other party, enters into a contract with that other party and the transaction appears to be **unconscionable.**

Where a contract is found to be entered into as a result of undue influence, this will render the contract voidable. This will enable the person influenced to have the contract set aside as against a party who subjected the other to such influence.

In **Allcard v skinner (1887) 36 Ch D 145**, the Plaintiff a 35-year-old lady, was introduced by her spiritual advisor, a lady superior of a religious organization known as the sisters of the poor. She became a sister and took three vows; the vow of poverty, chastity and obedience. The vow of poverty required her to surrender all her individual property to the

institution forever. The vow of obedience required her. to obey her lady superior without question.

She remained a sister for 8 years during which period she surrendered most of her property to the institution and the proceeds from it were used for purposes of running the institution. She left the sisterhood and 6 years later she sued to recover the value of her property contending that she surrendered it through undue influence.

It was held that although no personal pressure had been proved to have been used, the relationship between the two gave rise to the presumption of undue influence especially since she was required to obey her lady superior without question and not to seek the advice of any person without the superior's consent.

The legal effect of undue influence

Where consent to an agreement is obtained by undue influence, the agreement is a contract voidable at the option of the victim of undue influence **(S.16 (1)).** He may set the contract aside absolutely but if he received any benefit under the contract, he can only set it aside upon such terms and conditions as may seem just to court (S.16(5))

It has been defined in ***Allcard v. Skinner***[68] to mean:

> *such unfair and improper conduct, some coercion from outside, some overreaching some form of cheating and generally, though not always, some personal advantage obtained by the guilty party.*

[68] (1887) 36 CH. 145 at 181, per Lindley, LJ.

The, Legal icon, and Master of the Rolls, Lord Denning, MR, prefers to see the term simply as "*inequality of bargaining powers*", especially where there i: a relationship of trust and confidence. This was his reasoning in ***Lloyd's Bank Ltd. v. Bundy***.[69]

He noted that the law gives relief to a person who;

> *without independent advise, enters into a contract on terms which arc very unfair, or transfers property for a consideration which is grossly inadequate when his bargaining power is greatly impaired by reason of his own needs or desires, or by his ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by or for the benefit of the other".*[70]

From the foregoing it can be seen that undue influence is a product of inequality, of (or unfair) bargaining powers resulting from cither pressure or undue advantage taken by the other party or on his behalf by another. The parties may or may not have been in a position of fiduciary relations or positions of trust.

Now where there is no fiduciary or special relationship between the parties, the party alleging undue influence has to prove that he entered into the contract on account of it. It is enough proof to establish either actual coercion or force or that his independent decision was undermined by the domination of the other party.

In ***Williams v. Bayley***[71] a child forged his father's signature on several promissory notes which he gave to his bankers. In a meeting between the father, the bankers and the son, the bankers told the father the

[69] (1975) KB 326 (1974) 3 AER 757.
[70] At p. 339.
[71] (1866) LR 1 HL 200.

implication of what the child had done and that he could be prosecuted, convicted and sent on exile. Afraid of the enormity of the consequences of the son's conviction he signed a mortgage in favor if the bank in return for the promissory note.to be given to him. The Court held that the mortgage was invalid for undue influence on the father by the bank which had capitalized on his fears - an unconscionable transaction between them.

However, there is an equitable presumption of undue influence where a fiduciary relation exists between the parties. *The presumption is that the superior party unduly influenced the inferior party.* But the superior party may rebut the presumption by establishing that the contract was free from- undue influence or that he did not unduly take advantage of the status of the other party.

Thus, in ***Tate v. Williamson***[72] the tutor who took advantage of the precarious financial situation of the student to advise the student to sell his land to him at an 'under price' when he was aware, but never disclosed to the student, that there was mineral on the land, the value of which should have been higher than he paid for it; was held to be in a fiduciary relationship to the student. The Court regarded the action of the tutor as amounting to *"Constructive Fraud"*.

Father and son

In **Ottoman Bank Co. Ltd. v. Mawani and others [1965] 1 EA 464**, the plaintiff bank extended a loan to a business owned by the defendant's father and the defendant guaranteed the amount. The father's business was unable to pay the loan and the bank sued so to enforce the guarantee. Evidence that the defendant was still under the control of the father. He worked in the father's firm and had no independent source of income. It was held that he

[72] (1866) LR 2 CH. App. 55 at 61.

wasn't liable on the guarantee as it was voidable at his option for the father's undue influence.

As noted earlier, fiduciary relations exists between a Tutor and the Student, a Solicitor and his Client, a Doctor and his Patient, a Guardian and a Ward, a Priest and his Faithful (Penitent). Contracts tainted with undue influence where there are fiduciary relations between the parties are liable to be rescinded as they are voidable at the instance of the inferior party. However, once the presumption has been rebutted by the defendant, i.e., that the plaintiff took an independent and informed decision or that there was no undue advantage taken by the defendant, of the plaintiff, the contract shall be validated or confirmed.[73]

It may be salient to point out that *fiduciary duties and the presumption thereof continues even after the termination of the relationship between die parties.* This was the view of the Supreme Court of Nigeria in ***Williams v. Franklin***.[74]

Furthermore, the plaintiff may lose his right to rescind the contract if he expressly affirmed the transaction or by the operation of the doctrine of laches and acquiescence. Consequently, in ***Allcard v. Skinner***,[75] the Court of Appeal found that the matter was caught up by the doctrine of laches and acquiescence (lapse of time) when the plaintiff only brought up the matter after about six (6) years of leaving the Church (Sisters of the Poor Congregation).

[73] See Williams v. Franklin (1961) 1 ANLR 218.
[74] Supra. See also Alison v. Clayhills (1907) 97 LT 709 at 711.
[75] Supra. See also North Ocean Shipping Co. Ltd. V. Hyundai Construction Co. Ltd., Supra. The action to recover the extra 10% was not brought until after about one (1) year after the delivery of the ship.

ILLEGALITY

A contract is regarded as illegal where it is prohibited by law (Statutory or otherwise or where it is contrary to public policy. According to ***Anson***[76] *"where an agreement is invalidated either by express statutory enactment or by rules of Common Law it is illegal''*. Thus where a statute or the rules of Common Law prohibits or forbids certain contracts or they are contrary to Public Policy, such contracts are regarded as illegal and therefore void. However, the learned author made a distinction between Illegal Contracts and Void Contracts.

Regarding the latter, he posits that',

> *"where the law refuses to assist in any way, a person who founds his cause of action upon such an agreement or where the law states that such an agreement is not to have legal effect, the agreement is void*".

A closer look at the position taken by the learned author does not reveal any intrinsic differences between illegal and void contracts, since according to him, any action founded on "such an agreement," i.e., illegal agreement, is void. It seems the distinction is a mere intellectual exercise and a matter of semantics, nee an illegal contract is void and vice versa. That is, the law refuses to give legal effect to it.

For ***Treitel***,[77] illegal and void contracts may be classified into two, namely, contracts involving the commission of a legal wrong, and contracts contrary to public policy.

For Professor Sagay however, although he admitted that the term illegal contracts is wide, vague and imprecise in definition and includes

[76] See GUEST, A.G., Ed.: Principles of English Law of Contract, 22nd Ed., p. 298.
[77] Id., Referred to by Sagay, I.E., Id., p. 359.

void contracts[78], he nonetheless, went ahead to classify illegal contracts into three (3) namely: Contracts Illegal by Statute; Contracts illegal at Common Law and Contracts Void at Common Law.[79] With due respect all these classifications are merely intellectual exercises: whether a contract .is prohibited by statute or by Common Law rules, or even by public policy, it is illegal by virtue of that .statute, rule or policy and therefore void.

As if to corroborate this argument, Professor Bakibinga posits that: "a contract which is illegal is void."[80] However, toeing the line of Treitel[81], he classified illegal contracts into two (2), i.e., those contrary to public policy and those forbidden by statute[82] From this, it seems Bakibinga has either forgotten about contracts illegal by Common Law rules, or has implicitly grouped them among contracts contrary to public policy.

Whatever the classification adopted, it is important to note that a contract is illegal and therefore void whether it is expressly prohibited by Statute or by Common Law principles or by Public Policy. A party to such a contract has no protection in law and therefore cannot seek relief from the Court in consequence of the illegal contract. Restating the law**, Park, B**. in ***Cope v. Rowlands[83]*** said:

> *"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the Common Law or Statute Law, no Court will lend its assistance to give it effect.*"

[78] Treitel, Law of Contract, p. 317.
[79] See Sagay, I.E.: Nigerain Law of Contract, 2nd Ed., Ibadan: Spectrum books, 2000: p. 359.
[80] See Bakibinga D.J. Law of Contract in Uganda, Id, p. 93
[81] See note 79, Supra
[82] Bakibinga D.J., Id.
[83] (1836) 2 M & W 149. See also ACB v. Alao, Infra, note 91.

This position was followed by the Nigerian Court of Appeal in ***Thirwell v. Oyewumi***[84] to the effect that:

> *Certainly, the law will not lend its aid to the perpetrators of any illegality and will therefore not permit the enforcement of a contract on illegality.... "*

Thus, where the cause of action was founded or an illegal contract, the Court will not give any form of assistance or relief to the plaintiff.

A careful and closer look at the different categories of illegal, contracts is therefore apt, for purposes of clarification and comprehension.

i. CONTRACTS PROHIBITED BY STATUTE

Any contract, the entry into or the subject matter of which is expressly prohibited by statute is illegal and therefore null and void.[85]

As the Supreme Court of Nigeria held in ***Sodipo v. Lemminkainem***[86] that;

> *"…a contract that is expressly or implicitly prohibited by statute is illegal. Where the contract made by the parties is expressly forbidden by statute, its illegality is undoubted."*

Such contracts prohibited by statute are unenforceable and therefore void for illegality for example, under the National Lotteries Act,[87] gaming contract is prohibited, and may not be enforceable by the Courts. Also, under the Exchange Control Act 1962[88] a contract to

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[84] (1990) 4 NWLR (pt. 144) 384 at 400 per Akanbi, JCA (as he then was).
[85] See Cope v. Rowlands, Supra.
[86] (1986) 1 NWLR (pt. 15) 220 at 238, per Karibi-Whyte, JSC. See also note 87, Supra.
[87] (1967) of Uganda. Also Pools Betting Act 1968 of Uganda.
[88] Cap. 113 LFN, 1990 (Nigeria); see SS. 3(i) & 7(c) of the Act.

borrow, lend, or sell gold or foreign currency by a person other than an authorized dealer without the prior permission of the. Minister shall be void. Thus, in ***A.C.B. Ltd. v. Alao***[89] the purported loan agreement between the Respondent and the Appellant was held to be illegal and therefore unenforceable.

ii. CONTRACTS ILLEGAL AT COMMON LAW

This class of contracts are contrary to the principles of Common Law and have been determined and developed by the Courts in the course of time. The basis of the illegality is that they are contrary to public policy and are,

> *"regarded as being so injurious to society and prejudicial lo the social and economic interests of the community that I hey are prohibited and declared illegal. "*[90]

Contracts falling into this category appear to be listless, but we shall consider number of them for purposes of clarity and comprehension:

a) Contracts to Commit a Crime, Tort or Fraud

A contract between parties the aim of which is to commit a crime or tort or fraud is illegal and therefore not enforceable by the Courts. For instance, an agreement with hired assassins to kill a political rival is criminal and not enforceable by the Courts or ground of illegality.

In ***Tabs Assurance Ltd. v. Awuzie Industries (Nig.) Ltd***.[91] an insurance contract which was backdated with the object of defrauding the insurance company and cause an unlawful gain to the Respondents

[89] (1994) 7 NWLR (pt. 358) 614. See also Sodipo v. Lemmiukainem, Supra.
[90] Sagay Id., p. 386.
[91] (1995) 4 NWLR (Pt. 388) 223, see also ACB Ltd. V. Alao, Supra, at pp. 631 – 632.

was declared illegal and unenforceable by the Nigerian Supreme Court.

Also, in ***Clay v. Yates***[92] a contract for the publication of a libel, i.e. a defamatory publication, was declared illegal and unenforceable.
Furthermore, in ***Allen v. Rescous***[93] an agreement by one of the parties to beat up a third party for a consideration was held illegal and therefore void.

The ambit of illegality under this heading has been extended to cover contracts that are indirectly tainted with illegality or which may not be illegal per se but indemnify the guilty party of an illegal act against losses arising from his crime, tort or fraud. Accordingly, in ***W. H. Smith & Sons v. Clinton***[94] the defendant contracted to indemnify the plaintiffs, a firm of publishers, against the consequences of any libelous publication. They however failed to do so when the plaintiffs were ordered by the Court to pay damages for libel. It was held that the contract of indemnity was illegal as it was intended to shield the plaintiffs from liability for wrongs committed by them.

b) Contracts Prejudicial to the Administration of Justice

A contract to thwart the course of justice or to shield a criminal from prosecution or to stifle the prosecution of a crime is illegal and therefore void. A typical example is an agreement with an accused person to give false evidence in his favour for a consideration. Thus, in ***R v. Andrews***[95] the defendant who demanded bribe as a consideration for giving false evidence in favour of a driver standing trial for reckless

[92] (1856) 1 H & N 73.
[93] (1676) 2 Lev. 174.
[94] (1908) 99 LT 840.
[95] (1973) QB 422. See also R v. Panayloton 3 AER 112.

driving, was himself convicted, as the agreement was illegal - the object being to impede the course of justice.

Earlier in ***Williams v. Bayley***[96] the House of Lords declaring invalid an agreement to pervert or distort the course of justice stated that;

> *"you shall not make a trade of felony. If you are aware that a crime has been committed,* i *oil shall not convert that crime into a source of profit or benefit to yourself."*

However, it is to be noted that an agreement to settle a civil matter out of Court does not amount to perverting the course of justice and is therefore valid and Enforceable.[97]

c) Contracts Prejudicial to Public Safety

Contracts which are damaging to the public are illegal and void. Such contracts include a contract with an *"enemy-country*" or with a person resident within an enemy country. This is more so in times of war between the two countries and such contracts even though valid before the start of the war, shall be "*frustrated*" and thus become illegal, null and void. This was the situation in ***Daps v. Haco Ltd***.[98] Here the plaintiff sued to recover the arrears of his salary during the civil war. Dismissing the suit the Court held that the agreement had been *"frustrated"* and therefore void.

d) Immoral Contracts

Contracts relating to sexual immorality or that tends to promote promiscuity are void for illegality. For instance, an agreement for the hire of a room for prostitution or brothel keeping is illegal and therefore

[96] (1866) LR 1 HL 200 at p. 220.
[97] See McGregor (1888) 21 QBD 424.
[98] (1970) 2 ANLR 47.

void. In ***Pearce v. Brooks***[99] the hire of a car for immoral purposes was held unenforceable as it was void. Under this category are contracts for transport of girls to Italy for prostitution, or for bestiality, sodomy, homosexuality or pornography.

e) Contracts Prejudicial to the Status of Marriage

Marriage is a sacred institution recognized by law. Any contract therefore which is prejudicial to the status of marriage, such as a marriage concluded with a person who is validly statutorily married is void. Also in this category are contracts in restraint of marriage, such as was the case in ***Lowe v. Peers***.[100] Here the man promised to be married only to Miss Catherine Lowe, and to pay her £1,000 within three (3) months in case he marries anyone else. The agreement was held **void** as being contrary to public policy.

f) Contracts tending to Promote Corruption in Public Life

A contract which is to influence public officials from the honest performance of their duties, or which are tainted with bribery and corruption are illegal and void. In ***Okoronkwo v. Nwoga***,[101] the claim was held unenforceable and void where a contractor bribed a public officer with a car and £7,500, and sought to- recover these when he could not secure the contract.

Apart from the headings discussed above, there are other contracts declared void and unenforceable at Common Law. The list is never closed but includes contracts restricting personal liberty, contracts in restraint of trade, contracts to defraud the state of revenue, etc. Any

[99] (1886) LR 1 Exch. 213.
[100] (1768) 4 Bar 2225.
[101] (1972) 2 ECSLP. 615. See also Montifiore v. Menday Motor Co. Ltd (1918) 2 xxxxxxxxx 241.

contract falling under any of these categories is therefore illegal, null and void and of no effect whatsoever.

iii. CONTRACTS CONTRARY TO PUBLIC POLICY

A good number of contracts contrary to public policy have been developed under the Common Law rules. But it suffices to say that such contracts are also illegal and therefore void. For example, in ***Meribe v. Joshua***[102] a contract to a woman was held to be contrary to public policy and therefore unenforceable as it is null and void.

[102] (1976) 3 SC 23.

DISCHARGE OF CONTRACT

A contract creates certain obligations on one or all parties involved. The discharge of a contract happens when these obligations come to an end.

A contract may be discharged in four ways;

a. by performance,
b. by agreement,
c. by breach and;
d. under the doctrine of frustration.

Discharge of contract refers to the process by which the contractual relations be when parties are brought to an end and the parties thereto released from further obligations to each other. Contractual relations may be abated as a result of the discharge of the contract - such discharge may be as a result of the act of the parties or an act of God, i.e., a supervening natural occurrence which is independent of the parties and which makes the further performance of the contract legally, physically or commercially impossible.

There are four major modes or ways by which a contract may be discharged, viz, discharge by agreement, by performance, by breach and by frustration. A consideration of each of these modes may be necessary for purposes of elucidation or clarity.

DISCHARGE BY AGREEMENT

This is a process by which a contract may be terminated by a mutual agreement of the parties. As a general rule, since parties voluntarily entered into the contract, same parties may voluntarily agree to terminate or end the contract. This is expressed in the Latin maxim ***"codem modo quo, oritur codem modo dissolvitur"*** (which has been put together by agreement may be put asunder by agreement). In other words the parties may voluntarily agree to end or terminate the contract and thereby release each other from further obligations to each other.

Note:

Where a contract is still executory, i.e. Where each of the parties is yet to perform his contractual obligation, the parties may mutually agree to release each other from their contractual obligation. Each party's promise to release the other is consideration for the other party's promise to release him.

The general rule is that whatever is commenced by an agreement can be ended by an agreement. Thus, a contract can be discharged by the fresh agreement between the same parties. A contract may be terminated by agreement in any of the following ways;

a. Novation

Novation of contract means replacement of an existing contract by another contract. In novation the parties may change. If the parties are not changed then the material terms of the contract must be altered in the new contract because a mere variation of some of the terms of a contract is not novation but alteration.

Example:

A is indebted to B and B to C. By mutual agreement B's debt to C and B's loan to A are cancelled and G accepts A as his debtor. There is novation involving change of parties.

b. Alteration:

Alteration of a contract takes place when one or more of the terms of the contract are changed. If a material alteration in a written contract is made with the consent of all the parties, the original contract is discharged by alteration and a new contract takes its place. An alteration may be a change in the amount of money, the rate of interest, or the names of the parties. Alteration results in the discharge of the original contract.

The difference between 'novation' and 'alteration' is that in case of novation there may be a change of parties but in case of alteration parties remain the same and only the terms of the contract are changed.

Example:

A agrees to supply B. 100 bags of beans at Ug. Shs. 100,000/- per bag within 2 months from date of the contract. Later on, A. and B alter the agreement in the following way: A agrees to supply 80 bags of beans at Ug. Shs 120,000/=within 3 months instead of two. The latter agreement puts an end to the former.

c. Rescission

Means cancellation of contract by mutual consent. A contract may be cancelled 'by agreement between the parties at any time before it is

discharged by performance. The cancellation of agreement releases the parties form their obligation arising out of the contract.

Example:

A promises to deliver 100 bags of beans to B within two months. Before the date of performance, A and B mutually agree that the contract will not be performed. The parties have cancelled the contract.

DISCHARGE BY BREACH.

Where one of the parties fails to perform their side of the contract the innocent party may be able to terminate the contract and commence proceedings for damages (or other appropriate remedy).

In **Cutter v Powell (1795) 6 Term Rep 320,** A seaman who was to be paid his wages after the end of a voyage died just a few days away from port. His widow was not able to recover any of his wages because he had not completed performance of his contractual obligation.

This would essentially depend on whether the contract is executed or executor. In *executed contracts* the party yet to perform his own part of the contract seeks 10 be released from further obligation (unilateral discharge). Under this situation, the party seeking a discharge may either be released by an agreement under seal or upon a consideration which is accepted in satisfaction of the existing obligation under the contract, technically referred to as "accord and satisfaction".

Where however, the contract is still executory, i.e., each of the parties, is still to perform some obligations, each party agrees to release his rights under the contract as a consideration for similar to release by the

other party (bilateral or mutual discharge).[103] Here the discharge is based on the mutual consent or agreement of the parties with the attendant effect that monies paid or properties transferred may be returned and the parties returned to their status quo ante.

For contracts under seal or which are required by law to be made in writing, although under the old Common Law, they were required to be discharged by another agreement under seal or in-writing, they can now be discharged by a simple contract - written or oral - by the intervention of Equity and the provisions of the Judicature Act, 1873. Thus, in Berry v. Berry[104] by a separation deed, a husband promised to pay His wife £18 per month. Eight (5) years later, they had another agreement not under seal by which he agreed to give £9 per month and also 30% of his salary if it exceeded £350. The Court held that the separation deed had been validly the latter simple contract.

The parties may also agree to waive their rights and duties under a contract and discharge the contract between them. The waiver involves the renunciation abandonment of some claim or rights in the contract - a promise not to insist on mode of performance fixed by the contract. See ***Rickards v. Oppenheim***.[105]

As noted earlier, where the discharge agreement is supported by a fresh consideration it is referred to as "accord and satisfaction". The "accord" is the agreement by which the agreement is discharged, whereas the "satisfaction'' is the consideration which given which makes the agreement operative.[106]

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[103] See Sagay, I.E., Id., p. 532.
[104] (1929) 2 KB 316. See also UAC v. John Argo (1958) 14 NLR 105.
[105] (1950) 1 KB 6
[106] See British Gazette & Trade Outlook Ltd. V. Associated Newspapers Ltd. (1933) 2 KB 616.

In **Adekunle v. ACB**,[107] the appellant had a claim of £349.4. Shall Pence against the respondents who were his clients. He accepted £150 in full satisfaction of the claim. Thereafter, he sued to recover the balance of the £349. It was held that his acceptance of the £130 constituted 'accord and satisfaction' of his claims.

The summary of all that we have been discussing is that a contract may be discharged or brought to an end by the agreement of the parties, be it oral or in writing, and the parties would become relieved of further obligations to each other.

DISCHARGE BY PERFORMANCE

Where parties to a contract have performed their duties or fulfilled their respective obligations under the contract, the contract is discharged or brought to an end. As a general rule, performance must be complete, i.e., in accordance with the terms of the contract. Anything short of this would amount to a breach.

This is where both parties have performed the obligations, which the contract placed upon t hem. Performance must be completed i.e. it must be in accordance with the terms of the contract if the Performance is incomplete (contrary to the terms/the defaulting party may be sued for damages.

The general rule is that performance must be carried out strictly and precisely in accordance with the terms of the contract. The effect of the general rule is that where a contract provides for payment by one party after performance by the other, no. action for payment may be maintained until performance is complete.

[107] Unrept. S/N Western Nigeria C/A.

When the parties to a contract fulfil the obligations arising under the contract within the time and manner prescribed, then the contract is discharged by performance.

Example:

> *A agrees to sell his car to B for an amount of Ug. Shs. 10,000,000/= to be paid by A on the delivery of the car. As soon as it is delivered, A pays the promised amount.*

Since both the parties to the contract fulfil their obligation arising under the contract, then it is discharged by performance.

This rule may produce harsh and unjust consequences as happened in **Cutter v Powell**.

In this case the plaintiff sued as administrator of her husband's estate. The defendant had agreed to pay Cutter, the deceased, some money provided that he moved a ship up to its destination. The voyage began on August 2 and Cutter died on 20 September when the ship was left with 19 days to its destination. It was held that according to the express terms of the contract, the money was payable only upon completion of the whole contract.

The Sale of Goods and Supply of Services Act, 2017 recognizes this rule of strict performance. It provides in S. 37 that where the seller delivers to the buyer a quantity of goods less that he contracted to sell, the buyer may reject them.

Because of the harshness of the rule, over the years the courts and the legislature developed some mitigating factors by way of exceptions.

a. Substantial performance

The doctrine of substantial performance arises where a person performs his or her side of the bargain but there are minor defects in the performance of the contract, under the substantial performance rule, the company would be paid for the substantial work done on the project.

Hoening V Isaacs (1952)2 ALL ER 176, there was a contract by the plaintiff to decorate and furnish the defendant's flat for 750 pounds. The defendant alleged that the workmanship was poor and defective but paid 400 pounds. The plaintiff sued for the balance. The court found that there were defects in the work but these could be cured for 55 pounds. The Court awarded the plaintiff the full amount of the contract less the cost of putting right the defects plus the amount already paid.

b. Partial performance

This arises where a person only partially performs his or her side of the contract but the other party rather than reject the work, decides to accept what has actually been done. In such a case if the promise accepts the partial work done, he or she will be obliged to pay for the work on a *quantum meruit* basis. The Latin principle of quantum meruit means as much as deserved or what one has earned. It basically means payment for the actual or reasonable services rendered.

As noted earlier, performance of a contractual obligation must be complete, and any partial performance would only amount to a breach. Now, where there is a partial performance, the contractor cannot claim for the value of what he has done as he is clearly in breach.

Thus, in ***Cutter v. Powell***,[108] the defendant agreed to pay Cutter 30 guineas provided he continued to act as second mate in sailing the ship from Jamaica to Liverpool. The ship left Jamaica on 2nd August and landed on the 9th October. Meanwhile Mr. Cutter had died enroute on September 10th. The wife sued to recover the recover the value of what the husband had earned on the basis of 'quantum-meruit'. The action failed because the contract was to be performed completely before Cutter could be paid.

This principle was followed a century later in the case of ***Sumpter v. Hedges***.[109] Involving a contract for the erection of buildings. The plaintiff had done about 3/5 of the work and informed the defendant that he had no money to complete same. The defendant thereupon completed the work himself using some of the materials left by the plaintiff. Thereafter the plaintiff sued to recover his fees on quantum meruit basis and for the cost of the materials he left on the site. The action failed as the contract was not severable. However, he was awarded the cost of the materials only.

The rule as to complete performance as enunciated in ***Cutter v. Powell*** has been qualified by the following exceptions:

i. Acceptance of partial performance:

Where the defendant accepted the partial performance by the plaintiff, then he would be liable to pay for that part of the contract that was performed, on the basis of quantum meruit, See ***Omoleye Okeowo***[110].

[108] (1795) 6 TR 320.
[109] (1898) 1 QB 673.
[110] (1973) 3 U.I.L.R 180. The cloth contracted could not be gotten. A higher quality was supplied and accepted. The defendant was held liable to pay for it.

ii. Prevention of performance or completion:

If in the execution of the contract, the plaintiff was prevented from either performing or completing the performance of his obligations under the contract, he shall be entitled to either claim for damages or for what he had actually done on the basis of quantum meruit. This was the ratio in ***Planche v. Colburn***[111] where the plaintiff was engaged by the defendant to write a book. "The Juvenile Library" and after he had gone far into the book, the defendant abandoned the project. The plaintiff was held entitled to the value of what he had written on the basis of quantum meruit.

iii. Severable / Divisible Contract:

Where the contract between the parties is of a severable or divisible nature, i.e., it is made us of severable parts that can be conveniently dismembered from the whole, then the performance of some of the parts would entitle the party to recover the value of what has been performed on quantum meruit basis. For instance, a contract for the supply of stationeries - if the plaintiff was able to supply notebooks, biros, duplicating papers, and ink, but could net supply stapler, staple, pins and diaries because these latter items could not be found anywhere in the market as they were out of stock, then he should be able to recover the sum due for the items duly supplied. Whether a contract is divisible or not will depend on the intention of the parties and the nature of the contract itself.

[111] (1831) 8 Bing 14. See also De Bernardy v. Harding (1853) 8 Exch. 822 at 824, per Alderson, B. and Appleby v. Myers (1867) LR 2 CP 251.

Accordingly, in ***Ekwunife Wayne (W/A) Ltd***.,[112] the appellant was contracted to lay underground pumps for a petrol station and also to electrify them on completion. It was subsequently discovered that there was no electricity in that area and therefore he could not perform this part of the contract. It was held that he could recover for what he had done under the contract.

This principle could also be applied where the particular contract is illegal or void. Thus, the Court can severe the lawful or valid aspect of the contract from the unlawful or illegal contract under the principle of severance.[113]

iv. Substantial Performance

By the doctrine of substantial performance, a contractor who has performed substantially (though not entirely) his obligations under a contract may recover the stipulated contract sum less the value of what has not been done or not done, properly. The defendant also has a right to counter claim to damages for incomplete performance or losses suffered thereby[114]. This is necessary to avoid the untold hardships occasioned from the strict application of the Common Law principle of entire performance expounded in ***Cutler v. Powell***. More so; that the strict application of ***Culler v Powell*** would lead to "unjust enrichment of the defendant."[115]

Accordingly, in ***Melita & Co. Ltd. v. Baron Verhegen***[116] the appellant was allowed to claim the price for the contract for the erection of a house which had provided for installment payments. On completion,

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[112] (1989) 5 NWLR (pt. 122) 42 AT 441.
[113] See Adesanya v. Otuewu (1993) 1 NWLR (pt. 270) 414. See also Ritehie v. Atkinson (1808) 10 East 295.
[114] See H. Dakin & Co. Ltd. V. Lee (1916) 1 KB 566.
[115] Ekwunife v. Wayne (W.A.) Ltd., Supra at 441 – 442, pr Nnaemeka-Agu, JSC.
[116] () 21 EACA 153.

the respondent withheld the last installment on grounds of structural defects, but the appellant based his argument on substantial performance of the contract which the Court of Appeal agreed with.

In ***Ekwunife v. Wayne (W/A) Ltd.***,[117] the Supreme Court of Nigeria explained the principle of substantial performance to the effect that;

> *"...Complete performance by one party was a condition precedent lo the liability of the other.... However, as a rigid application of this principle invariably led to unjust enrichment of the defendant who enjoyed some benefit from the contract without paying for it, the Courts in their desire to do justice between contracting parties, in particular to mitigate the harsh results of the rigid application of the principle .... on plaintiffs who often spent huge sums of money to perform some part of their own side of the bargain, developed the doctrine of substantial performance. The sum total of this doctrine of substantial performance is that, though the contract is indivisible, so long as the promisor has performed a substantial part of his own sale of the bargain, though he may not have performed precisely or fully what he had promised to perform, he is entitled to sue the promisee who accepted what he performed on the contract, though the promisee can counter-claim or bring a cross- action for damages for the partial performance, omissions or defects in execution.*[118]

Consequently, where there has been a substantial performance of a contract, the plaintiff may sue to claim for the value of what he has

[117] Supra.
[118] See also Hoenig v. Isaacs (1952) 2 AER 176.

done under the contract under the doctrine of substantial performance.

v. Tender of Performance:

Tender of performance refers to an attempted performance of an obligation. If a party to a contract attempts or offers to perform but the performance is rejected by the other party, he would be deemed to have performed and is discharged from obligations, and may also sue for breach of contract. This is akin to prevention of performance earlier discussed.

In ***Startup v. MacDonald***[119] the contract was for the supply of oil "within the last 14 days of March". The plaintiff delivered the goods by 8:30p.m on the 31st March which was rejected by the plaintiff as being too late. The Court held the tender as being valid performance.[120]

In commercial contracts "time clauses" are normally regarded as crucial to the performance obligation and as such are classified as conditions, breach of which entitle the non-breaching party to treat his obligations as repudiated, as in the following case:

Bunge Corp v Tradax Export SA [1981] 2 All ER 513

In this case, a contract for the purchase of 15,000 tons of Soya beans was to be shipped in 3 shipments of 5,000 tons. The buyers were to provide a cargo vessel at the port. Buyer was also required to give 15 days notice to the readiness of the ship.

[119] (1843) 6 M & G 593.

[120] If the tender involves payment of money, it is not enough for the debtor to offer to pay simply putting his hand in his pocket. See Finch v. Brook (1834) 1 Bing NC 253.

On one occasion, they gave this notice four days to late. Breach of contract or warranty? In these four days, the value decreases by $60.ton 1. The sellers sought to repudiate for breach. Buyers said no serious consequences here, so no right to repudiate. Other commercial background reasons? - exploitation of legal technicalities. House of Lords said that time clauses were so fundamental to the contract that they were in fact conditions as to commercial certainty. Therefore, the seller was entitled to repudiate the contract for breach.

In some consumer contracts this requirement is relaxed and such clauses may be treated as warranties, breach of which does not discharge the non-breaching party of their performance obligations but instead merely gives a right to damages.

Where there has been only partial or defective performance, the non-breaching party may be prevented form repudiating the contract under the doctrine of "substantial performance". This will only operate where the breach is trivial in the context of the overall guidance. The non-breaching party instead may claim damages, a set-off against the contract price. The doctrine is best illustrated by the following case:

Hoenig v Isaacs [1952] 2 All ER 176

Plaintiff agreed to decorate flats for £750. Some of the work was defective. The defendant had already paid £400, and refused to pay the balance on the grounds of partial defective performance. To put this right, would cost £56. Court of Appeal said that the plaintiff was entitled to the £350 (i.e. the defendant was not able to be discharged because there was substantial performance) less the £56 cost of the repair.

In contrast to the above case:

Bolton v Mahadeva [1972] 2 All PR 322 (177)

Here, the plaintiff agreed to install central healing, costing £560. Performance partially defective. The householder discovered the defect, and the plaintiff (plumber) refused to fix it. The repair was valued at £174. So, the defendant refused to pay any of the £560 of the contract. Householder defective central heating worth £560 - £ 174 = £386. Was the plumber entitled to payment? Or is the householder able to get away without paying? The court said that this was a more serious breach - the plaintiff was not entitled to any money at all. Householder discharged from any obligations.

The distinction in this case is the relative value of the defect. Also, the non-breaching party must have a real choice in the matter here, the plumber was refusing to repair it!

c. Divisible Contracts

The general rule that performance must be precise and exact does not apply to divisible contracts. A divisible contract is a contract in which partial performance attracts an obligation to provide payment of part of the consideration. For example, X agrees to supply 100 tons of maize to Y in ten installments of 10 tons each. X delivers only two installments but becomes broke. Under the notion of divisible contract, Y will be obliged to pay X the moneys owed under the contract, that is for the two installments.

At common law, where performance is incomplete such party in default is not entitled to any payment.

In the case of **Sumter vs. Hedges (1898) 1 QB 673**, CA, also cited in Max and Young, "Cases And Material In Contract Law" at page 459, on the subject "partial performance of an entire contract", the Plaintiff builder who had contracted with the Defendant to build two houses and stables on the

Defendant's land for the sum of 565 pounds, did part of the work, amounting to about 333 pounds and had received payment of part of the price. He then informed the Defendant that he had no money to continue with the work. Collin LJ found that he had abandoned the contract.

In other words, parties must-fulfill their obligations in line with the terms of the contract and once they have each done this, they are discharged or relieved from further responsibilities to each- other render the contract.

However, problems may arise where only one party has fully performed his obligations and the other party is yet to perform his or has only partly performed. In such a situation, only the party that has performed fully is discharged the other is not and may be sued for breach of contract. The party in breach may allege that he was prevented from performing by the other party. Further still, each party may blame his inability to perform on the other party on the ground that by the terms of the contract the other was required to perform first as a condition precedent lo his own performance, etc.

But as to whether one party is required to perform before the other is a matter of the intentions of the parties as manifested in the terms or the nature of the contract; i.e., whether there is a condition precedent or the obligations are concurrent or to be performed simultaneously. Where the obligations are concurrent, the parties perform at same time and no one may sue the other for not starting first, unless he has performed his; but where there is a condition precedent, the party obliged to perform that condition must so perform before the other could perform his.

Furthermore, besides keeping to the terms of the contracts, the parties are obliged to perform their respective duties within the agreed time. If no time was agreed upon, they are required to perform within a reasonable time - what is a reasonable time will depend "on the

circumstances of the case and the nature of the contract itself. Whether time 'is of the essence' of the contract depends largely on the terms of the contract.[121] If by the terms of the contract time was stipulated for the performance of the obligations, then the party performing must act within the stipulated time. Otherwise, he would be in breach and the other party may repudiate the contract or sue for damages. In ***Panesar v. Popat***[122] time was made 'of the essence' in the contract for the supply of furniture. The seller breached the time stipulation, and the buyer extended the time by some days. The seller still could not supply at the agreed date, whereupon the buyer repudiated the contract and refused subsequent delivery. The Court held that the buyer was entitled to refuse delivery since time was made of the essence of the contract.[123]

DISCHARGE BY FRUSTRATION

Frustration may be defined as a supervening or unexpected occurrence in a contract without the fault of the parties, which makes the continued performance of the contract practically, legally and commercially impossible, or which makes the intended result radically or fundamentally different from what the panics originally agreed.

A contract is said to be frustrated if an event occurs which brings its further fulfilment to an abrupt end, and upon the occurrence the parties are discharged. But the doctrine of frustration only relates to the future. This means that the parties are discharged from their future obligation under the contract but remain liable for whatever rights that may have accrued before the frustration, although the parties are both excused from further performance of the contract.

[121] See for example, S.10 of the Sale of Goods Act, 1893.
[122] (1968) EA 17.
[123] See also Amadi v. Thomas Aplin & Co. Ltd. (1972) 3 SC 228.

As already noted, the general rule is that there must be strict performance of obligations in the contract. However, there are instances where a party may find it impossible to carry out his obligations. There may be initial impossibility to perform the contract for example due to disappearance or destruction of the subject matter which arises in cases of common mistake. But where the impossibility arises subsequent to the contract, then this is called frustration.

The basic common law rule was that where performance had become unexpectedly onerous or even impossible due to the occurrence of a subsequent event, the party whose performance is affected could not be discharged. In **Paradine v Jane,** court held that if a party wishes to protect himself from the effect of subsequent difficulties, he should expressly state so in the contract. However, in the 19th and 20th centuries, a lenient approach was developed by the court.

Section 66 (1) of the **Contracts Act, 2010** Act 7 of 2010 (hereafter referred to as the Contracts Act 2010 codifies the common law doctrine of frustration to the extent that where a contract becomes impossible to perform or is frustrated and where a party cannot show that the other party assumed the risk of impossibility, the parties to the contract shall be discharged from the further performance of the contract.

Frustration occurs when an intervening act or circumstance, without the fault of any party, makes it impossible to perform the contract. In the words of Lord Radcliffe in ***Davis Contractors Ltd v Fareham Urban District Council [1956 1 All ER 145*** at page 160,

> *'So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognizes that, without default 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. Non haec in foedera veni. It was not this that I promised to do.'

In the case of **Krell vs. Henry [1903] 2 K.B. Page 740,** there was an appeal from the dismissal of a suit of the Plaintiff for enforcement of a contract to rent a room. The trial court held that the foundation of the contract was that the Defendant wanted to watch the Coronation procession which had been fixed for a particular date. However, the Coronation was postponed and the Defendant refused to pay for the room. The Defendant had paid a deposit but did not take up the room. The judge held that the Plaintiff was not entitled to recover the balance of the rent fixed by the contract

A contract may be discharged by frustration the effect of which is that the contract becomes automatically determined or brought to an end and the parties relieved of further obligations under the contract. However, rights which accrued to the parties before the frustrating event occurred may be enforceable whereas rights which were yet to accrue at the time of the frustration are not enforceable.

In **Taylor v Caldwell,** the defendant agreed to hire a musical hall to the plaintiff. After the contract was made but before the day of the first concert, a fire broke out completely destroying the musical hall. By this time, the plaintiffs had made extensive arrangements in. relation to the productions they intended to perform. Because of loss of the music hall, their concerts had to be cancelled. This resulted into substantial financial losses to the plaintiffs. The contract contained no express provision covering this eventuality. Consequently, the plaintiff sued for non-performance of the contract in order to recover their losses. The defendants argued that they were not liable since the music hall had

been destroyed through no fault of their own. The court upheld the defendants' defense

The doctrine of frustration discharges both parties from their contractual obligations where following the formation of the contract, performance of the contractual obligations become either:

a) Impossible; or
b) Radically different.

Effect on the contract.

In the case ***Hirji Mulji vs. Cheong Yue Steamship Co Ltd*** [1926] AC 497 confirms the effect of frustration is that it brings the contract to an immediate end, whether or not the parties wish this to be the result. In other words, it is void, not voidable (as is the case for repudiatory breaches).

The case which established the doctrine of frustration was **Taylor vs. Caldwell (1863)3 B & S 826**. An important quality of frustration is that it must be based on an assumption made by both parties.

The test for frustration.

There are three main elements when assessing whether frustration applies to a contract.

1. Has the contract allocated the risk of the particular event occurring?
2. Has there been a radical change in obligations?
3. Was the radical change due to the fault of one of the parties?

The frustrating events.

1. Act of God
2. Non-occurrence of contractual event
3. Destruction of subject matter
4. Illegality or Statutory Intervention
5. Alteration of manner of performance or impossibility by one party
6. Outbreak of war,
7. Delay or interruption

A brief discussion of the events considered as frustration to a contract and the operation of the doctrine of frustration is necessary for purposes of comprehension.

i. Act of God.

Ryde v Bushell and Harvey, the Plaintiff leased his farm to the defendants and one of the terms of the contract was that certain acreage of coffee was to be planted. However, because of the heavy rains, they could not complete their obligations. The plaintiff brought an action for breach of contract. Court rejected the plea of act of God advanced by the Defendants.

Newbold P stated:

> *But before the plea can succeed, it must be established that it was an Act of God which prevented performance or which destroyed the results of performance. Nothing can be said to be an Act of God unless it is an occurrence due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any*

action which would reasonably have been taken by the person who seeks to avoid liability.

ii. Subsequent Illegality or Statutory Intervention:

An otherwise legal and valid contract would become frustrated where there was a subsequent law or regulation or policy of government prohibiting such contract. Thus, the prohibition renders the contract illegal and unenforceable.

A contract is also frustrated if, after its formation, a circumstance arises which renders its further performance illegal. There is said to be supervening illegality, which operates as a frustrating event e.g. change in the law of the country.

Accordingly, in ***Uzomah v. Uzomah***[124] a contract to build on a certain site was held to be frustrated when the Lagos EDB acting under its statutory powers prohibited erection of any building in the area

Also, in ***Obayuwana v. The Governor of Bendel State***,[125] the appellant was appointed a member of the Oredo Customary Court in Benin City. The Governor subsequently revoked the appointment, and as if not enough, the State House of Assembly passed a law abolishing Customary Courts in the State.[126] The appellant challenged the revocation of his appointment. It was held that the contract of appointment had been frustrated by the act of the Governor and the law passed by the House of Assembly of the State.

Illegality refers to where the parties form a contract, and subsequently, before or during performance, the contract becomes illegal to perform. The general rule is that this will frustrate the contract if the

[124] (1965 – 66) NMLR
[125] SJSC Dec. 1982, p. 167. See also Reily v. The King (934) AC 176.
[126] Law No. 10 of 1980.

effect on the contract is serious enough. If the effect is minimal and only partial, the doctrine of frustration will not apply.

It is important to remember that the rules of illegality, will apply where the contract is illegal at the time of formation. Frustration here only applies where the contract becomes illegal following its formation.

The most common example of illegality is where legislation is enacted which renders the contract illegal (Denny, Mott and Dickson v James B. Fraser & Co Ltd[1944] AC 265).

In some cases, the illegality of the contract is temporary. If the length of time is short enough, the contract may not be frustrated and the parties will simply have to wait out the period of time before continuing the contractual obligations. The courts which consider the length of time the contract will operate for, combined with the length of time of the illegality - National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675.

iii. Outbreak of War:

The outbreak of war is another element that can render an otherwise legal or lawful contract frustrated and therefore illegal. Where there is an outbreak of war any contract between citizens of the waring States become frustrated; as the citizens of the other Stale at war would be seen as alien enemy. This situation covers not just citizens of the enemy State but also residents or other persons carrying on business in the said enemy state, or within a territory occupied by an enemy State.[127]

[127] See Sooracht's case (1943) AC 203.

In The ***Fibrosa Case***[128] a contract for the sale and delivery of machinery was held frustrated when that port was occupied by the enemy in the 2nd World War.

One striking question is whether the doctrine of frustration is applicable to Civil Wars as it is to International Wars. Although the issue is not settled, however the Courts have tended to answer this question in the affirmative. And according to Prof. Sagay, and rightly too;

> *As far as frustration is concerned, there can be no distinction between a Civil War and an International War. The factor of physical impossibility is the same in both cases, and as far as each side is concerned, the other side is the enemy, and the persons residing in such enemy controlled territory are enemy aliens for the purpose of contracts.*[129]

It remains to be added that even if the parties are not resident in enemy territories, but both reside in same territory, the fact of the physical impossibility of performance of the contract would operate to frustrate the contract, thus automatically determining the contract.

In ***Daps Brown v. Haco Ltd.***[130] where the plaintiff sued to recover the arrears of his salary and other entitlements during the Nigerian Civil War, the action failed, as the contract was held lo have been frustrated by the Civil War.

Where both parties have assumed performance will be done in a specific way which is rendered impossible by the outbreak of war, this

[128] (1943) AC 32.
[129] See Sagay, Id., p. 381.
[130] Supra. See also United Cinema & Film Distributing Co. v. Shell BP, PDC (Nig) Ltd. (1973) 3 UILR 439.

may amount to frustration -Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93.

iv. Destruction of Subject Matter:

A contract would be discharged as frustrated if, without the fault of the parties thereto the subject matter was destroyed before the completion thereof The, destruction may be as a result of earth quake, volcanoes, tornadoes, flood or fire,

Thus, in ***Taylor v. Caldwell***,[131] Blackburn J. stated that in such situations, the contract would be;

> *"Subject to an implied condition that the parties shall he excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."*

The defendant let a building to the plaintiff for holding concerts on specified days. Before the concerts could be held the music hall was accidentally destroyed by fire. A suit was filed for breach of contract and court held that the action could not be maintained.

In this case, Caldwell agreed to let a music hall to Taylor so that four concerts could be held there. Before the date of the first concert, the hall was destroyed by fire. Taylor claimed damages for Caldwell's failure to make the premises available. The court held that the claim for breach of contract must fail since it had become impossible to fulfil. The contractual obligation was dependent upon the continued existence of a particular object.

[131] (1863) 3 B & S 826. See also Bentworth Finance (Nig) Ltd. V. Alh Sani Bakori, Unrept. S/N NCH/46/71 of 12th February, 1973.

Here, the contract was for the hire of a Music Hall for some proposed concerts, but the hall was gutted by fire and destroyed before the date of the concert. It was held that the contract was frustrated by the fire outbreak.

v. Death:

Contracts of a personal nature such as contracts of agency, employment or apprenticeship are frustrated and discharged on the death of any of the parties thereto.

A contract for personal services will be frustrated on the death of either party. The. same principle applies where either party is permanently incapacitated from performing the contract.

In **Condor v Barron Knights**, a 17-year-old drummer collapsed and was admitted to a psychiatric hospital. Medical opinion was that he would only be fit to work four nights a week. The band had engagements for seven nights a week and so the defendants decided to dismiss the drummer. The court held it was, in a business sense, impossible for the drummer to perform the contract and for that reason the contract was discharged for frustration.

With due respect, the case of ***Cutter v. Powell***[132] appropriately fits in here. In wise, even if the widow had sought to complete the contract by acting as the 2nd March for the remainder of the journey between the point of the husband's death and the port of destination, she would still have been unable to recover the contract sum, as the contract was one of a personal nature.

[132] Supra. See also Robinson v. Davies (1871) LR 6 Exch. 269.

Also, in ***Jackson v. Union Marine Insurance Co. Ltd.,***[133] the-contract to write a book was held to be frustrated with the insanity of the author.

The death of either party to a contract discharges the contract where personal services are involved.

Just as the destruction of the subject matter of the contract terminates it, the death or serious indisposition of a party whose personal services were contemplated by the contract will similarly terminate it. Thus, if A contracts to stage a series of shows during the month of June- September but is in May sentences to imprisonment for one year, or becomes insane permanently or for a substantial part of the period in question, the contract will similarly be discharged by frustration- the frustrating event being constituted by the imprisonment or insanity.

vi. Unavailability of subject matter:

Similar to the non-occurrence of an event, a contract may be formed with a particular subject matter in mind. This section covers what will happen where the subject matter is destroyed - *Taylor v Caldwell (1863)*. Generally speaking, where the subject matter of a contract has been destroyed due to no fault of either party, the contract will be frustrated. See *Appleby v Myers (1867) LR 2 CP 65.*

In these cases, the parties have both made an assumption that the subject matter will exist at the time of the contract. You ensure that this is the case, and that the destroyed thing is the actual subject matter of the contract.

[133] (1874) LR 10 CP 125 at 145.

If the subject matter or even the person responsible for the performance of a contract, though not ceasing to exist, becomes unavailable for the purpose of the contract, the contract shall become frustrated. In the Ugandan case of ***Victoria Industries v. Ramanbhai Bros.,***[134] a contract for the shipment of maize through Lake Victoria to Mwanza was held frustrated when the East African Railways refused to accept shipment of the maize.

There are many other situations in which a contract may be discharged by frustration, but we shall be content with these for now. However, we shall proceed to look at situations in which the frustration was self-induced by a party to a contract seeking to rely on the frustration.

vii. Government intervention

Where a party is prevented from carrying out his obligation because of government laws or policies, the contract may be frustrated.

Denny, Mott and Dickinson Ltd v James B Fraser and Co Ltd, Lord Macmillan stated: *it is plain that a contract to do what has become illegal to do cannot be legally enforceable*.

Consequently, where X a Ugandan contracts to sell goods to Y a Kenyan, but subsequently the Kenyan movement bars the importation of goods of any kind from Uganda, such a contract would be discharged.

[134] (1961) EA 11.

Note

A contract shall not be frustrated where:

1. It is more difficult or expensive to perform
2. Impossibility of performance is the fault of either of the parties/self-induced frustration.
3. Where there is a *force majeure* clause
4. Where the frustrating event could be foreseen

viii. Self-Induced Frustration:

Briefly, to amount to frustration, the frustrating event must not have been self-induced. Accordingly, where the event constituting frustration was self-induced it would not amount to frustration as to discharge a contract.

Consequently, in ***Himaco v. Republic Motors***[135] the plaintiff paid for a fully registered motor vehicle, which was not delivered for well up to 20 months despite repeated demands. He then sued the defendants who pleaded that the contract was dependent on availability of forex from the Bank of Uganda and that it was agreed that if forex was unavailable the plaintiff would be refunded his money. It was also contended that the plaintiff was informed of the unavailability of the forex but that; he refused to collect his money. The plea of frustration based on unavailability of forex must fail as the defendant did not take sufficient steps to obtain the needed foreign currency. In other words, the frustration, if any, was self-induced by the defendant and therefore did not avail him.

[135] HCCS No. 597/89; 78. See also Howard & Co. (Africa) Ltd v. Burton (1964) EA 540.

To be capable of discharging a contract however, the frustrating even must have occurred outside the operations of the parties. In other words, the doctrine of frustration will not apply where the contract expressly provided for the contingency, or where it was self-induced, or could have been reasonably foreseen, or the performance has become more problematic or onerous, or that the contract is less profitable. Where any of these circumstances was the case, the contract would still be valid and enforceable by the parties.

ix. Where the events could have been reasonably foreseen

The doctrine of frustration will not apply where the contract expressly provided for the contingency, or where it was self-induced, or could have been reasonably foreseen. Where any of these circumstances was the case, the contract would still be valid and enforceable by the parties.

Justice Engonda – Ntende while rejecting the claim by the 1st defendant that the contract was frustrated by reason of a presidential directive in **Wakiso Cargo Transporters Co Ltd v Wakiso District Local Government Council & Anor,** stated inter alia that;

> *"Clearly if anyone is at fault here, it must be the defendant, who gave out property to the plaintiff to manage when the title to do so, was in doubt, and as it turned out contested by another person. If it had title or other right to hand over the said property to the plaintiff, it chose not to defend its position, but meekly handed over the same to the other claimant. These events are not the kind that could be referred to as sufficient to amount to frustration of a contract.*

x. Where the performance has become more problematic or onerous, or that the contract is less profitable or expensive.

A contract is not discharged under the doctrine of frustration merely because it turns out to be difficult to perform or expensive or onerous. Thus, the parties will not generally be released or discharged from their bargain on account of ordinary risks or business such as the rise or falls in process, depreciations of currency or unexpected obstacles to the execution of the contract.

Kiryabwire, Mugenyi and Kasule JJA, in **Revolutionary Ads & Designs Ltd V Board of Trustees of Nakivubo Stadium**, Civil Appeal No. 131 of 2013 noted *inter alia* that;

> *"It follows then that the dotrine of frustration must not lightly be invoked merely because the contract turns out to be difficult to perform or expensive or onerous, it must be kept within very narrow limits."*

Their Lordships also agreed with Lord Roskill who stated in Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 WLR 399 ("ECGD") that;

> *"It never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain."*

xi. Non-occurrence of an event central to the contract

A situation may arise where although it is physically possible to carry out the contract, non-occurrence of the event renders the object of that contract defeated.

In **Krell v Henry**, the Plaintiff let a flat to the defendant for 26th and 27th June 1902. The defendant intended to use the flat in order to watch and celebrate the coronation procession of King Edward VII. A payment of one third of the rent was made. Due the sudden illness of the King, the Coronation procession was cancelled. The defendant refused to pay the balance of the rent owing. Court held that the Plaintiff could never recover the money since the contract had been frustrated by the cancellation of the procession; that without the procession, the foundation of the contract had disappeared.

THE LEGAL EFFECTS OF FRUSTRATION

At common law a contract is terminated at the time of the frustrating event. From the date of that event, the parties are released from all future contractual obligations. Thus, obligations which accrue before the event are not discharged by frustration and must be honored.

In **Chandler v Webster**, the defendant agreed to let a room to the plaintiff for the purpose of viewing the coronation procession. The cost of the hire was payable immediately but in fact the plaintiff only paid £100 in advance. Before he had paid the balance, the procession was cancelled and the contract was as a result frustrated. It was held that the plaintiff had no right to recover the £100 but he was also liable to pay the balance since the obligation to pay this had already accrued prior to the supervening event. The plaintiff's counsel argued that he was entitled to recover the £100 since there was a total failure of consideration. Court rejected the argument and held that the effect of frustration was not to discharge the contract ab initio but only from the time of the supervening event and that there was no total failure of consideration.

This decision could clearly produce extremely harsh consequences. The decision was overruled by the House of Lords in **Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd.** The appellants ordered some machinery from the respondents for delivery to their factory in Poland paying £1000 in advance by virtue of the terms of the contract. In 1939, Germany invaded Poland and the contract was frustrated. The London agent for the appellants asked for the return of their £1000 but the respondent refused on the basis that a substantial amount of time and money had been spent on the order.

Had the court relied on Chandler's case, the E1000 would have been irrecoverable. The House of Lords allowed the claim holding that there had been a total failure of consideration thus overruling the Chandler case. The court observed that the appellants had not received anything that they had bargained for under the contract and could thus recover the money they had paid.

Though the Fibrosa case diminished the injustice of the Chandler case, it did not eliminate every hardship. Fibrosa does not apply where there is a partial failure of consideration.

As Viscount Simon LC noted;

> *"...English common law does not undertake to a position a prepaid sum; in such circumstances it must be for the legislature to decide whether provision should be made for an equitable apportionment of prepaid monies which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid."*

Indeed, to clarify the law, the Contract Act 2010 re-enacting the provisions of the Law Reform (Frustrated Contracts) Act of England improved on the Fibrosa case by allowing a party to recover money prepaid even though at the date of frustration there had been no total failure of consideration.

Recovery of money paid

The Contract Act provides that any sum paid or payable to a party under a contract before the time the parties are discharged above, shall in the case of a sum paid be recoverable from the party as money received by that party for his or her use and in the case of any sum payable cease to be payable **(S.66 (2)).**

Where a party to whom any sum was paid or was payable incurred expenses before the time of discharged in or for the purpose of performance of the contract, the court may where it considers just to do so having regard to all circumstances of the case, allow the party to retain or, as the case may be, recover the whole or any part of the sums paid or payable which shall not exceed the expenses incurred **(S.66 (3).**

DISCHARGE BY BREACH

A breach of contract may be defined as the failure or refusal of a party to perform or fulfill his obligations under a contract. The breach may take the nature of total failure to perform; or a partial or improper performance.

A contract may be discharged by breach, i.e., where there is a breach of contract, the innocent party may rescind the contract and treat it as having been discharged.

Breach of contract by a party thereto is also a method of discharge of a contract, because "breach" also brings to an end the obligations created by a contract on the part of each of the parties. Of course, the aggrieved party i.e., the party not at fault can sue for damages for breach of contract as per law but the contract as such stands terminated.

A contract is said to be breached when its terms are broken. Failure to honor one's contractual obligation is what constitutes a breach of contract. buyer has two options; he may choose to wait for the date of performance to come before taking any action against the seller.

In the case of **Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690**, where the Honourable Justice Hellen Obura (as she then was) defined breach of contract as:

> *"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."*

It is essentially at the discretion of the innocent party to so treat the contract as discharged, and he may besides, be entitled to damages, and in some cases to a refund of the contract sum. However, as we saw earlier, it would not amount to a breach where the contract is subject to a condition precedent which has not been performed by the other party. Also, the nature of the breach itself may determine the course of action to be taken by the innocent party; i.e., whether the breach is a breach of condition or merely a warranty.

REPUDIATION OR RENUNCIATION

Repudiation or renunciation occurs where a party to a contract declares his intention (by words or conduct) not to perform his own part of the contract when the time for performance falls due This is also popularly referral to as ***anticipatory breach***. The innocent party has discretion either to sue immediately the intention not to perform is communicated to him or may choose to wait until the time of performance is actually due.[136] The basis of the action by the innocent party is that by electing not to perform his obligation under the contract, the promisor has by his act or default disabled himself from performing his promise, i.e. renunciation or repudiation of the contract; thus the innocent party is entitled to treat the contract as at an end and consequently sue for damages.

The innocent party may decide to wait until the due time of performance before taking any action-, in other words, he treats the contract as still subsisting until the promisor or guilty party puts his intention into use by not performing his obligation at the due date. But to benefit from such wait, he must show that-he is able and willing to perform his own part of the contract.[137] Note however that if he did not treat the renunciation as anticipatory breach, no right of action shall accrue to him until after _the due date of performance - and should any frustrating event intervene in the course of such wait, as was the case in ***Avery v. Bowden***,[138] he shall still not be able to sue as no right of action has accrued to him.

Conversely, where the innocent party decides to treat the promisor's repudiation as anticipatory branch, he may seek the relief of specific

[136] See Johnson v. Milling (1886) 16 QBD 460 at 467, per Lord Esher, M. R. See also Nigerian Supplies Manufacturing Co. Ltd. V. Nigerian Broadcasting Corporation (1967) 1 ANLR 35.
[137] See Aldina v. Globe Mercantile Corporation Ltd. (1968) EA 114.
[138] (1855) 5 E & B 714.

performance from the Court, and the Court may compel the defaulting party to perform his obligations under the contract.

Thus, in ***Hasham v. Zenab Yo Chandu Mansi,***[139] the defendant agreed to sell certain premises to the plaintiff. However, the defendant repudiated the contract before the date of completion. The Court of Appeal upheld the plaintiff's action specific performance.[140]

Note that where the repudiation is accepted by the innocent party, the contract and consequent, obligations there under come to an end and by operation of law the innocent party may be entitled to damages. He cannot thereafter change his mind on the decision, as this would only amount to 'approbating and reprobating' at the same time.

FUNDAMENTAL BREACH

A fundamental breach has been defined in ***Photo Productions Ltd. v. Securicor Transport Ltd***.[141] as an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract.

A fundamental breach of a contract entitles the innocent party to treat the contract as discharged, but to so operate to discharge the contract; it must be a breach which goes to the root of the contract having the effect of depriving the injured party of achieving the main purpose for which he contracted.[142]

[139] (1957) EA 38; (1960) EA 7.
[140] See also Frost v. Knight (1872) LR 7 Exch. 111 at 112.
[141] (1980) AC 827, per Lord Diplock.
[142] See Sagay, Id., 554 – 555.

It may be the breach a fundamental term of the contract i.e., a term which constitutes the main purpose of the contract as was defined in ***Chanter v. Hopkins***[143] where Lord Abinger noted that in a contract for the sale of peas, it would amount to fundamental breach if the seller supplied beans instead. This would amount to non-performance of the contract.

A breach of performance also entitles the injured party to repudiate the contract. A condition is defined as a major term and the basis of a contract, the breach of which could lead to a discharge or repudiation of the contract.[144]

If the breach is not of a major term, then it is a breach of a *warranty*, and the injured party may not be entitled to repudiate the contract but to sue for damages.[145] A warranty has been defined as a term which is collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not a right to treat; the contract as repudiated.[146]

It is to be noted that where there is a fundamental breach, the guilty party would be precluded from avoiding liability by relying on an "exclusion clause" inserted the contract for his own benefit, as was declared by Lord Denning in ***Karsales (Harrow) Ltd. v. Wallis***.[147]

In ***Boshali v. Allied Commercial Exporters***[148] the contract was for the supply of cloth between London and Lagos. The goods supplied were of inferior quality to the sample that was shown to the buyer before the contract. The suppliers tried to rely on an exclusion clause that relieved

[143] (1838) 4 M & W 399 at 404.
[144] See Re: L xxxxxxx Exp Collions (1876) 7 QBD 410; (1875) 10 xxxxxx App 367.
[145] See S. 11(1) (b & c) SGA, 1893.
[146] Id. S. 62 (1) SGA. The breach of a condition may be treated as a breach of warranty.
[147] (1956) 2 AER 866 at 868.
[148] (1961) 1 ANLR 917.

them of liability. The Privy Council, (reversing the Nigerian Federal Supreme Court), held that "an exemption clause can only avail a party if he is carrying put the contract in its essential respects. A breach which goes to the root of the contract disentitles a party from relying on an exemption clause. “Thus, a guilty party may not be permitted to enjoy the benefits of an exclusion clause inserted in a contract when he is in breach of it.

All in all, it should be noted that where there is a breach of contract, the innocent party may be entitled to the remedy of repudiation or rescission, damages, specific performance or injunction. The remedy (ies) to be pursued will depend on the nature of the breach itself and how the innocent party has treated the breach. In the succeeding discussions we shall consider the remedies for breach of contract.

REMEDIES FOR BREACH OF CONTRACT

It is trite law that "***ubi jus ibi remedium***" (where there is a right, there is remedy).[149] And even Equity will not suffer a wrong to be without a remedy. Accordingly, where the rights and obligations conferred on a party to a contract have been breached, the injured party may seek redress or remedy from the Courts.

A brief discussion of each of these remedies is apt for purposes of elucidation, these are;

i. Damages
ii. Rescission
iii. Specific Performance
iv. Injunction
v. Quantum Meruit

Lord Nicholls stated the general position in the case of ***Attorney General v Blake, [1998] 1All E R 376*** at page 309 thus,

> *"As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are compensatory for loss or injury. The general rule is that, in the oft-quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong"*

The particular remedy to be sought or pursued will depend on the nature and -character of the breach itself; and importantly, on how the innocent party has treated the breach.

[149] See Nwankwo v. Nwankwo (1992) 4 NWLR (Pt. 238) 693.

i. DAMAGES

Damages is a Common Law remedy which may be defined as the pecuniary or monetary compensation awarded by the Court to a party that has suffered losses as a result of a breach of contract. It is aimed at putting the injured party at nearly the same position that he would have been had the contract not been breached by the defendant. The rationale for the award of damages at Common Law can be seen from the dictum of **Parke, B.** in ***Robinson v. Harman***[150]to the effect that:

> *"The rule of Common Law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in die same situation, withrespect to damages, as if the contract had been performed."*

The crux of this dictum is that the plaintiff who has suffered losses as a result of the defendant's breach of contract should be indemnified against losses that arose from the breach, provided however that this can be achieved through monetary compensation.

Damages are monetary compensation allowed to the injured party of the loss or Injury suffered by him as a result of the breach of contract. The fundamental principle underlying damages is not punishment but compensation. By awarding damages, the court aims to put the injured party into the position in which he would have been, had there been performance and not breach, and not punish the defaulter. As a general rule compensation must be commensurate with the injury or loss sustained, arising naturally from the breach. If actual loss is not proved, no damages will be awarded to the other party. The plaintiff cannot claim damages for loss which is attributable to his failure to mitigate.

[150] (1848) 1 Exch. 850 at 855; (1843 – 1860) AER 383 at xxxxx85.

Damage means injury and damages means monetary compensation for the loss suffered by the aggrieved party in a breach of contract. The object of awarding damages for the breach of a contract is to put the injured party in the same financial position as the contract had been performed. For example - in the position in which he would have been had there been performance and not breach. (Refer to section 61 of the Contracts Act)

Damages are the direct probable consequence off the act complained of Refer to section 61(2) of the Contracts Act and the case of **Assist (U) Ltd. versus Italian Asphalt and Haulage & Anor, HCCS No. 1291 of1999 at 35** where it was held that;

> *'…the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering.'*

In **Kampala District Land Board & George Mitala Vs Venansio Babweyana,** Civil Appeal No. 2 of 2007 is well settled law on award of damages by a trial court. It was held that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

In **Esso Petroleum Co. Ltd versus Mardon (1976) 2 ALLER** held that;

> *"The damages available for breach of contract are measured in a similar way as loss due to personal injury. You should look into the future so as to forecast what should have been likely to happen if he never entered into the contract"*

But the measure of damages to be awarded has been succinctly defined, by Alderson, B. in the celebrated case of ***Hadley v. Baxendale***[151] to be such us may, fairly and reasonably be considered either as arising directly and naturally in the ordinary course of things, from the breach of contrail itself or might have reasonably been contemplated by the parties at the time the contract was made.

This appears to have' qualified or limited the rather too wide rule in ***Robinson v. Harman***.[152] The rule in ***Hadley v Baxcndale*** was given statutory flavour in S.51 (2) of the Sale of Goods Act, 1893, to the effect that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract. Accordingly, where the damages sought by the plaintiff does not reasonably and ordinarily flow from the breach of contract, or the parties could not reasonably have contemplated the loss, then it would be difficult for the plaintiff to recover.

Before advancing any further, may we consider the different types of damages that may avail a party for breach of contract. These are nominal damages, general damages and special damages.

a. Nominal Damages.

This refers to the sum awarded to the plaintiff by the Court for the breach of contract. Nominal damages is not based on substantial loss or injury suffered or for actual damage. It is awarded irrespective of whether the plaintiff suffered actual damage or not. The mere fact of the breach entitles the plaintiff to this type of damages under the

[151] (1854) 9 Ex. 341; (1843 – 1860) AER 461 at 465. See also Victoria Laundry v. Newman Industries (1949) 2 KB 528.
[152] Supra

general principle of "***ubi jus ibi remedium***." Thus, he recovers nominal damages not as a result of any loss or injury suffered but as a result of the infringement of his legal right. He need not prove actual loss.

Nominal damages simply mean, 'very small'. Where the injured party has not suffered any loss by reason of the breach of contract, the court may award very nominal sum as damages. See **Njareketa Vs. Director of Medical services. (1950) EA 60.**

In ***Nigerian Advertising &. Publicity Ltd. v. Nigerian Airways Ltd***.[153] the plaintiffs were awarded nominal damages even though they could not establish any loss suffered as a result of the breach of contract. Also, in the Ugandan case of ***Nalumba v. Uganda Wild Life Dev. Ltd***.[154] though the plaintiff was unable to prove actual loss he was nonetheless awarded a nominal damage of Ushs.40/=.

b. General Damages

It is also known as substantial damages. Ordinary damages are damages which actually arise in the usual course of things from the breach of a contract. General damages are those which will be presumed natural or probable consequence of the wrong complained of Ordinary damages depend "on the' knowledge which the parties are presumed to possess.

General damages has been defined as compensation awarded to the plaintiff for the loss or injury as the law itself implies or presumes to have

[153] Unrept. S/N IK/88/71 (High Court of Lagos State).
[154] (1966) 2 ALR Comm. 210.

occurred as a result of the breach of contract, such loss, or injury being the direct, immediate, necessary or proximate result of the breach without reference to any special circumstances or factor[155] **Prof. Sagay** has submitted that where the Court itself has to estimate or assess the damages, the resultant figure is termed general damages.[156]

In ***Ghandi v. Pfizer***,[157] upon the breach of the plaintiff's dealership, contract, the Court ordered the defendant to refund the plaintiffs deposit of£200 and also awarded the sum of £200 as general damages in favour of the plaintiff.

c. Special Damages

This refers to the compensation for any damage which is the actual result of the-injury or loss, suffered by the plaintiff. To avail the plaintiff, special damages must be the immediate and direct consequence of the defendant's breach of contract. Such special damages must be specifically pleaded and strictly proved.

Special damages are awarded to the plaintiff in special circumstances for sustaining loss as a breach of the contract. Special damages may be successfully claimed only when they "may reasonably be supposed to have been in the contemplation of both parties; at the time they made the contract, as the probable result of the breach of it."

Justice Engonda – Ntende in **Wakiso Cargo Transporters Co Ltd v Wakiso District Local Government Council & Anor (supra)** had this to say;

> *"To sustain a claim for special damages, it is now settled law that the plaintiff must specifically plead the claim for special*

[155] See Nehi, S.1, Id., P.94. See also Bolag v. Hutcinson (1905) AC at 515 at 525 per Lord McNaghten.
[156] Sagay, Id., p. 656
[157] (1965) 1 ANLR 182 at 184

damages, setting out particularized items of what is claimed as special damages in the plaint."

In ***Bolag v. Hutchinson***[158] the House of Lords held that special damages are such as the law will not infer from the nature of the act, they do not follow the ordinary course of things. They are exceptional in character and therefore they must be claimed specially and proved strictly. The House of Lords held that in a contract special damage cannot be claimed unless they are within me contemplation of the parties at the time of the contract. Essentially, special damages are award based on the philosophy and principle of "***restitutio in integrum***", i.e., restoring the parties to the position they would have been had the contract not been breached. And since special damages need be specially pleaded and proved, it follows that the burden of such proof lies with the plaintiff who is alleging the special damages. It also follows that where the plaintiff alleges but could not prove the special damages, he shall not be entitled to the award.

In ***Kaloli Sempa v. Latif's Garage Ltd***,[159] the plaintiff took a car on hire purchase, but the car was repossessed by the defendant for non-payment. The plaintiff proved that the non-payment was due to the absence of the defendant whom be alleged had fled the country. He claimed but was not able to prove special damages; as such the Court refused to award him special damages for the wrongful repossession though it ordered the return of the car to him.

Accordingly, where there is a claim for special damages it must be pleaded specifically and proved, otherwise the relief shall not be granted by the Court, as it may be considered as being remote, i.e., not foreseeable.

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[158] Supra, note 157.
[159] (1965) HCCS 642 (Uganda)

d. Exemplary /Punitive damages

The are damages intended to punish.

Justice Engonda – Ntende in **Wakiso Cargo Transporters Co Ltd v Wakiso District Local Government Council & Anor (supra)** held that the Plaintiff who claimed exemplary damages for breach of contract could not succeed because it is settled law in Uganda that, generally, no award for exemplary damages can be made for breach of contract.

Exemplary damages are also known as punitive or vindicated damages.

In the case of ***El Termewy vs. Awdi & 3 Ors*** (High Court Civil Suit No.95 OF 2012) court held that punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the **defendant's misconduct** and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to **warn society that similar conduct will always be an affront to society and also the court's sense of decency.** They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract.

In the case of ***El Termewy v Awdi & 3 Ors*** (High Court Civil Suit No. 95 OF 2012) [2015]. The plaintiff instituted this suit against the defendants jointly and severally seeking to recover special damages, general damages, aggravated damages, punitive damages, interest and costs of the suit for breach of his service contract.

Court awarded;

1. Special damages to a tune of Ug.Shs. 2,999,000=and USD 2,666.
2. General damages to a tune of Ug.Shs.20,000,000=
3. Punitive damages to a tune of Ug.Shs.20,000,000

In the case of **Obongo Vs. Municipal council of Kisumu [1971] EA 91**, court held;

> *"It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit goes to the person who was wronged, their object is entirely punitive."*

e. Liquidated Damages.

If the amount of damages, in the event of the breach is determined by parties at the time of entering into the contract, they are called

'liquidated damages' for example non-payment, against promissory note.

Liquidated damages represent a sum, fixed or ascertained by the parties in the. contract, which is a fair and genuine pre-estimate of the probable loss that might ensue as a result of the breach. A penalty is a sum named in the contract at the time of its formation, which is disproportionate to the damages likely to accrue as a result of the breach. (Refer to section 61 of the Contracts Act)

Uganda Baati vs. Patrick Kalema High Court, Commercial Division, Civil Suit. Number 126 of 2010 and adopting the definition in Stroud's Judicial Dictionary that:

> *"...'liquidated demand' inter alia means and includes, the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in money and a statutory demand for the payment of a total debt."*

In **Transtel Ltd & Diamonl Stars Lul V. Mahi Computers & Appliances Ltd Property Services (U) Ltd Commercial Divisisom Civil Suit No 397 Of 2015** while quoting Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065 at page 486 stated that:

> *"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."*

f. REMOTENESS OF DAMAGES

The primary duty of the Court when considering claims for damages is to first resolve the issue whether the defendant is liable at all for the breach of contract, and if he is, the nature and extent of such damages or losses alleged by the plaintiff.

Generally, and as we saw earlier in ***Hadley v. Baxendale***[160], damages for breach of contract are regarded as too remote (and therefore not recoverable) unless they may reasonably and fairly be considered either as arising directly and naturally from the ordinary course of things, or, might have been reasonably contemplated by the parties as the probable consequence of such breach.

A classic case to illustrate the issue of remoteness of damages is ***Victoria Laundry v. Newman Industries***.[161] Here the plaintiffs who were laundresses and dyers purchased a large boiler from the defendants so as to expand their business. The defendants who knew of the plaintiff's business also were informer .at was needed for immediate use. They however never knew that the boiler was needed as substitute for the smaller boiler currently being used. The new boiler was damaged as the defendants were loading it for delivery; and had to take five months to be repaired and delivered. The plaintiffs thereby suffered loss of profits, and claimed for damages under two headings thus: i) £320 (i.e £16 per week for 5 months) for extra customers they could have had from the expanded business and ii) £5,240 (i.e £262 per week for 5 months) for the lucrative dying contract with the Ministry of supply.

The Court applying the principles in ***Hadley v. Baxendale***[162] and similar authorities, allowed the first head of the claim, holding that reasonable persons in the position of the defendants must foresee, without any

[160] Supra
[161] (1949) 2 KB 528.
[162] Supra

express information that the boiler which was meant for "immediate use" would suffer losses if there was a five-month delay of delivery - particularly at a time when laundry facilities were in acute shortage in the area. On the second head of the claim however, i.e., the special dyeing contract with the Ministry, the Court held that this was a special circumstance requiring special knowledge, and that in the absence of such information to the defendants they were not liable for that loss of profits; more so that they never arose in the normal course of events: In other words, the claims under the second head was regarded by the Court as being too remote a damage as to attach liabilities to the defendants.

In ***Hadley v. Baxendale***,[163] the crank, shall of the plaintiffs who were millers was broken. They contracted with the defendants to carry the broken shaft to an engineer to be used as a model for a new one. The defendants delayed the delivery of the shaft and the mill came to a standstill. The defendants never knew what the plaintiffs had no spare shaft. The plaintiffs' claim for damages failed on the ground that it was too remote - the special circumstances of the plaintiffs not having a spare shaft leading to a total loss having not been communicated to the defendants.

In the most celebrated ***Heron II Case***[164], the contract was for the shipment of sugar from Constanza to Bazrah. The ship deviated from the route and arrived about nine (9) days late by which time the price of sugar had fallen tremendously. The respondents claimed for the price difference between the amount they would have sold the sugar had the ship arrived on time and the amount it was actually sold. While admitting to pay interest on the value of the sugar for the period of the delay, the appellants however denied that the fall in market price was due to their fault. Rejecting this argument, the Court of Appeal and the

[163] Supra
[164] Kuofos v. C. Czarnikov Ltd. (1969) 1 AC 350; (1969) 3 AER 686, popularly called Heron II.

House of Lords held, that the fall in market price was not too remote to be recoverable as damages, as the appellants "must be held to have known that in any ordinary market prices are apt to fluctuate from day to day."[165]

ii. SPECIFIC PERFORMANCE

This is an equitable and discretionary remedy granted by the Court to compel a party to a contract to perform his obligations under the contract.

Specific performance means the actual carrying out of the contract as agreed. Under certain circumstances an aggrieved party may file a suit for specific performance, i.e., for a decree by the court directing the defendant to actually perform the promise that he has made.

Specific performance means that when one of the parties had breach the contract, other parties can request the court related to force the parties that had breach the contract to perform the term and condition that is stated in the contract. (Refer to section 64(1) of the Contracts Act).

The courts grant the relief of specific performance in the following situations-(Refer to section 64(2) of the Contracts Act and Ewadra Emmanuel V. Spencon Services Limited Civil Suit No.0022 of2015).

1. If the compensation to be awarded cannot be determined. Remedy of specific performance is awarded in cases where it is impossible to fix compensation. In this case, the court directs the

[165] See also the Nigerian case of Olagunji v. Raji (1986) 5 NWLR (Pt. 42) 408.

defendant to perform his. promise as agreement as agreed at the time of making the contract.

2. Remedy of specific performance is awarded when there is no substitute or alternate for- the subject matter of the contract.
3. Remedy of specific performance is awarded in case of goods, the value of which cannot be easily ascertained and the goods have a unique character. For example, buildings, land or goods having special value for the claimant.
4. Remedy of specific performance is awarded at the sole discretion of the court.
5. The claimant must have come to court with clean hands.
6. The claimant must have brought the suit without unnecessary delay.

It is usually granted in cases where the remedy of damages, (i.e., pecuniary or monetary compensation) will either be insufficient or inadequate. Thus, in the old English case of ***Ryan v. Mutual Tontine Association***,[166] Lord Kay declared that:

> *"...Specific performance was invented, ...in order to meet cases where the ordinary remedy by action in damages is not an adequate compensation for breach of contract..."*

The rationale for this remedy, lay in the fact that damages or indeed other may not be adequate or appropriate to compensate the plaintiff. Before granting order of specific performance, the Court considers whether specific performance do more and complete justice' than an award of damages.[167]Added to this, the Court consider whether the grant of specific performance will be just and equitable in

[166] (1893) 1 Ch. 116 at 126.
[167] See Tito v. Waddell (n.2) (1977) Ch. 106 at 322. See also Fakoya v. St. Paul's Church Shagaa (1966) 1 ANLR 74.

the circumstances of the case, and will therefore not grant the order where it will create hardships be impossible to perform.[168]

Generally, however, the Court will not grant the order of specific performance in the following cases:

a) Where damages will be an adequate and appropriate remedy[169]
b) In contracts for personal services, like Master and Servant/ Domestic Servants.[170]
c) In contracts requiring continuous supervision.[171]
d) Contracts without consideration (unless under seal).
e) Where performance will impossible, as was the ease in ***Taylor v. Russel***, Supra, where the WACA refused to order specific performance because the land had been sold out to a third party when the action was instituted.
f) Where one of the parties is a Minor. This is based on the tact that mutuality is not possible: you cannot compel minor and he cannot compel the other since he cannot himself be compelled. An exception to mutuality is in the area of contract for sale of land where one party has signed a memorandum of transfer.

It is salient to point out that for the plaintiff to be entitled to the order of specific performance, he must have come to Equity with clean hands; i.e., he has performed his own part and is not responsible for any attendant fraud, mistake, misrepresentation or illegality.[172]

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[168] Taylor v. Russel (1947) 12 WACA 179.
[169] Hutton v. Wathing (1948) Ch. 26.
[170] See Chukwu v. NITEL (1996) 2 NWLR (Pt. 430) 290 CA. see also Ondo State University v. Folayan (1994) NWLR (Pt. 354) 1 at 10 SC. But this approach has changed in modern times especially towards employer-employee relations – a General Manager cannot be seen as in a contract of personal service. See Olniyan v. University of Lagos (1985) 2 NWLR) 599.
[171] AG v. Block (1959) EA 180.
[172] See Forthergill v. Philips (1871) 6 Ch. App. 770 at 778. Also Motibhai Manji v. Khursid Begum (1975) EA 10

Furthermore, the order will not be granted where the plaintiff is guilty of laches and acquiescence as was the case in the Kenyan case of ***Mzee Bin Ali v. Allibhay Narbhoy***.[173]

iii. INJUNCTION

An injunction may be defined as an order of Court restraining a party to a contract from doing an act, or compelling him to do an act in line with the contract. Injunction is either prohibitory or restrictive or mandatory and is usually, granted to enforce a negative stipulation in a contract especially where damages would not be an adequate remedy.

Note:

It is a mode of securing the specific performance of the negative terms of the contract. To put it differently, where a party is in breach of a negative term of the contract (i.e. where he is doing something which he promised not to do), the court may by issuing an injunction, restrain him from doing, what he promised not to do. Thus, "injunction" is a preventive relief. It is particularly appropriate in cases of "anticipatory breach of contract" where damages would not be an adequate relief.

A classic illustration of a prohibitory injunction is the case of ***Warner Bros. Pictures v. Nelson***.[174] Here the defendant - a film actress - contracted to render exclusive services to the plaintiffs for a number of years in USA. In breach of the contract, she left for Britain where she performed for another organization. The plaintiffs successfully obtained an order of injunction, restraining her from continuing in the breach of contract. A similar order was granted by the Court in the Nigerian case

[173] 1 KLR 58.
[174] (1937) 1 KB 209.

of ***African Songs Ltd. v. Sunday Adeniyi, (Sunny Ade)***[175] and the Uganda case of ***Maranji v. Kanji***.[176]

As noted earlier, an order of injunction will not be granted where damages will be an adequate remedy. In other words, injunction can only be granted if damages will be inadequate or insufficient, as was the case in ***Union Beverages Ltd. v. Pepsi Cola Intl. Ltd.***[177] and ***7-Up Bottling Company Ltd. v. Abiola***.[178]

Furthermore, injunction will not be granted where it would work untold hardships on the parties, or where the plaintiff never came to Court with clean hands, or where he slept over his right (laches and acquiescence).

In this option, injunction can be said as a remedy that is equitable that the court requires the party to do something or the other way, to stop him or her from doing something.

Types of injunctions.

There are three types of injunction which is

a) Permanent injunction.
b) interlocutory injunction,
c) mandatory injunction and also prohibitory injunction. Permanent injunction is granted by court after the determination of the main suit and last for as long as the contractual relationship exists.

[175] Unrept. S/N LD/1300/74 of 14/2/1975 Case Book, P. 361 (HC Lagoa).
[176] 3 ULR 159.
[177] (1994) 3 NWLR (Pt. 330) 1 at 17.
[178] (1995) 4 NWLR (Pt. 389)287

Temporary/Interlocutory injunction.

The meaning of interlocutory injunction can be say as to maintain the status quo of something in a pending suit. In the other word, interlocutory injunction means to stop the action from being done. Interlocutory injunction is applied in before the starting of something or stops something for being continued.

For example, when there is a contract for tenancy. The land lord threatens to evict the tenant. The tenant will file a suit for breach of contract and seeks interlocutory injunction to restrain the landlord from evicting him until when his suit is heard.

Mandatory injunction.

With mandatory injunction, the court enforces something or some action to be done. In other word, when one of the parties refuse to do the promises that had stated in the contract, the other parties can request the court to apply the mandatory injunction on the parties to finish the action.

Injunction an equitable remedy.

Like specific performance, an injunction is an equitable remedy and therefore only granted at the discretion of the court where;

1. where damages would not be inadequate remedy to compensate the claimant because the claimant needs to restrain the defendant from starting or continuing breach of a negative contractual undertaking or needs to compel performance of a positive contractual obligation (mandatory injunction).
2. The balance of convenience must be in favour of the claimant.
3. The claimant must have come to court with clean hands. The claimant must have brought the suit without unnecessary

iv. QUANTUM MERUIT

Another remedy for a breach of contract available of an injured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum merit literally means, "as much as is earned" or "in proportion to the work done".

This remedy too is available to an injured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum merit literally means, "as much as is earned" or "in proportion to the work done".

The aggrieved party may file a suit upon quantum merit and may claim payment in proportion to work done or goods supplied.

This is an equitable remedy meaning "quantity merited", or ''as much as he has earned". It arises where a party was expressly or impliedly requested to do some work without specifying the fee or remuneration therefor but the circumstances of the request imply that the work is to be paid for, there is an implied promise to pay on quantum meruit basis.

The phrase 'Quantum Meruit' means "as much as earned". A right to sue on a quantum meruit arise where a contract partly performed by one party, has become discharged by the breach of the contract by the other party. The right is founded on an implied promise by the other party arising from the acceptance of a benefit by that party.

The aggrieved party may file a suit upon quantum merit and may claim payment in proportion to work done or goods supplied.

It also arises where a work is to be done for a lump sum payment, and the plaintiff does only part of the work or performs differently. Ordinarily he cannot claim under the contract since he is the party in breach, but

under Equity he can claim for the value of what he has done on quantum meruit basis, especially where complete performance was prevented by the defendant as was the case in ***Planche v. Colburn***.[179] Also the plaintiff may recover if he has substantially performed his part of the bargain, as we saw earlier in ***Ekwunife v. Wayne (W/A) Ltd.***[180]

Furthermore, the plaintiff may also recover on quantum meruit basis even if the contract is void. Here the obligation to pay is imposed by law *quantum* contractru. i.e as it arises from the contract, as was case in ***Craven – Elly v. Canons Ltd***.[181] But if there is no contract at all between the parties, the Court should not grant a relief of quantum meruit - ***Olaopa v. Obafeini Awolowo University***.[182]

v. RESCISSION

By definition rescission means to withdraw from, to abrogate, to revoke or to repudiate a contract as a result of a breach by the other party. It operates essentially as a refusal of further performance. To be effective, the party seeking to rescind the contract must first inform the other party.

Rescission is a remedy which sets the contract aside and puts the parties back in the position they were in before the contract was made. Where there is a breach of. contract the aggrieved party may choose to treat the contract as rescinded and refuse further performance. In such case, him and the other party are absolved of all

[179] Supra. (In a contract to write a book, the owner abandoned the project, but the author reovered on quantum meruit basis.
[180] Supra
[181] (1936) 2 KB 403; (1936) 2 AER 1066
[182] (1997) 7 NWLR (Pt 512) 204 at 223, per Adio, JSC

their obligations under the contract. (Refer to section 53(1) of the Contracts Act).

Where a party who rescinds avoidable contract received any benefit from it, they shall restore the benefit to person from whom it is received. (Refer to section 53(2) of the Contracts Act).

In **Joseph Muluuta v. Katama Silvano, SCCA No. 11 of1999**, court stated that if a party receives consideration and does not receive anything in return, then he is entitled to a refund of the money.

Example

A agrees to buy'200 bags of beans to B to supply 5 bags of sugar on a certain Day. B agrees to pay the price after the receipt of the goods. A does not supply the goods. B is discharged from liability to pay the price.

The principles governing rescission were articulated in Buckland Vs Farmer & Moody(19780 3 ALLER 929 at 938. Halsbury's laws of England, Vol. 9 (1) Re-issue, paragraph 989 cited in Sihira Singh Santoh Vs Falulu Uganda Ltd HCCs No. 517 of 2004 as follows:

> *"where one party (A) to a contract has committed n serious breach of contract by defective performance or by repudiating his obligation under the contract, the innocent party (B) will have a right to rescind the contract de futuro, that is, to sue for damages for any loss he must have suffered as a result of breach. Such a breach by A does not automatically terminate the contract. B has a right to elect to treat the contract as continuing or to terminate the contract by rescission. In case where it is alleged that B has a right to rescind for*

breach, it must be determined (1) whether there has been a breach by A of the term of the contract or a mere representation: (2) Whether the breach is sufficiently serious to justify rescission de futoro of the contract by B as well as claim for damages, and (3) Whether B has instead elected to affirm the contract."

The Court may also refuse to rescind the Contract-

a) Where the plaintiff has expressed or impliedly ratified the contract;
b) Where owing to the change of circumstances (not being due to any act of the dependent himself), the parties cannot be restored to their original position; or
c) Where third parties have, during the subsistence of the contract, acquired rights in good faith and for value; or
d) Where only part of the contract is sought to be rescinded and such part is not a severable from the rest of the contract.

When there is a breach of contract by one party, the other may rescind the contract and need not perform his part of obligation. Such innocent party may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage, which he has sustained through the non-fulfillment of the contract.

Rescission has the effect of restoring the parties to their status quo ante (i.e., their former position). Accordingly, rescission will not be allowed by the Court if "***restitutio in integrum***" (restoring the parties to their former position) is not possible. It will also not be granted if the innocent

party took some benefits under the contract, or where a third party had acquired rights bona fide or for value.

Rescission may only be allowed if the breach is a breach of a condition or a fundamental term; but if it is a breach of a warranty, rescission shall not he granted and the appropriate remedy may be in damages. In other words, the injured party would be required to continue to perform the contract and only claim for damages

It is instructive to point out that the effect rescission, especially in cases of mistake and misrepresentation, is to terminate the contract ab initio as if it never existed.[183]

[183] See Sule v. Aronjre, Supra. See also Ajayi v. Eberu (1964) 1 ALR Comm. 155

LIMITATION OF ACTION

Where there is a breach of contract, an action by the injured party to enforce his rights there under must be brought within the period set by law. Under the **Limitation Act**[184], the period within which a relief may be sought for breach of contract is six (6) years - calculated from the date the cause of action arose. Actions brought after the effluxion or expiry of the time set by law becomes statute barred and the plaintiff may not recover therefrom .

It should be noted however that if the damages claimed for breach of contract consists of or includes damages for personal injury to any person, then the limitation period shall be three (3) years.[185]

The Act also provides for exceptions to the general rule under SS. 21-25 thereof by providing for an extension of time in certain instances:

a. Disability: If the plaintiff was under a disability when the right of action accrued to him, the action may be brought at any time before the expiration of six (6) years from the date when the plaintiff ceased to be under the disability.[186] But if the claim is for damages which include, damages for personal injury arising out of the contract then the period of extension shall be three (3) years (and not six (6) years).[187]

b. Fraud and Mistake: Where the action is based on the fraud of the defendant or his agents, or the right of action is concealed by the defendant's fraud; or where the action is for relief from the consequences of a mistake the period of action shall not begin to run until the plaintiff has discovered the fraud or the Mistake.[188]

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[184] 1959 Cap. 80 LRU 2000, S. 3 (1) (a)
[185] See the Proviso to . 3
[186] S. 21(1)
[187] S. 21(2)
[188] S. 25 (a & b)

c. Statutory limitation; The laws of a State may specifically provide for periods within which certain matters may be litigated upon, and such matters must be brought to Court for adjudication within the time set by the law; failing which the action becomes statute barred. For instance, actions for the breach of contracts for the sale of land, and actions for the recovery of land shall generally be brought within twelve (12) years.[189]

Note however that no action shall lie to set aside a transaction involving transfer of properly where, despite the fraud or mistake, a third-party innocent purchaser for value has acquired an interest in or purchased the property. Such third-party purchaser could not have been party to the fraud, or did not know or had reason to believe that the mistake had been made.[190]

Furthermore, where the plaintiff was ignorant of some material facts, the computation of time for purposes of limitation shall not run until he has become seised of those material facts.

Finally, it should be noted that where the plaintiff acquiesced in the wrong complained against, he shall not be entitled to any relief from the Court.[191]

[189] See SS. 5, 13 & 18 L/A
[190] S. 25 (d & c)
[191] See Sec. 28 L/A