NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW234

COURSE TITLE: THE LAW OF CONTRACT II

Course Code: **LAW234**

Course Title: **The Law of Contract II**

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Introduction

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

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

What You Will Learn in this Course

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

Course Aims

The aim of the course to give you an understanding of general principles of law and how they operate in practice..
This will be achieved as we discuss issues of:-
- Factors which may vitiate a contract
- Rules and Exceptions
- Discharge of contract
- Remedies

Course Objectives

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

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

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

Explain the term and formation of contract

Understanding the vitiating elements of a Contract

Privity of contract

Rules and Exceptions

Discharge of contract

Remedies

Working through this Course

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

Study Units
There are 4 modules in this course, they are as follows:

Module 1 Vitiating Elements of a Contract

Unit 1 Mistake
Unit 2 Misrepresentation
Unit 3 Duress
Unit 4 Illegality and Unenforceable Contract

Module 2 Privity of Contract

Unit 1 Meaning and Nature of the Doctrine of Privity
Unit 2 The Doctrine of Privity
Unit 3 Operation and Application of the Doctrine
Unit 4 Rules and Exceptions

Module 3 Discharge of a Contract
Unit 1 Discharge by Agreement
Unit 2 Discharge by Performance
Unit 3 Discharge by Frustration
Unit 4 Discharge by Breach

Module 4 Remedies
Unit 1 Legal and Equitable Remedies
Unit 2 Remedies for Breach of Contract
Unit 3 Quantum Meruit Claims
Unit 4 Quasi-Contract

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

Text Books and References

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)
T.O DADA, General Principles of Law, 3rd ed., T.O. Dada & Co. (2006)
I.E. SAGAY, Nigerian Law of Contract, 2nd ed., Spectrum Law Publishing (2001)
TREITEL, G.H The law of Contract, 7th ed, London: Sweet and Maxwell (2007)
ANSON, Principle of the Law of Contract, 13th Ed.,
M.C. OKANNY, Nigerian Commercial Law, Revised Ed., Africana First Publishers Plc(2009)

How to Get the Most from this Course

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

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

The main body of the unit guides you through the required reading from other sources. This will usually be either from your recommended books or from a reading section. Self-assessment exercises are interspersed throughout the unit, and

answers are given at the end of units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each self-assessment exercise as you come to it in the study unit. There will also be numerous examples given in the study units; work through these when you come to them, too.

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

- Read this course guide thoroughly.

- Organize a study schedule. Refer to the 'Course overview' for more details. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e.g. details of your tutorials, and the date of the first day of the semester is available. You need to gather together all this information in one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates for working on each unit.

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

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

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

Summary

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

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

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1.0 INTRODUCTION

The basis of a contract is the consent of the parties. The general rule is that there must be a consensus ad idem, that is the meeting of the minds. Thus, in ***Olanlege v. Afro Contractor Co. (Nig) Ltd (1996) 7 NWLR (pt. 458) 29 CA***, the judge stated that one of the fundamental principles of the law contract is that the parties must reach a consensus ad idem, in respect of the terms, otherwise, the contract cannot be regarded as legally binding and enforceable. Mistake, where it is operative, negate consent. In order to be operative, the mistake must be fundamental and must relate to a fact, which existed at the contract was entered into. What amounts to consent is however determined by the parties and what they have both concluded at the time of the contract. ***Esin v. Matzen and Timms (Nig) Ltd (1966) NCLR 299***

2.0 OBJECTIVES

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

- The meaning of mistake
- Types of mistake
- Effect of Mistake
- Mistake in Relation to document.

3.0 MAIN CONTENT

3.1 Meaning of Legal Mistake

In the law of contract, the word 'mistake' has a narrower meaning than in its colloquial use. In other words, it bears a more restricted meaning in law than in every day speech. In popular speech, every case of obvious misunderstanding in which one or both of the parties to a contract would not have entered into the contract, if they had realized the true facts, would be regarded as a mistake. Thus, a layman may think that any agreement based on such misunderstanding will not be enforceable. However, legal mistake operates within very narrow limits. It applies only to facts, and even so, only within the narrow area of mistakes of fact which are fundamental. A mistake of law is ineffective as every person is presumed to know the law (***ignorantia non haud excusat***). Therefore, for mistake to be operative, it must be one of fact, not of law. Where a legal mistake operates at all, its effect at common law is to make contract absolutely void. In the words of Lord Akin, in ***Bell v. Level Brothers Ltd (1932) AC 161, at p.217*** 'if mistake operates at all, it operates to negates or in some cases to nullify consent'. A mistake which produces this effect is called an operative mistake.

3.2 Types of Mistake

Legal writers are not agreed on the types of mistakes that exist. Cheshire and Fifoot identifies three types, namely, common mistake, mutual mistake and unilateral mistake, while Anson and Chitty identify only two types of which they call mutual mistake and unilateral mistake. Treitel identifies two broad classifications, namely mistake which nullifies consent and mistake which negative consent. However, a close analysis of these various classifications of mistake shows that there are simply different ways of looking at the same thing. For example, the first two of Cheshire and Fifoot's three classifications, namely common, mutual mistakes, are subsumed in Anson's and Chitty's conception of mutual mistakes, which, according to them, covers every case where a mistake exists on the part of both parties. Again, Treitel bases his own classification on an analysis of the legal effects of mistake with which most writers agree.

It is however better to expla the three categories so as to give a well defined and clear distinction.

1. Unilateral Mistake.
2. Common Mistake
3. Mutual Mistake

3.2.1 Unilateral Mistake: This occurs where a party is mistaken as to the subject matter or the terms of the agreement. This could be a mistake as to the terms, or a mistake as to identity. Where there is a mistake as to identity, it could happen where the parties are not physically seeing one another e.g. where they deal by correspondence, in this case, the mistaken party must be able to show that there is an identifiable third-party with whom he intended to contract with and that such mistake is as to identity and not attributes; or where parties contract

face to face, in this case, it must be shown that he intended to deal with someone different, that the party he contracted with is aware of it, that the person's identity is of importance, and reasonable steps was taken to confirm the identity of the person. See: ***Phillips v. Brooks (1919) 2 KB 243.***

3.2.2 Common Mistake: This occurs where it is alleged that there has been a common mistake, in that both parties to the contract concluded it under the same (common) mistake or misrepresentation, about some fact which lies at the basis of the agreement. Both parties acted in the erroneous belief that a certain state of facts was in existence at the time the agreement was reached. This mistake was therefore 'common' in a double sense:

i. they were both mistaken,
ii. about the same thing.

For example, if X and Y entered into a contract under a common mistake, it means that although X and Y perfectly understood each other and their respective intentions, X and Y were mistaken about some underlying and fundamental fact, e.g., that the thing which is the subject-matter of their contract does not exist or has ceased to exist (a case of ***res extinct***); or that the thing which X contracted to sell to Y belong to Y (a case of ***res sua***) or that the painting which X contracting to sell to Y as Michelangelo's work was in fact the work of an inferior artist. In the case of a common mistake, the presence of agreement or consensus is not in dispute, for, as stated above the parties perfectly understand each other had their respective intentions. But, what is urged is that because of a common error as to some fundamental fact, the agreement or consensus in nullified. See Nassar and Sons (Nig.) Ltd v. Lagos Executive Development Board (1959) 4 FSC 242.

Common mistake has operated to this effect only in the narrow areas of (1) ***res extrincta*** and (2) ***Res sua***.

Res Extincta: Non-existence of the subject-matter of the contract. Where the parties contract under the mistaken belief of the existence of a subject-matter which, in fact, unknown to them had perished at the time the contract was concluded, the apparent consent of the parties is void. Thus, in ***Couturier v. Hastie (1956) 5 H.L Cas. 673***, a man bought a cargo of corn which he and the seller thought at the time of the contract to be in transit from Salonica to England, but unknown to them, had fermented and had already been sold by the master of the ship to a purchaser at Tunis in order to prevent complete loss. The plaintiff nevertheless sued the defendant for the contract price.

It was held that, the claim failed, because the contract proceeded on the assumption that the corn was in existence at the time the contract was concluded. In other words, the contract was void for mistake; therefore the buyer was not liable for the price of

the cargo. The Lord Chancellor (Lord Cranworth) reading the unanimous judgment of the House of Lords Stated:

> ***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 has come to the only reasonable conclusion upon it…***

The above rule received statutory blessing in **Section 6 of the Sale of Goods Act, 1893**, which provides that:

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

In other words, the effect will be the same if the contract is for the sale of specific goods that have already perished.

However, if on the true construction of the contract, the seller contracted upon the terms that he warranted the existence of the subject-matter, the principle in ***Couturier v. Hastie (Supra)*** will not apply. Although such situations are in practice, the Australian case of ***MrRae v. Commonwealth Disposal Commission (1950) 84 CLR 337***, affords a way very good example. There, the Commission contracted to sell to the plaintiff a wrecked oil tanker described as lying on Jourmaund Reef, 100 miles north of Samarai. In fact, there was no tanker lying anywhere near the latitude and longitude stated, and indeed there was no place known as Jourmaund Reef. The High Court of Australia awarded the plaintiff damages for breach of contract on the ground that the only proper construction of the contract was that it included a promise by the Commission that there was a tanker that there was a tanker in the position specified.

It is necessary to note that cases of ***res extincta*** have operated also in areas other than those of buying and selling of articles. Thus, in ***Scott v. Coulson (1903) 2 Ch. 249*** X agreed to assign to Y a policy of assurance upon the life of Z. Unknown to both X and Y, Z was already dead before the contract was made.

It was held that, the contract was void. Similarly, in ***Strickland v. Turner (1852) 7 Ex. 208***, the plaintiff brought and paid for an annuity on the life of a man, who unknown to parties, was already dead.

He was allowed to recover the purchase money as the annuity had ceased to exist at the time of sale. Again, in ***Galloway v. Galloway (1914) 30 TLR 531***, a man and woman entered into a separation deed, on the false (but fundamental) assumption that there was a valid marriage between them. In other words, they erroneously believed they were lawfully married as husband and wife, when in fact; the marriage between them was void. It was held that, the separation deed was a nullity.

In ***Griffith v. Brymer (1903) 19 TLR 434***, an agreement to hire a room for the purpose of watching coronation ceremony of King Edward the seventh was held to be void, because unknown to the parties, the ceremony had been cancelled at the time the contract was concluded. Finally, in Norwich Union Insurance Society Ltd. v. W.H. Price Ltd. (1934) AC 455, the Privy Council decided that where an insurance company paid its insured the value of a cargo of lemons which, the company believed, was destroyed by reason of an accident to the vessel, which was an insured risk, whereas the damage had been caused by over-ripening, an uninsured risk, the company could recover the amount paid.

Res Sua: Absence of Title in the Seller of the Subject-Matter. Where the parties contract in circumstances in which unknown to them the subject-matter of the transaction belonged to the purchaser, the contract would be void for mistake. For both parties must have accepted in their minds, an as essential and integral element of the contract, that the seller had a right to sell and the purchaser could purchase the subject-matter of the contract. Thus in ***Copper v. Phibbs (1867) LR 2 HL 149***, X agreed to take a lease of a fishery from Y, though contrary to the belief of both parties at that time, X was the real owner of the fishery and Y had no title to it at all.

It was held by the House of Lords that the agreement should be set aside for having been concluded on the basis of a common mistake. Also in ***Abraham (on behalf of the Grand United Order of Oddfellows, Faith Lodge) v. Chief Oluwa (1944) 17 NLR 123***, the Oddfellows Faith Lodge, on whose behalf the plaintiff brought this action, bought a piece of land from one Savage in 1917. Savage himself had earlier bought it in 1883 from the holder of a 'Crown grant' without any deed of conveyance being executed. In 1943, the defendant, who was a judgment creditor of one Oloto, wrongly though the property belonged to Oloto and attached it under a write of fi.fa (fiery facias), and the sale of the land was advertised. The plaintiff put up a caution notice, warning all persons against purchasing the land which he claimed belonged to the Lodge. Furthermore, the plaintiff, fearing that it either had a defective title or no title at all, bid for the property when it was auctioned by the defendant, and bought it for £68. Consequently, on confirming that its title had all the time been valid, the plaintiff brought an action for the agreement to be set aside, and the purchase money refunded to it, on the ground of 'mutual' mistake. It was held that, in the circumstances, the contract was void.

Common Mistake as to Quantity, Types or Characteristics of the Subject-Matter: Apart from cases falling within ***Res Extrincta and Res Sua***, there are other common mistakes as to quantity, type or characteristics of the subject-matter. In this regard, mistake will only to operative where it is affirmatively proved that the subject-matter of the contract, by reason of the mistake, is essentially different in quality from what the parties had bargained for. In fact, the common law rule is that apart from cases falling within ***Res Extrincta and Res Sua***, a contract is not void merely because the parties have made the same mistake, however fundamental the mistake may be. For, the doctrine of common mistake relating to the foundation of

the contract is interpreted restricted and applies only if in the words of Lord Atkin in ***Bell v. Lever Brother Ltd. (1932) A.C 161***, the state of affairs which exists in reality, makes the contract something different in kind from the contract in the … state of facts, that the parties erroneously assumed to exist. If, for example, there was no mistake when the contract was made but facts subsequently come to light which, though important, do not destroy the identity of the subject-matter as it was when the contract was made, the contract is not void. This was clearly enunciated in ***Bell and Lever Brother Ltd. (Supra)***, which contains in the speech of Lord Atkin, the most authoritative pronouncement of recent years upon the law relating to mistake. In that case, the lever company, which had a controlling interest in the Niger Company, in 1923 appointed Bell, Chairman, and Snelling, Vice-Chairman, of the Board of the Niger Company, at salaries of £8, 000 and £6, 000 per annum respectively. In 19226 the arrangement renewed for another five years. During their period in office, Bell and Snelling violated their conditions of employment by dealing in the private capacities in the company's business. This would normally have entitled the company to determine their appointment without any entitlement. In 1929, as a result of the amalgamation of the Niger Company with another company, the positions of Bell and Snelling became redundant. Totally unaware that Bell and Snelling had been guilty of conduct which could have resulted in their dismissal without compensation (i.e., making secret profits), the company offered Bell £30, 000 and Snelling £20, 000 as compensation for the termination of their services. Both men accepted the compensation.

On discovering the violation of their agreement by the two men, the Company instituted this suit, alleging fraudulent misrepresentation and claiming recession of the agreements and repayment of money paid under a mistake of fact. The jury found that if the Lever Company had been aware of the breaches of duty by the defendants, they would have terminated their agreements and dismissed them from office without compensation; but that when entering into the compensation agreement, the defendants did not fraudulently conceal their breaches of duty. Rather, the breaches were not present in their minds at the relevant time. Having been found liable to refund the compensation fee on the ground of mistake both at the High Court and the Court of Appeal levels, Bell appealed to the House of Lords.

The House of Lords held, by a majority of three to two, that there has been no mistake at law to render the contract void. The main judgment was given by Lord Atkin. Having held that a mistake as to the identity of the contracting parties or the existence of the subject will operate to negative or nullity consent, Lord Atkin then went on to consider a mistake as to quality. According to the learned Lord:

> ***In such a case, mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. (1932) AC 161 at p. 218.***

Relying on the principles laid down in earlier authorities like ***Kennedy v. Panama Royal Mail Co. (1867) LR 2 QB 580 and Smith v. Hyghes (1871) LR 6 QB 597***, the court came to the conclusion that the mistake made by Lever Brother was one of the quality and not of the substance of the subject-matter of the contract, and that a mistake as quality cannot invalidate a contract. If a purchaser buys an article in the belief that if possesses a particular quality, he is bound by the contract even if it turns out that the article does not possess that quality, unless the seller had made the presence of the quality a part of the bargain:

> ***Is an agreement to terminate a broken contract different in kind form an agreement to terminate an unbroken contract, assuming that the breach has given the one party the right to declare the contract at an end? I feel the weight of the plaintiff contention that a contract immediately terminable is a different thing from a contract for an unexpired term, and that the difference in kind can be illustrated by the immense price of the release from the longer contract as compared with the shorter. And I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment for three years, still less a term for a few months. But, on the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases and the party paying for the release gets exactly what he bargains for. It seems immaterial that he would have got the same result in another way, or if he had known the true facts, he would not have entered into the bargain. (1932) AC 161 at pp. 233-4.***

If any party is under some misapprehension about some fundamental underlying fact, or is mistaken as to the quality of the subject-matter, the mistake is not operative and, therefore, the contract is valid at common law inspite of the mistake. The mistaken party is then bound by the contract unless there is illegality or fraud. The case of Leaf v. International Galleries (1950) 2 KB 86 affords a good illustration. There, the parties entered into a contract in 1944 for the sale of a picture which both of them though had been painted by a famous artist called Constable. In 1949, L found that the picture was in fact not painted by Constable, and sought to repudiate the contract and recover his money.

It was held that, the buyer had got the picture he paid for, and that the mistake was only one as to quality and so did not make the contract void. In other words, the contention was rejected by the court on the ground that the identity of the picture was not destroyed by the mistake in relation to the artist. However, the point was made in this case if the mistake is one of substance, and merely the quality of the subject-matter, the contract will be void for mistake.

Also, in ***Rose (London) Ltd. v. Pim junior and Co, Ltd. (1953) 2 QB 450***, it was held that, the fact that the parties believed that they were dealing with a type of horse-

beans (feveroles) more valuable than those contracted for would not make the contract void. According to Denning, L.J.:

> At the present day, since the fusion of law and equity, the position appears to be that when parties to a contract are at all outwards appearances in full and certain agreement, neither of them can set up his own mistake or the mistake of both of them, so as to make the contract a nullity from the beginning.

3.2.3 Mutual Mistake: There is a similarity between mutual mistake and common mistake in one important respect, namely, that they both involve a mistake of both parties. But whereas both parties make the same mistake in common mistake, in mutual mistake, they make different mistakes, ***Cf. Nassar and Sons (Nig.) Ltd v. L.E.D.B. (1959) 4 FSC 242***. Both parties misunderstood each other. In other words, each party is mistaken as to the other's intention, though each does not know that their respective promises have been misunderstood. Here the subject-matter is in existence, but the parties are not negotiating to the same end. If two persons contract for the sale of an article, and believed themselves to be in agreement whereas in fact that were not, there is no contract as the mistake avoids the contract, because there no ***consenus ad idem***. In other words, the parties are at cross-purposes. Examples are:

i. X offers to sell his 10-years-old horse to Y, but Y believes that the offers relate to X's 7-years-old horse.
ii. X intends to offer, and in fact offers, to sell a video set to Y, but Y accepts the offer in the honest belief that it relates to a radio set. X does not know of Y's mistake.

In both examples the parties are to cross-purposes, and the real legal posed is one of offer and acceptance. Has there been a real correspondence of offer and acceptance? In other words, have the parties reached an agreement or not? Unlike in the case of a common mistake, where there is a correspondence of offer and acceptance between the parties, the real contention of the plaintiff in the case of mutual mistake is that the mistake complained of negatives or precludes the existence of consensus. The test applied by the courts in attempting to determine whether a contract exists or not is an objective one. They would pose the question: What would a reasonable third party infer from the words and circumstances of the contract? If the inference thus determine is in favour of the plaintiff's contention, the is a nullity; if is not, the contract is valid at common law, though in equity, as we shall presently see, it may be set aside.

From decided cases, it is evident that the courts have usually upheld the plaintiff's contention in cases where the mutual mistake affects the very essence or character of the subject-matter of the contract. Thus, in ***Scriven v. Hindly (1913) 3 KB 564***, a man made a bid at an auction sale thinking that he was bidding for hemp. In fact the bales in question contained tow, which is very different. The conduct of each party had in some measure contributed to the error. The plaintiff sued the defendant for the amount of the bid.

It was held that, the parties were never ***ad idem*** as to the subject-matter of the proposed sale, and that the contract was therefore void. In other words, the action failed because

the plaintiff knew he was selling how while the defendant thought he was buying hemp, and it was a reasonable mistake by the defendant due to an ambiguity in the auction particulars.

On the other hand, in ***Wood v. Scarth (1858) 1 F and F 293***, the defendant wanted a premium of £500 (i.e, an extra /lump sum payment) from anyone who could rent his house for £63 per annum. He expected his clerk to make this clear. The plaintiff had a conversation about it with the defendant's clerk and then accepted the offer, by letter, thinking that what he had to pay was only £63 a year. It was held that, the contract was valid, and the plaintiff was awarded damages for its breach.

Also, in ***Smith v. Hughes (1871) LR 6 QB 597***, the defendant was shown samples of oats by the plaintiff and he bought them, thinking that he was buying old oats (which was what he wanted). They were in fact new oats which were useless for the defendant. It was held that, the contract was valid because, although the parties are at cross-purposes, they are not in agreement at all. For a mistake as to quality will only negative consent if it is a mistake as to a fundamental quality by which the thing is identifiable. According to Cockbum, C.J:

Both parties were agreed as to the sale and particular parcel of oats. The defendant believed the oats to be old and was thus induced to buy them, but he omitted to make their age a condition of the contract. All that can be said is that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them.

In cases where it is impossible for the court to infer an agreement, as where the agreement is vague, the court will declare that no contract has been made. Thus, in ***Raffles v. Wichelaus (1864) 2 H. and C. 906***, the plaintiff sold to the defendant 125 bales of cotton which was to arrive ex peerless from Bombay. In actual fact, two ships called Peerless sailed from Bombay at about the same time, one in October and other in December; the buyer meant the one sailing in October and the plaintiff had in mind the one sailing in December. The plaintiff tendered cotton which arrived aboard the Peerless which sailing from Bombay in December. The defendant refused to accept the goods on the grounds that he had intended to buy cotton from the peerless which left Bombay in October.

The suit was dismissed. And although it was not actually stated that the contract was void for mistake, this would appear an inevitable conclusion if no clear evidence could be adduced that both parties were in their contract referring to either the October Peerless or the December Peerless, See also Falck v. Williams (1900) A.C. 176.

The above shows that whenever there is a clear ambiguity about the terms of the offer and acceptance, there will be no binding contract. The same conclusion was reached in Scriven Brothers v. Hindley and Co. (1913) 3 KB 564, where as we have seen, the

defendant bade for tow believing it to be hemp, thereby paying more than they should. The plaintiff sends for the price. It was held that, there was no binding contract in the absence of a coincidence of offer and acceptance.

Both parties misunderstood each other. In other words, each party is mistaken as to the other's intention, though each does not know that their respective promises have been misunderstood. Here the subject-matter is in existence, but the parties are not negotiating to the same end.. The offer he made was made to a deferent person and not to the person who purported to accept it.

English law on this matter is somewhat complicated and involves subtle distinctions, not necessarily apparent at first sight. And the application of the above four conditions have proved very troublesome for the courts. The third condition has been particularly much more difficult to satisfy where the parties are contracting in each other's presence (inter praesentes) e.g., in a shop, than where they are contracting away from each other (inter absentes), e.g., by post.

Before illustrating the application of this third condition with some cases, it is necessary to note that there is a difference between mistake as to the identity of a person and mistake as to the attributes of a person. While the former makes the contract void because the identity is material, the latter only makes the contract voidable. An example of the former is a case of X intending to contract with Y, but unknown to him, he was in fact contracting with Z. In the latter case, X intends to contract with Y who comes before him; it is only that he has been deceived that Y is creditworthy whereas Y is not. This distinction is not always easy to make in practice. In ***King's North Metal Co. Ltd. v. Edridge, Merrett and Co. Ltd (1897) 14 TLR 98***, X received a letter purporting to come from Hallam and Co. in Sheffield asking for quotations in respect of mental wire. On the letter head was a photograph of a large factory and a list of overseas depots. X replied and Y ordered for the wire. But the order came from a fraudulent man called Wallis, who sold it to Z. In fact, Hallam and Co. never existed. X now sued Z for the recovery of the proceeds of the goods on the ground that the contract with Y was void for mistaken identify. It was held that, the contract was void but voidable only, and that, therefore, a bona fide purchaser for value had acquired a good title to the goods.

Also, in Philips v. Brooks Ltd. (1919) 2 KB243, a rogue whose name was North entered the plaintiff's jewellery shop and selected pearls worths £2, 550 and a ring worth £450. He produced a cheque book and wrote out a cheque for £450. He produced a cheque book and wrote out a cheque for £3, 000. When singing it, he said 'you see whom I am, I am Sir Bullough' (of St. James Square, a wealthy man the plaintiff had heard of), and then he gave Sir Goerge Bullough's address. The plaintiff, upon consulting a directory found that he lived at the address given. He then allowed North to take away the ring in exchange for the cheque of £3, 000. The vogue's cheque bounced. North later pawned the ring for £350 with the defendant, a pawnbroker, who had no notice of the fraud. North was found guilty of obtaining the ring by false pretences. The plaintiff jeweler brought an action to recover the goods from the pawnbroker, arguing that there was never any

contract between himself and North, and therefore North had no title to the ring; consequently, he could not transfer a valid title to the defendant.

It was held, by Horridge, J., that the defendant obtained a good title to the jewellery, because the plaintiff intended to contract with the person who transacted face to face with him in his shop. According to the learned judge:

> ***The plaintiff had contracted to sell and deliver the ring to the person who came into his shop…who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough… His intention was to sell to the person present and identified by sight and hearing.***

Horridge, J., further said:

> ***I think the seller intended to contract with person present and there was no error as to the person with whom he contracted, although the plaintiff would not have made the contract if there had not been a fraudulent misrepresentation.***

Here the sale between the plaintiff and the rogue was only voidable, but as a third party, i.e., the pawnbroker, had bona fide acquired interest in the ring for value, it could not be rescinded. It follows that where the identity of the party is not material, it will only make the contract voidable, and a third party may acquire a good title under the contract if he is bona fide purchaser without notice.

In the following two cases the courts held that the contracts were void because the identities of the parties were material to the contracts. In ***Lake v. Simmons (1927) AC 487***, a jeweler was insured against loss by theft, with the exception of jewellery entrusted to a customer. One Ellison, posing as a wife of a wealthy customer – Van der Borgh – induced the plaintiff to let her have the possession of two pearl necklets so that she could show them to her husband and another fictitious person for approval with a view to purchase them. The question was whether the loss was covered by the insurance policy.

It was held that, the loss was so covered, on the ground that the plaintiff had not entrusted the necklets to Ellison as there was lacked of consent. Also, in ***Ingram v. Little (1961) 1 AB 31,*** there plaintiff who were joint owners of a car, advertised if sale for. A rogue, introducing himself as Hutchinson, offered to buy it. When he brought out his cheque book to pay for it, the first plaintiff told him that they wanted cash and that, therefore, the proposed sale was cancelled. At this juncture, the rogue said he was PGM Hutchinson, a reputable businessmen living at an address in Caterham and having business interests in Guildord. The plaintiff had never heard of P.G.M. Hutchinson, but one of them went to the local post office nearby to ascertain from a telephone directory which recorded the existence of such a person. Consequently, the plaintiffs believed the rogue was P.G.M. Hutchinson, and decided to accept his cheque which was later dishonoured. Soon afterwards, he sold the car to a third party, i.e., the defendant, who acted bona fide. The plaintiffs sued the defendant for the value of the car or its release.

The court of Appeal held that, the defendant was obliged to restore the car to the plaintiffs or to pay its value, because the contract between the plaintiffs and the rogue was void, and the rogue not having acquired any title to the car was himself incompetent to confer title to the defendant. In other words, the contract was void for mistake as to identify, and the car was still the plaintiff's property. The above case demonstrates that, in the case of acquisition of title, the principle of ***memo dat quod non habet*** will apply, and the fact that the goods have been sold to a third party will not prevent their being recovered by the original owner. Surely, this is very hard on the innocent third party.

Thus, in ***Cundy v. Lindsay (1878) 3 App. Cas. 459,*** the leading character in the drama was yet another rogue. The rogue, named Blenkarn, writing from '37 Wood Street, Cheapside' offered to buy large quantities of handkerchiefs from the plaintiffs, Lindsay and Co. He signed his name in the letter to look liked 'Blenkiron and Co' a responsible firm, known by reputation to the plaintiffs and carrying o business at 124 Wood Street. The plaintiffs depatched the goods to 'Blenkiron and Co., 37 Wood Street, and Cheapside'. In that way, Blenkiron got possession of the handkerchiefs. He did not pay for them, and he sold 2500 dozen of them to the defendants, Cundy, who purchased the goods without knowledge of the fraud. The plaintiffs subsequently brought an action against the innocent defenadants, who were the appellants in this case, for conversion.

It was held by the House of Lords that, there was no contract between the plaintiffs and Blenkiron, as the plaintiffs had no intention of dealing with him but with someone else. As there was no contract with Blenkiron, he got no title to the goods and so would pass none to the defendants, who were therefore liable for conversion.

Similar decision was reached in ***Hadman v. Booth (1863) 1 H and C. 803***, where Eldward Gandell represented himself to be Thomas Gandell and received goods which he pledge to a third party. Also, in ***K. Challaram and Sons Ltd. v. Messrs. Costain (West Africa) Ltd. (1957) 2 ERLR 10***, the defendants used to obtain goods from the plaintiffs on credit. An unidentified person obtained goods from the plaintiffs by using the defendants' order forms and by forging the signature of the defendants' accountant. The plaintiff company brought an action for goods sold and delivered, but the defendants denied liability, saying that they neither ordered the goods nor received them. It was held that, the defendants were not liable, as this was a case of mistaken identity. The plaintiffs thought that they were dealing with the defendant but, in fact they were dealing with some individual who used the defendants' headed order forms.

It is clear, from the above discussion, that mistake arising ***inter praesentes*** present some difficulty. It is suggested that the conclusion in each case will largely turn to the evaluation of the facts placed before the court. Thus, where the factual situation shows that the fraud perpetrated by the imposter only renders the contract voidable, a third party bona fide purchaser for value is protected, whereas in ***Ingram v. Little (supra)***, if the actual situation of the fraud renders the contract void, a bona fide purchaser from the impostor is not protected. ***Ingram v. Little*** may be distinguished from ***Phillips v. Brooks Ltd (supra),*** on the ground that the woman in Ingram v. Little had never heard of PGM

Hutchinson before, while the plaintiff in ***Phillips v. Brooks Ltd.,*** knew that there was a person as Sir George Bullough.

It is also evident that the mere fact that there is a 'face to face transaction' does not necessarily follow that the parties transacting ***inter praesentes*** intended to transact between themselves. In the light of the above statement, the Federal Court of Appeal decision in ***Lewis v. Averay (1972) 1 QB 198; (1971) 3 All ER 907*** is interesting for it shows that where the parties contracted face to face and the other contracting party misrepresented his identify, this has no effect to render the contract void but only voidable on the ground of fraudulent misrepresentation. The facts of the case are as follows: a rogue posing as Richard Green, a well known actor, called on the plaintiff who had advertised his car for sale and offered to buy it for the advertised price of £450. He then signed a cheque 'R.A. Green' and was allowed to take the car away after producing a false identity card, showing that he was indeed Richard Green. The cheque proved worthless and the buyer was of course not Richard Green. He sold the car to Averay, who bought it in good faith.

The Court of Appeal, following ***Phillips v. Brooks***, and disapproving of ***Ingram v. Little*** held that, despite his mistake, the plaintiff had concluded a contract with the rogue. Although the contract was voidable for fraud, it could not now be avoided since the car had come into hands of an innocent purchaser for value. Referreing to Lord Devlin's dissenting judgment in ***Ingram v. Little*** which he approved of, Lord Denning, M.R. stated as follows:

> ***When dealing is between a seller like Mr. Lewis and a person who is actually there, present before him, then the presumption of the law is that there is contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there, who is present in person. It is liable no doubt to be voided for fraud, but it is still a good contract under which title pass unless and until it is avoided. (1971) 3 All ER 907 at p. 911.***

It would thus appear that the trend is towards an almost irresistible presumption that where both parties to a contract are physically present together , when the contract is made, such a contract cannot be rendered void for mistake as to indentity. Thus, if an innocent party has to bear the loss, it should be the party whose negligence made it possible for the rogue to successfully practice his fraud in the first place, i.e., the original owner of the goods. As Lord Denning stated in Lewis v. Averay;

> ***…I very much regret that either of these good and reliable gentlemen (Lewis and Averay) should suffer, in my judgment it is Mr. Lewis who should do so. Ibid., at p.912.***

An alternative suggestion is that the loss should be apportioned between two such innocent people. It is necessary to note that the decision in the above case based largely on the provisions of the **Misrepresentation Act, 1967**. It is therefore suggested that the

case is of no relevance, and should not even have a persuasive authority, in the present state of our law.

3.3 Effects of Mistake in Equity

From the foregoing, it clear that English common law gives a somewhat narrow scope to the doctrine of mistake. However, the fact that mistake may not render a contract a nullity does not mean that there is no relief at all, for in all cases of mistake, whether common, mutual or unilateral, equity has sometimes intervened in order to reduce hardship. Equity may come to the plaintiff's rescue in the following ways:

1. **By Rectification:** This applies where the agreement has been put into writing, but fails to express the intention of the parties accurately. In other words, equity will rectify a written agreement which because of a mistake does not accurately express the parties' intention. Thus in ***Oyadiran v. Baggett (1962) LLR 96***, a case that involved a mutual mistake, a convenant which had been agreed between the lessor and the sublessee was omitted in the dead of lease.

   Ballamy, J. ordered a rectification in order to give effect to the common intention of the parties. A similar remedy was granted in Joscelyne v. Nissen (1870) 2 QB 86. There, a father had agreed that his daughter should take over his car hire business upon the condition that the daughter paid certain household expenses such as gas, electricity and coal bills. By mistake, the written agreement failed to put these responsibilities on the daughter. The court ordered a rectification to agreement.

   But before rectification can be obtained, the following conditions must be satisfied.
   i. There must have been a prior, complete and certain agreement between the parties on all the terms of the contract.
   ii. The intention of the parties must continue unchanged up to the time the agreement was reduced into writing.
   iii. The existence of such mistake must be clear. In other words, the written agreement did not express what the parties had already agreed upon.
   iv. Only literal faults can be rectified to enable the parties to achieve their common intention.

2. **By setting aside the Agreement:** A party whose contract is affected by operative mistake may be granted a rescission of the contract. Although the mistake may not be void at common law because it is not sufficiently fundamental, the Court will nevertheless set it aside if it will be unfair, or create undue hardship, or it one of the parties (the party requesting enforcement of the contract) ought to have known the other was mistaken. Thus, in ***Cooper v. Phibbs (1867) LR 2 HL 149***, the Court set aside a contract where the plaintiff bought what he already owned.

   Also in ***Sodipo v. Coker (1931) 11 NLR 138***, the plaintiff bought at an auction sale of piece of land described as 'about 50 acres', which was later discovered to be only 22acres. The contract was set aside. Again in ***Lawrence v. Lexcourt Holdings Ltd.***

(1978) 1 WLR 1128, 9(2) Stud. LR 29, the plaintiffs let business premises to the defendants for 15years on the mistaken belief, shared by both parties, that the plaintiffs had an unlimited planning permission. In fact, the plaintiff's planning permission was only two years. The plaintiffs sued for a specific performance of this agreement, to which the defendant counter-claimed for rescission of the lease on the ground of common fundamental mistake. The court dismissed the plaintiff's suit, and granted rescission to the defendants.

In ***Solle v. Butcher (1950) 1 KB 671***, both parties believed erroneously that as a result of structural alterations, the flat was to subject to rent control. The tenant claimed a declaration that the lease was under rent control, and the landlord counter-claimed for rescission of the lease on the ground of common fundamental mistake. It was held that, the lease was subject to rent control: the common mistake of the parties was one of fact and not of law; the lease, was therefore, voidable at the instance of the landlord.

Finally, in ***Grist v. Bailey (1966) 3 WLR 618***, G. bought a house from B for £850. Both parties believed that a tenant who was in occupation of the house was a statutory tenant, whereas he was not protect and could have been compelled to quite on notice. The value of the house with vacant possession was £2, 250. It was held that the parties were under a common mistake of a fundamental nature. While at common law, the contract was not void, equity would grant relief and treat the contract as voidable. The seller was therefore, entitled to rescind the contract.

3. **By Refusal to Grant Specific Performance:** The court may refuse to order specific performance of the contract. For example, X and Y enter into a contract and X later discovers he has made a mistake. If Y tries to enforces the contract by applying to the court for the decree of specific performance, the court will decide whether or not it is equitable to enforce the contract. If the mistake is insufficient to avoid the contract, X will pray the court refuse the decree. Thus, in Webster v. Cecil (1861) 30 Beav 62, the defendant by mistake offered in writing one of his plots of land to the plaintiff for £1, 250 instead of £2, 250, when he had earlier rejected an offer of £2, 200 from the plaintiff.

   The plaintiff was refused a decree of specific performance. It must, however, be noted that equitable remedies are discretionary in nature. Consequently equity may decline to come to the aid of the disadvantage party if the circumstances are such that it may occasion hardship on the contracting party or on an innocent third party.

4.0 CONCLUSION

It follows from the above discussion that the mere fact that one of the parties to a contract acted under a mistake does not, as a general rule, affect the validity of the contract. In other words, a party cannot avoid a contract merely on the ground that he made a mistake in entering into it (unless he has been induced to contract by some positive misrepresentation by the other party). Furthermore, a mistake or error of judgment on the

part of a party entering into a contract, or the party's mistake as to his power of performance of the contract, will not vitiate the contract.

5.0 SUMMARY

Where a successful plea of mistaken identity is made, there is an operative mistake and the effect is to render the contract void ab initio. Consequently, property transferred under the contract can be recovered from any person who holds it. On the other hand, it the plea is unsuccessful, the contract, in so far as mistake is concerned, is valid at common law and property passes to the transferee. But since every case of mistaken identity usually involves misrepresentation, the contract may be declared voidable on the grounds of equity. Accordingly, the contract may be set aside, if the necessary conditions for rescission or avoidance exist (e.g., if no bona fide third party right has been acquired, or restitution in integrum is still possible).

For the plaintiff to succeed in a plea of mistaken identity he must fulfill the following four conditions:

1. He must show that he intended to contract with a person, i.e., a human entity different from the person who has actually dealt with him.
2. That the person who has actually dealt with the plaintiff knew or ought reasonably to have known that he intended to deal with a different person.
3. That at the same time of the transaction, the plaintiff regarded the identity of the other contracting party as of crucial importance and as a ***condition sine qua non*** to his entering into the contracting.
4. That there was no opportunity for the plaintiff to verify the true identity of the person who dealt with him or, if there was such opportunity, that he took all reasonable steps to verify the identity.

6.0 TUTOR MARKED ASSIGNMENT

1. Mistake in contract law is an incorrect understanding by one or more parties to a contract and may be used as grounds to invalidate the agreement. Common law has identified three different types of mistake in contract.Discuss citting relevant cases.
2. Discuss the following
   a. What happens if you have made a mistake when entering into a contract?
   b. What happens if there is a mistake in the contract you have already entered?

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 MISREPRESENTATION

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1.0 INTRODUCTION

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

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

2.0 OBJECTIVES

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

- Define Misrepresentation
- Describe different classes of Misrepresentation
- Define Innocent. Fraudulent and Negligent Misrepresentation.

3.0 MAIN CONTENT

3.1 MEANING OF MISREPRESENTATION

This is a statement made by one party to the other with regard to some existing fact or to some past event which is one of the causes that induces the main of the contract, such a misrepresentation must not be a statement of a law or a promise as to the future nor a statement of intention to a statement of opinion nor mere puffing. Misrepresentation is an untrue statement of a fact which materially induced a party to enter into a contract. Generally, mere silence is not a misrepresentation.

3.2 TYPES OF MISREPRESENTATION

There are three kinds of misrepresentation.

1. Innocent misrepresentation
2. Fraudulent misrepresentation
3. Negligent misrepresentation

The result in all the cases is to make the contract voidable at the option of the innocent party.

3.2.1 Innocent Misrepresentation

An innocent misrepresentation occurs where the maker of a statement honestly believes his statement to be true through in fact it is false. At common law, unless the representation forms a term of the contract, the representee (i.e. the injured party) has no claim in damages against the representer. ***See Lamare v. Dixon (1873) LR 6 HL 414.***

In equity, the party misled by the misrepresentation can obtain an order for the rescission of the contract affected by innocent misrepresentation, but this must be made within a reasonable time, or else the plaintiff's equitable right of rescission will be lost. This right may also be lost if plaintiff affirms the contract. In application of the equitable doctrine of rescission to an innocent misrepresentation, the aim is to restore the parties to the ***status quo ante***. Hence no damages are awarded to the parties in such a case. There can be restoration of property or the payment of some indemnity to the plaintiff for any obligation which he may have performed under the contract.

As already stated, a representation which is true when made but, to the knowledge of the party making it, becomes untrue before the contract is entered into must be corrected. If it is not, the contract can be rescinded. Thus, in ***With v. O'Flanagan (Supra***) in negotiating a sale of a medical practice in January, X represented the taking to be the rate of £2, 000 a year. In May, when the contract was signed, the takings had, owning to X's illness, fallen to £5 a week. It was held that, the contract could be rescinded owing to X's failure to disclose the fall in the takings.

3.2.2 Fraudulent Misrepresentation

This is a false statement made by a party who knows it to be untrue or does not believe it to be true; or a statement made recklessly, not caring whether it is true or false. Briefly stated, it is a false statement which, when, the maker (the representor) did not honestly believe to be true. It was defined by Lord Herschell in ***Derry v. Peek (1889) 14 App. CAS. 337*** as a false statement made.

1. Knowing, or
2. Without belief in its truth, or
3. Recklessly, careless whether it be true or false.

If the representor honestly believes that what he is saying is true, the misrepresentation is not fraudulent. It follows, therefore, that the representation must be made with the intention that it should be acted upon by the party misled, and actually misleads that party if it is to form the grounds for avoiding a contract. In ***Peek v. Gurney,*** the plaintiff brought an action for false statements in a company prospectus. It was held that, because the prospectus was issued only to mislead the public into being original subscribers of shares of the company, as the plaintiff had bought shares in the market, he could not succeed in his action as it was not the intention of those responsible for the issue of the prospectus to mislead purchaser of shares in the market. Also in ***Derry v. Peek (supra),*** a tram company had statutory powers to run trams by animal power, and with the consent of the board of Trade, by steam power. A prospectus was issued inviting the public to apply for shares and stating that the company had the right to use steam power. The Board of Trade refused its consent to the use of steam power, and the company was wound up. It was held that as the directors honestly believed the statement in the prospectus they were not guilty of fraud.

For the ascertainment of fraud, the best of honest belief is purely subjective, the question is not whether the belief that the statement was true could be reasonably entertained on an objective consideration of its truth or falsity, but the test is whether the person who made the statement believed it to be true in the sense in which he understood it albeit erroneously when it was made. In ***Akerhielm v. De Mare (1959) AC 789***, the defendants induced the plaintiffs by a false statement to subscribe to a company in Kenya. The company was a failure and the plaintiff who had lost their money claimed damages for fraudulent misrepresentation. It was held that there was no fraudulent misrepresentation as the defendant honestly believed the statement to be true in the sense in which they made them.

However, absence of reasonable grounds for belief in the truth of a fact may tend to show that ij fact the belief was not held. If the representation is made knowing it to be false, the fact that it was made from an honest motive will not prevent it from being a fraud. Where, therefore X accepted without authority a bill of exchange drawn on Y, honestly believing that Y would confirm his act, he was held liable for fraud. ***Polhill v. Walter (1832) 3 B and Ald. 114.***

A Nigerian case on the question of fraudulent misrepresentation is the of Abba v. Mandilas andKalabaris Ltd. (1966) 2 LLR 241. There the plaintiff wished to sell her car

and buy a new one. She claimed that she was only interested in buying a Volkswagen Karman Chia 1500 convertible and that the defendant garage led her to believe the car she wanted was available, and they would take her own car as agreed, but the new car was not delivered. When the plaintiff went to see the defendants, they told her for the first time that the car she wanted was not in production and offered her another type. She refused and brought an action against the defendants for deceit, alleging that the defendant's representation that they would sell a particular type of car was false. She also claimed that she had been induced by this representation to sell her own car and thereby suffered damage. The defendants denied her allegations, claiming that they had understood that the plaintiff primarily wished to sell her own car and had not decided what to buy in its. It was held by Omololu, J., that on the evidence before the court, there had been no representation at all, and that an official of the defendant company had no a personal basis merely helped the plaintiff to find a buyer for her car. There was no promise to sell her another car in place of her own at all.

The learned judge stated that to enable the plaintiff to recover damages, the misrepresentation must be proved to be fraudulent. According to him, until 1843, it used to be thought that to be false or fraudulent, the misrepresentation must be dishonest. But after the case of ***Taylor v. Ashton,*** followed by the case of ***Derry v. Peek***, it is now established that mere non-belief in the truth was also indicative of fraud. He therefore disbelieved the plaintiff's story. It was difficult, in his own opinion, that a reputable firm like the defendants' would set on the defendant's trail, three or four of their senior officers to deceive her with a view merely to make her purchase a motor car worth about £1,000 at such a great risk. The learned Judge, elaborated further on the definition of fraudulent misrepresentation, declaring that mere non-belief in the truth was an indicative of fraudulent as positive dishonesty. He also adopted the following passage from ***Halsbury's Laws of England, 3rd edition, p. 845.***

…it may now be taken as established beyond all question that, whenever a man makes a false statement which he does not actually and honestly believe to be true, that statement is, for purpose of civil liability, as fraudulent as if he had stated that which he did not know to be true, or knew or believe to be false. Proof of absence of actual and dishonest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately; indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief.

Overall, the learned judge found that the plaintiff had not proved her claim, and therefore dismissed it, awarding costs of the action to the defendants.

3.2.3 Negligent Misrepresentation

A negligent misrepresentation is one made carelessly, or without reasonable grounds for believing it to be true. Misrepresentation cannot be regarded as negligent and therefore as giving rise to liability on the part of the representor, unless the representor owes a duty of care to the representee. Such a duty of care has long recognized as existing between two people in a fiduciary relationship- moving from the person in whom trust is reposed to the person who is reposing the trust.

Thus, in ***Nocton v. Ashburton (1914) AC 932,*** a mortgage sued his solicitor, alleging that by improper advice, the solicitor had induced him to release part of the security for the mortgage and that the remaining security had become insufficient. He also alleged that the solicitor was fully aware of this fact but had nevertheless given the advice because he stood to benefit from the action. It was held that although fraud in the sense defined in ***Derry v. Peek*** had not been proved against the solicitor, the mortgage was nevertheless entitled to the relief sought, for the solicitor had committed a breach of the duty imposed on him by the relationship in which he stood to the client.

However, with regard to negligent statement outside the area of fiduciary relationship, which cause economic loss as against physical damage or injury to the person acting on it, it was not until 1963, in the case of ***Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd., (1964) AC 465, (1963) 2 All ER 575,*** that a special duty of care moving from the maker of the statement to some categories of person acting on it, was given recognition. Before then, it was thought to be impracticable to grant relief t everybody who suffered damage through the carelessness of another in speech or writing. In fact, prior to 1963, the phrase 'innocent misrepresentation' was used to describe all misrepresentations which were not fraudulent. However, in 1963, it was stated by the House of Lords in ***Hedley Byrne*** case that, the duty of care, which is the foundation of the tort negligence, can extend to careless statement where a 'special relationship' exists between the parties. A misrepresentation is thus negligent where a special relationship exists between the representor and the representee made the statement carelessly ad in a breach of a duty imposed on him by that special relationship to take reasonable care that the representation is true. Any special relationship is enough; it need not be fiduciary in nature, although more often than not it is fiduciary.

The reason for the divergence between the law of negligence in words and that of negligence in action were explained by Lord Pearce in Hedley Byrne case as Follows:

Negligence in words creates problems different from negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage. (1964) AC 465,at p.534.

The test of negligence is the objective one of reasonableness. A person of unusual simplicity of mind who makes a statement which he believes to be true but which any reasonable man would not make without investigation of the fact, is liable for negligent misrepresentation.

3.3 REMEDIES FOR MISREPRESENTATION

1. Where the Misrepresentation is Not a Term of the Contract

Fraudulent Misrepresentation: Where there is misrepresentation is fraudulent, it will render the contract voidable both at law and in equity. Consequently, the aggrieved party may take one of the followings.

a. He may sue for rescission: However, since the aim of rescission is to restore the parties to the *status quo ante,* he can only do so if he is still in a position to make full restoration or restitution. In other words, he can only do so if *restitution in integrum* is still possible. In ***Sodipo v. Coker, Deputy Sheriff and Amor (1923) 11 NLR 138***, where the land advertised to sold in an auction sale was described as 'about 50 acres', but subsequently discovered to be only 22 acres, and although the purchaser was taken round the ground, the court held that, the sale must be set aside on the ground of the auctioneer's material misdescription of the land, and that the purchase money must be refunded.
b. He may repudiate the contract and plead the fraudulent misrepresentation as a defence if the representee sues him for specific performance. He may also sue for damages in tort on the ground of deceit, since fraud is a tort, and this context it is known as a deceit.

Innocent Misrepresentation: Although there is no remedy, at common law, for innocent misrepresentation, in equity, such a contract is voidable. But since the administration of common law and equity is now fused, the aggrieved party in a contract induced by innocent misrepresentation may now either:-

a. Sue for rescission, if *restitution in integrum* is still possible; or
b. Repudiate the contract and plead the misrepresentation as a defence if the representor sues him for specific performance.

Negligent Misrepresentation: The aggrieved party in a contract induced by innocent misrepresentation can only bring an action in tort for damages resulting from such misrepresentation.

2. Where the Misrepresentation Has Been Made a Team of the Contract

Since in this case is then a breach of the contract, the aggrieved party can, in addition to the remedies stated above, sue in contract for damages, whether the misrepresentation is fraudulent , innocent or negligent.

Limits to Rescission

Although, as we have seen, the right of restitution is possible, whether the misrepresentation is innocent or fraudulent, such a right may be refused or lost under the following five circumstances:

1. **If He Has Affirmed the Contract:** Where the injured representee on becoming aware of the misrepresentation affirms the contract, the rights of rescission are lost. The intention to affirm may be stated expressly or may be implied from the conduct of the party. Thus in ***Seddon v. North Eastern Salt co. (1905) 1 Ch. 326***, a shareholder's right to claim rescission for misrepresentation was held that to have been lost when after discovering the misrepresentation, he continued to carry on the business of which the shares gave him control. Also a person who induced by misrepresentation to subscribed to shares in a company, cannot rescind of after discovering the truth, he accepts dividend rates at a meeting, or tries to sell the shares.

Western Band of Scotland v. Addie (1867) LT 1 Sc. And Div. 145. The same applies to a person who, having been induced to take lease of premises by misrepresentation, nevertheless continues to pay the rent on the premises after discovering the truth. ***Kennard v. Ashmar (1864) 10 TLR 213.***

2. **Lapse of Time:** Where there has been a considerable lapse of time between the date of the conclusion of the contract and the date of the commencement of the action for rescission, the latter will not be granted. This is particularly so in cases of sale and allotment of shares in a company, where the utmost promptness is said to be essential.

3. **Where restitution is impossible:** The right of rescission is also lost where it is impossible to restore the parties to their original position. Thus, where for example, Sabukwe bought food items under certain misrepresentations and the said items have either been consumed or put to such use that it is impossible for them to be restored to their original position, the court will refuse to grant rescission of the contract. ***Oluwo and Anor v. Adewal (1964) NMLR 17.***

4. **Third Party Rights:** The right of rescission is lost if a third party has acquired rights in the subject-matter of the contract for value and without notice of the misrepresentation. In other words, the right to rescission by the representee may be refused by the court where a third patty purchaser for value acquires some interest in the subject-matter of the contract, Before it is rescinded, provided the third party had no notice of the misrepresentation. For example, a person who has been induced by fraud to sell goods cannot rescind the contract of sale after the goods have been bought by an innocent third party. Thus, in ***White v. Green (1851) 10 CB 919***, X bought iron from Y and issued Y a false bill of exchange. Meanwhile, X sold the iron to Z. Y on discovering X's fraud seized the iron from Z. it was held that Y was liable in damages for conversion because the title in the iron had already passed to Z.

   On the same principle, a person cannot rescind an allotment of shares in a company after the company has gone into liquidation. At that point, the rights of third parties intervene in that assets of the company have be collected for distribution amongst the company's creditors.

5. **Executed Contracts:** It is also settled law that, in cases of innocent misrepresentation, the representee cannot exercise the right of rescission, after the contract has been performed or executed. This popularly referred to as rule in ***Angel v. jay (1911) 1 KB 666***. There, a lessor innocently misrepresented during negotiations for a lease that the drains were in good order. The lease for a term of three years was executed and the tenant occupied the premises for six months. He then discovered the falsity of the representation and sought to rescind the lease. It was held that he could not do so, because the right to rescind the contract for the lease terminated on the execution of the lease.

   Earlier in 1905, the courts had, in the case of ***Seddon v. North Eastern salt Co. (1905) 1 Ch. 326***, adopted a similar principle as in ***Angel v. jay***, by taking the stand

an executed contract for the sale of shares would not be rescinded for innocent misrepresentation. This is known as the rule in ***Seddon's*** case. In this case, X agreed to sell the controlling shares in a company to Y. He told Y that the loses of the company up to a certain period were £250, while in fact they were £900. However, Y continued to operate for three months, at a profit, after the discovery of the representation; he finally brought an action to rescind the contract. It was held that, the contract had been executed and rescission was no longer possible. But the decision in the above case could equally have been explained on the ground that Y had affirmed the contract.

It is necessary to note that the Rule in ***Angel v. Jay or Seddon's*** case does not apply to cases of fraud, breach neither of fiduciary duty nor presumably to negligent misrepresentation. The principle of the Rule of ***Angel v. Jay*** was generally understood to be confirmed in its application to conveyance of land or disposition of interests in land. Obviously, the rule worked some hardship in situations where the injured party had no opportunity of making his own dependent examination of the subject-matter of the contract, but relied entirely o the innocent misrepresentation of the party. However, in practice, in transactions involving land or interest in land, the prospective purchaser usually conducts his private examination of the subject-matter of the contract before concluding the contract. In any case, since such examinations are exceptional with regard to other types of contract, it seems unreasonable and unjustifiable that the principle in ***Angel v. jay*** should be extended to every type of contract.

3.3 CONTRACTS UBERRIMAE FIDEI

Generally, in contracts, there is no duty placed on a contracting party to disclose material facts which he knows will influence the other contracting party in coming to a decision about the contract. In contracts for the sale of goods, the maxim is *caveat emptor*, which means 'let the buyer beware'. There is a duty on each party to inform himself of all the materials facts, which he requires before entering into a contract. What is important to note, therefore is that silence does not generally amount to misrepresentation consequently, a party to a contract need not disclose material facts within his knowledge to the other party.

However, there are exceptions to the *caveat emptor* rule, and in the case of certain contracts, the law casts upon the seller a duty to disclose material fact to the other party. In other words, there are certain situations in which the circumstances are such that only one of the parties to the contract is peculiarly possessed of some material facts, and the law imposes a duty on him to disclose these facts with the utmost good faith, i.e., *uberrima fides.* It follows that in such contracts, a higher duty is imposed than mere abstinence from innocent misrepresentation or fraud. It is said, therefore, that in such cases, *uberrima fides* is demanded and the contracts are designated contracts *uberrimae fidei* (of the utmost good faith), and failure to disclose any material fasts constitute constructive fraud, and that will be a valid ground to rescind the contract. In these contracts, the duty of disclosure is imposed, not because of any particular relation between the parties, but because of the nature of the contract.

Referring to this class of contracts in ***Davies v. London and provincial Marine Insurance Co. (1878) 8 Ch. D. 469, at p.475***, Foy, J. said:

> ***Very little said which ought not to have been said and very little not said which ought to have been said, would be sufficient to prevent the contract being valid.***

The following contracts come under *uberrimae fidei* principle, and can be rescinded unless there has been a full disclosure of material facts:

1. Contracts of insurance
2. Contracts to purchase shares in companies
3. Contracts of family arrangement
4. Contracts of sale of land
5. Contracts in which a fiduciary relationship exists between the parties.

3.4.1 Contract of insurance

Contracts of insurance provide an outstanding example of contracts *uberrimae fidei*. All insurance contracts, whether marine, fire, life, motor vehicle or burglary, are contracts *uberrimae fidei*. It is a common law rule that every contract of insurance requires full disclosure of material facts to the insurer, as are known to the assured, so that the insurer may be acquainted with the exact character of the risk which he is accepting. What this means is that the assured should not keep back any information which might influence a prudent insurer in determining whether to accept or reject the risk because the insurer undertakes to insure a person or thing only after all material facts have been disclosed. A fact is, therefore deemed to be materials if it will influence the judgment of a prudent insurer in fixing the premium or in determining whether or not to take the risk.

Generally, the insurance company gives that prospective assured a proposal form to fill and assured later signs a declaration vouching the veracity of the statements he has stated, and further agrees that they be incorporated as terms of the insurance contract. Failure to disclose a material fact renders the contract voidable at the instance of the insurer. It is upon the disclosure material facts that the insurer fixes the premium and or determines whether he will take the risk or not. The assured cannot escape liability by arguing that he did not consider, or believe that the facts were material. In a proper case, it is the duty of the court to decide whether the facts in issue are material or not.

The right if the insurer to avoid the contract for non-diclosure of material facts is not affected by the fact that the insured has no intention to conceal the facts. Thus , in ***Akpata and anor. v. African Alliance Insurance Co. Ltd. (1969) FNLR 111***, the deceased failed to disclose in the proposal form that he was previously insured. It was held that the non-diclosure was sufficient ground for the avoidance of the contract by the insurance defendant company.

3.4.2 Contract to Purchase Shares in Companies

If a company issues a prospectus inviting the public to buy shares in the company, such prospectus must contain a full disclosure of the material circumstances of the company.

Kit should be accompanied by, and is in fact usually accompanied by statements of the company's financial position, the value of their assets, the state of the company's business, the profits and the dividends declared, etc. Thus, all the material facts which can help the public in deciding whether or not to buy a share are peculiarly within the knowledge of the company's board and officials. It is therefore imperative that the company should disclose all relevant facts, if the public is not to be defrauded, particularly by promoters who set up new companies. ***Venezuela Railway v. Kisch (1867) LR 2. HL 99, at p.113***

Statutory intervention has however strengthened and added clarity and precision to this formerly rather rebulous are of the law. Under the Companies Act, 1968, the promoters of a company who invite people to take shares in the company under a prospectus are under a duty to make full disclosure in their prospectus of material facts which will influence the decision of a subscriber to purchase the shares of the company. The Act also provides civil and criminal remedies for untrue statements in the prospectus including rescission of the contract for a misstatement as well as the payment of compensation by those who authorize the issue of such prospectus.

3.4.3 Contracts of Family Arrangement

When members of a family make arrangement for the settlement of the family property, for example, as regards inheritance and succession, each member of the family must make full disclosure of every material fact within his knowledge. Thus ,in Gordon v. Gordon (1917) 3 Swanst. 400, two brothers entered into an arrangement for the division of the family property, on the mistaken assumption that the eldest son had been born before his parents were married and was illegitimate. It was discovered 19 years later that the younger son had withheld knowledge of a marriage ceremony that had taken place between his parents before the birth of the eldest son; which meant that the eldest son had been legitimated all along. It was held that the agreement could be set aside upon the discovery of the elder brother of the true state of affairs, as the younger brother should have disclosed the true facts at the time the agreement was entered into.

However in the more recent case of ***Wales v. Wadham (1977)1 WLR 199*** a wife was negotiating a financial settlement with her husband after divorce, and she failed to disclose the fact that she intended to remarry. It was held that she was under no duty to disclose this fact. The above decision seems to have created some uncertainty in the status of family arrangement as an exception to the non-disclosure rule. This may perhaps be explained by the particular circumstances of this case, in that the parties had been negotiating a compromise on the basis that neither party was required to make a full disclosure.

3.4.4 Contracts for the Sale of Land

Generally, contract for the sale of land is governed by the principle of *caveat emptor* (let the buyer beware). The vendor owes no duty to disclose latent defects to the purchaser. But in one sense, contract for the sale of land is categorized under contract ***uberrimae fidei***, to the extent that the vendor is under a duty to disclosure all defects in title. In other

words, although contracts for the sale of land are not strictly ones requiring ***uberrimae fidei*** (the vendor does not have to disclose all material facts), in certain circumstances, the vendor is obliged to disclose, for example, when the title is defective. If there is a misdescription of the vendor's interest in the land or the extent of the land being offered for sale, the purchaser can avoid the contract. Thus in the Nigerian case of ***Bamgbala v. Deputy Sheriff of Lagos and CFAO, Suit No. LD/568/85 of 11th April, 1967 (unreported)***, the plaintiff bought a piece of land in a public auction conducted by the first defendant. The property was sold in order to satisfy the money owed by one A.A. Oshodi, a judgment debtor in Suit No. LD/4/1956, in which CFAO was the second defendant. At the auction sale, representatives of the Oshodi family cried out against the sale and warned against the futility of such sale. The plaintiff was however declared the purchaser by the auctioneer on payment of £1,050 but he was unable to prevail on the Registrar of Titles in Lagos to register the certificate of purchase and the Deed of Ratification. The plaintiff brought this action claiming an order rescission and refund of the purchase price alleging that there was misrepresentation as to the quantum of the estate pt out for sale. The defendant resisted the action and submitted that the doctrine of caveat emptor should be invoked against the plaintiff. The court rejected the defendant's submission and gave judgment for the plaintiff.

3.4.5 Contract in which a Fiduciary Relationship Exists Between the Parties

Utmost good faith is imposed in equity on the parties to a contract where one person stands in a fiduciary or confidential relationship with another in the sense that the party in whom confidence is reposed is obliged to make full disclosure of all materials facts and also employ reasonable care in relation to the affairs of the other party. In other words, ***uberrimae fidei*** is also required to be shown in certain cases in which a fiduciary relationship exists between the parties.

In all cases of fiduciary relationship, the law assumes that one person is in a superior position to the other, and the trust and confidence of the other person is reposed in him. The party in the superior position is therefore in a position to take advantage of the other party in a contract between the two. The court will declare the contract voidable and therefore susceptible to rescission by the other party id the terms are regarded by the court as being unfair to him. Thus, in cases of contracts between partners, principal and agent, sureties, solicitor and client, a guardian and his ward, trustee and *cestui que trust* (beneficiary) physician and patient, and various other cases which are not possible to enumerate, the most frank disclosure must be made by the partners, the agent, the creditor, the solicitor, the guardian, the trustee, the patient or other person in a fiduciary position.

An instance of the fiduciary duty is offered by the case of ***London General Omnibus Co. v. Holloway (1912) 2 KB 72***. In that case, Holloway entered into a 'fidelity bond' to acts as surety for the proper discharge of the duties of an employee of the plaintiff company. Although the company was aware that the employee had previously been guilty of dishonesty, they did not inform Holloway of this fact. The employee was subsequently guilty of theft, and the company sued Holloway upon the bond. It was held that,

Holloway could avoid his liability, as the company should have disclosed the previous dishonesty of the employee.

It should be noted that tin all cases of fiduciary relationships, an absence of honesty is not essential. Failure to disclose a material fact, which would have been favourable to the second party is sufficient. Thus, in ***Tate v. Williamson (1886) LR 2 Ch. App. 55*** and oxford undergraduate finding himself in financial difficulties, sought the advice of his tutor. The tutor advised him to sell some land belonging to him, and offered to buy it himself. He (the tutor) failed to disclose to the student that the land contained some minerals, which would have considerably enhanced its market value, and so bought it for half the price it would otherwise have fetched. After the infant had drunk himself to death at the age of 24, his executors brought an action, to challenge the validity of the agreement. It was held that, the tutor was guilty of constructive fraud, and that the agreement was voidable at the instance of the infant's executors.

Finally, it may be added that although certain relationships in the business world, for example, principal and agent, partners, a company and its promoters, come within the class of those that involve fiduciary relationships, the fiduciary duty in these cases is not so stringent and does not go beyond the duty to disclose.

4.0 CONCLUSION

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

5.0 SUMMARY

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

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term Misrepresentation
2. What is the difference between innocent and fraudulent misrepresentation, if any.
3. Explain the term Negligent Misrepresentation.
4. What element must a Plaintiff prove to maintain an action based on fraudulent misrepresentation?

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 DURESS

CONTENT

1.0 Introduction
2.0 Objectives
3.0 Main Content
- 3.1 Meaning of Duress
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1.0 INTRODUCTION

In contractual agreement, some form of pressure, which the law regards as improper, may obtain consent of the parties. A victim of such circumstance is entitled to relief under common law of duress and equitable rules of undue influence.

In contract book, the classical rulebook understanding of duress is that it is a variety of procedural unfairness, which prevents a valid agreement from being reached due largely to the overborne will theory. Duress is the compulsion under which a person acts through fear of personal suffering from injury to the body or from confinement, actual or threatened. In the absence of a fiduciary relationship between an employee and his employer, the employee is under no duty to disclose to the employer facts which would disqualify him or render him eligible for the employment.

2.0 OBJECTIVES

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

- Define duress; identify factors that can vitiate a contract.
- Identify elements of Undue Influence
- Know the difference between duress and undue influence

3.0 MAIN CONTENT

3.1 MEANING OF DURESS

Both at law and equity, it a person enters into a contract under duress or as a result of undue influence exercised over him at the material time, it will be deemed that the person has not voluntarily consented to the transaction; consequently, the contract will be voidable at his option. The justification for this rule is that contracts falls in the realm of private law, the basis of which must be the free consent of the parties.

3.2 TYPES OF DURESS

There are two types of duress namely:

3.2.1 Duress at Common Law

Duress, which is a common law doctrine, means any actual or threatened violence imprisonment or restraint of personal liberty of a person, his wife, child, parent or relatives which induces him to enter into a contract against his will. Duress renders the contracts voidable at the instance of the party who was forced to enter into the contract. But, the violence or threats of violence must be to the person on the contracting party.

Therefore threats to one's property will not amount to duress. Thus, in ***Skeate v. Beale (1841) 11 Ad. And El. 983***, it was held that a landlord's threat to sell the goods of his tenant was not duress.

But, in ***Friedeberg-Seeley v. Klass (1957) Current Law Year Book 1482,*** the plaintiff was alone in her flat. There was a knock at the door, the defendants entered and refused to leave, they physically forced her to sign a receipt for jewel case and its contents which they took away. When they had gone, she found on the table a cheque of £90. It was held that, the receipt was obtained by duress, and the transaction was, therefore, set aside.

As already mentioned, duress makes the contract voidable at the option of the party who has suffered it when there is:

1. **Actual or threatened Physical Violence or Imprisonment:** In ***Cummng v. Ince (1847) 11 QB 112***, X was taken to a private asylum and an inquisition under a commission of lunacy was held upon her. Before the verdict was given, it was agreed X should be released and should give up certain deeds she possessed. It was held that, as the agreement to give up the deeds was made under fear of confinement in the asylum, it was not binding upon X.
2. **Threatened Criminal Proceedings:** The person threatened need not be the actual contracting party, but may be the husband or wife or near relative of the party. Thus, in ***Kaufman v. Gerson (1904) 1 KB 591***, G. misappropriated his employer's money. K the employer threatened G's wife that if she did not promise to make good the money out of her own property, he would prosecute her husband. Consequently, G's wife agreed to do so, provided that there would be no prosecution. It was held that, such an agreement could be forced against her as it had been induced by moral coercion (i.e, duress)
3. **Implied Threat of Criminal Proceedings:** In ***Mutual Finance Ltd. v. John Wetton and Sons (1937) 2 KB 389***, W's son forged the company's signature to a guarantee. In exchange for a forged guarantee, m obtained a valid guarantee from the company, because, as M knew, W's state of health was such that the prosecution of his son would be likely to endanger his life. The company was W's family company. No actual threat of prosecution was made. It was held that, the guarantee was obtained by undue influence and was voidable.
4. **Wrongly Detention or Threatened Seizure of Property:** In ***Maskell v. Horner (1915) 3 KB 106***, H owned a market and claimed tolls from M, a produce dealer. M refused to pay, and H seized his goods, where upon M paid and continued to pay yearly under protest. H's right to tolls was subsequently declared illegal. Held, M could recover the payments made.

3.2.2 Economic Duress

The widening scope of duress at common law can be illustrated by the recognition being given the concept of economic duress. Thus in ***North Ocean Shipping Co. Ltdx v. Hyundai Construction Co. Ltd. (1979) QB 709; (1978) 3 All ER 1170,*** the defendant ship builders forced the plaintiffs for whom they were building a ship to pay an extra 10 percent, over and above the agreed cost of the threatening to abandon the construction of the ship midway, knowing that the plaintiffs had already concluded a lucrative contract to

lease the ship to a third party on completion of the construction. It was held, by Mocatta J., that the action of the defendant constituted economics duress.

3.3 UNDUE INFLUENCE

This arises when a party obtains benefit from the other, whether under a contract or by means of a gift, by exerting an influence over the latter which prevents him from exercising an independent judgment. Undue influence is a doctrine of duress as too narrow. Accordingly, the doctrine was developed to cope with situations of constructive fraud in which contracts or dispositions of property were made without free or genuine consent. The allegation of undue influence ids therefore based on the fact that the complainant entered into the contract (or made a gift of property) without free consent, in that the other party exerted an influence over him, which prevented him from exercising an independent judgment in the matter. And, for influence to be regarded as undue within the meaning of the rule of law which will be sufficient to vitiate a will, it must be an influence exercised by coercion or fraud. ***Boyse v. Rossborough 10 ER 1211.***

The presumption of undue influence may arises in teo cases:-

1. Where there exists a special fiduciary relationship between the contracting parties, and
2. Where no special fiduciary relationship exists between the parties.

Where there exists a special fiduciary between the parties, for example, relationship of solicitor and client, doctor and patient, spiritual adviser and disciple, trustee and beneficiary, parent and child, guardian (i.e. person in loco parentis) and ward, the existence of undue influence in relation to the contract or exchange of gifts between such parties is presume, and need not be proved as a fact, but place the burden of proof on the party in whom confidence was reposed to established that the transaction was not procured by undue influence. It is evident from that the transaction was not procedure by undue influence. It is evident from the list of special fiduciary relationships enumerated above that the relationship arises in any situation where one person occupies a position of dominance over the other. In such a case, equity imposes on the dominant person a duty to be faithful to the confidence that is reposed in him by the other.

Where a presumption of undue influence exists, the presumption can be rebutted if the dominant person can show that in fact he exerted no influence for the purpose of obtaining the contract or gift; in other words, that the contract was the result of the free exercise of the independent will of the plaintiff. The privy Council held in ***Johnson v. Williams (1935) 2 WACA 248 at p.255, that:***

The most obvious way is by establishing that gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the done and with the full appreciation of what he was doing.

It follows from the above statement of the Privy Council that the presumption of undue influence is rebuttable by the party in whom confidence was reposed, by showing that there was no abuse of the special fiduciary relationship, and that the transaction was fair. The fairness of the transaction is often established by showing that the 'weaker' independent advice is not enough. It must also be shown that the advice was taken, or that the advice must be given with a knowledge on the part of the adviser of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interest of the donor, ***Johnson v. Williams (1935) 2 WACA 248, at p.256.*** In ***Taylor v. Brew (1942) 8 WACA 201***, the settlor, Mrs. Taylor, inherited a considerable fortune on attaining 21 under the will of her maternal grandmother. Her father, who was also her solicitor and for whom she had an intense dislike persuaded to make a settlement of her property by a trust deed. A clause was inserted without the instruction or knowledge of the settler. This clause vested the whole property in the father, should the daughter die intestate. It was held that the trust deed was null and void on the ground of undue influence exercised by the father over his deceased daughter

The above case is similar to the English case of ***Lancashire Loans Ltd. v. Black (1934) 1 KB 3880***. There a daughter married at the age of 18 and thereupon left her parental home and lived with her husband. Her mother was very extravagant and frequently borrowed money from money lenders. When the daughter came of age she, at her mother's request, raised £2, 000 on her reversionary interest under her father's will in order to pay off her mother's debts to moneylenders. The mother continued to borrow money from moneylenders, and a year later she asked the daughter to sign a document so that she (the mother) might be able to borrow some more money. The mother and the daughter signed a joint and several promissory note for £775 at 85 per cent interest. The daughter, who did not understand the transaction, signed document at the request of her mother. The only advice the daughter received was that of a solicitor who also prepared the documents.

In an action by the moneylenders on the promissory note against both the mother and daughter, it was held that, the daughter was under the influence of her mother when she entered into the transaction in question, and also that she had no independent advice, and that as the moneylenders had notice of the facts which constituted undue influence on the part of the mother, they were in no better position than the mother. The transaction was, therefore, set aside, so far as the daughter was concerned. According to the Court:

There is no rule of law that the marriage of a daughter, coupled with her departure from the parental home, necessarily puts an end to the domination f her parents. Whether or not the parental dominion has completely ceased is a question of fact depending on the particular circumstances of each case.

However, as was established in the Privy Council case of ***Inche Noriah v. Shaik Allie Bin Omar, (supra)***, independent advice is not the only way in which the presumption can be rebutted. In other words, it does not necessarily follow that there must be an independent advice in all cases in order to rebut the allegation of undue influence. The defendant is entitled to show by other means that the contract was made I the existence of

the free will of the other party. Moreover, where the independent advice has been given, the failure of the plaintiff to take it, does not affect the validity of the agreement. The important fact is that the advice was indeed given. Again, even where there is an independent advice, this will not be effective unless given the legal adviser had full knowledge of all the relevant circumstances. In ***Inche Noriah case Supra***, a Malay woman of great age and wholly illiterate made a deed of gift of valuable property in Singapore to her nephew, who managed her affairs. She was advised by her lawyer, who did not know that the gift constituted practically the whole of her property and did not tell her that she could equally benefit her nephew by will. It was held that the gift could be set aside on the ground of undue influence.

There is no presumption of undue influence between an engaged couples ***Zanet v. Hyman (1961) 1 WLR 1442***, or between husband and wife, ***Ilowes v. Bishop (1909) 2 KB 390***. Undue influence may, however be proved to exist in fact in this as in other cases, and when it is proved, the contract is voidable.

Even where there is no special fiduciary relationship between the parties, yet the court may hold that the circumstances were such that one of the parties to the contract exerted undue influence over the other party to the contract. The term, undue influence, is regarded as any conduct on the part of one of the parties which affects the contract between them and makes it unconscionable to allow the parties to be bound by the contract concluded under such circumstances. Therefore, once it is found that there are some elements of domination by one over the other, in the agreement, the court will set aside the agreement, but only if it can be shown that the will of the other party was so overborne as to prevent is exercise of an independent judgment. Even then, it is not sufficient to establish that a person has a power to overbear the will of the other; it must be proved as a fact that in the particular case that power was exercised. In other words, in the absence of any special fiduciary relationship between the parties, the burden lies on the party alleging undue influence to prove same as the contract presumed to be avoid. For example, there is undue influence by X over Y if X presses Y to pay or promise him some money by a threat of criminal prosecution against Y or against Y's spouse or close relative, ***Williams v. Bayley (1866) LR 1 HL 20***, or by a threat of destruction of Y's property, or leakage of Y's secret. The onus of proving pressure lies on the complainant.

4.0 CONCLUSION

Like duress, the effect of undue influence is to make the contract voidable; therefore, the contract will be valid until avoided, i.e., set aside at the suit of the aggrieved person. *Taylor v. Brew (1942) 8 WACA 220*, However, the action will fail under the following circumstances:

a. If it can be shown that the victim of undue influence affirmed the transaction after the undue influence had ceased.
b. If the transaction occurred after the relationship giving rise to the presumption of undue influence had ceased.

c. It ht injured party fails to bring an action in court within a reasonable time. In such a case, the claim for relief will be barred by lashes, as delay defeats equity. Thus in ***Allcard v. Skinner (1887) 36 Ch. D 145***, the plaintiff was introduced by her spiritual adviser to a Mother Superior of a Protestant institution. On becoming a sister, she surrendered all her property to the Mother Superior. She however, remained a sister for eight years and afterwards gave up. Six years after she had left the sisterhood, she brought an action to set aside the gift.

   It was held that although she had been subjected to undue influence, her claim was nevertheless rejected on the ground of undue delay in bringing the action. In the interval between leaving the sisterhood and the bringing of her action, the undue influence had been removed. Her acquiescence amounted to a confirmation of the gift.

d. If third parties have in good faith acquired rights from the transaction.

5.0 SUMMARY

We have discussed the concept of duress and the types. These are two types namely:

a. Discuss at common law
b. Economic duress

Note duress makes the contract voidable at the option of the party who has suffered it where certain condition has been met.

6.0 TUTOR-MARKED ASSIGNMENT

Define the common law concept of “Duress” and give two examples of cases in which the courts have recognized ‘economic Duress’

Discuss the effects of duress and undue influence in a contract between parties to a contract.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 ILLEGALITY AND UNFORCEABLE CONTRACT

CONTENT

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1.0 INTRODUCTION

The term illegality is used in a wide, vague and imprecise manner in relation to contracts. It embraces simply illegal, and void contracts, contracts rendered illegal by statute and those contracts which are rendered illegal and void under the common law. With this imprecise manner of using illegality, it is difficult to give an accurate classification. English writers divided contracts which are affected by illegality. The general rule is that there is a presumption that every contract is valid and the law will normally support rather than invalidate a contract. This presupposes, however that the contract, in the first place has a legal purpose. This is expressed in the legal maxim: ex turpi causa nonoritur action which means: "no right of action can spring from something which is wrongful (i.e. illegal)". To this general rule, there are exceptions. This is the topic we shall learn in the first part of this unit.

It is rather a difficult subject, difficult because

i. There is no single form of illegality

ii. It is external to the contract itself

iii. It covers a wide range of different areas

iv. It defiles categorization

v. Its effects are different

vi. The situation in which it arise also vary profoundly

vii. Contracts contrary to public policy are illegal, but "public policy"

is ill-defined and is always changing in nature. But the topic is important as it affects not only contracts to commit crimes or promote immorality but also contracts which are performed illegally or which are not formed in accordance with the procedure prescribed by statute.

We will turn our attention once more to the principle of 'freedom of contract' to which we have referred on several occasions. Contrary to this underlying foundation of the law of contract, there are occasions where the courts will refuse to enforce certain contracts and no assistance whatsoever will be given to parties who attempt to rely on them. This occurs in two broad areas: where a contract is completely illegal (either at Common Law or by an Ordinance or Subsidiary Legislation); or where the

courts declare a contract void as being against public policy. These underlying elements of what constitutes a legally ending contract are covered in the next section of this unit.

2.0 OBJECTIVES

At the end of this unit you be able to define;

- The Meaning of Illegality
- Classification of Illegality
- The consequences of Illegality
- Distinguish between
  a. Contracts which are illegal in formation
  b. Contracts which are illegal in performance
- Understand the consequences of a finding that a contract is illegal
- Understand the impact of public policy on illegality and vice versa.

3.0 MAIN CONTENT

3.1 MEANING OF ILLEGALITY

We stated earlier that if contract are freely and voluntarily entered into by the parties they will be enforced by the courts. But this statement is not completely true, for the courts will not enforce an illegal contract, even though all the elements required for the formation of a valid contract are present. The main reason for this is that it is not the policy of the law to aid citizens in carrying out unlawful agreements.

In the law of contract, the term 'illegal' is a very wide, vague and imprecise one. Thus, it embraces illegal contracts strictly so called, and void contracts. It also includes contracts rendered illegal or void by statute and those rendered illegal or void by common law. Because of this lack of charity in the definition of illegal contracts, it has become virtually impossible to carry out a logical and satisfactory classification of the subject.

3.2 CLASSIFICATION OF ILLEGALITY

However, for our purpose, contracts will be classified into:

A. Contracts rendered illegal at Common Law
B. Contract rendered illegal by Statutes
C. Contract rendered illegal void at Common Law
D. Contract rendered illegal void by Statutes

3.2.1 Contract Rendered Illegal at Common Law

The following contracts traditionally regarded as contracts coming within the group of contracts rendered illegal at common law, on the ground of public policy.

1. A contract to commit a crime, a tort or a fraud

2. A contract affecting the freedom of marriage.
3. A contract injurious to a friendly State or detrimental to the State.
4. A contract prejudicial to the administration justice
5. A contract that tends to promote corruption in public life
6. A contract to defraud the revenue.

It is necessary to note these contracts will necessity contain over-laps. For example, a contract to defraud the revenue or to promote corruption in public life, or a contract prejudicial to the safety of the State, will also be a contract to commit a crime. We shall, there discuss the cases under headings with which they have a preponderance of factors. Also, a contract that is sexually immoral has been transferred from this section, in which it is traditionally found to the section on void contracts, because such contracts are strictly not illegal, but merely void.

1. **A contract to Commit a Crime, A tort or A Fraud:** A contract between two or more persons to murder or assault another person, or to rape a woman, or to commit any other crime is illegal. The breach of such agreement cannot be the subject matter of an action in a court of law. For example, X agrees to pay N500.00 if Y assaults Z, who is X's political rival. If Y accomplishes his own part of the agreement, there is no doubt that the N500.00 is irrecoverable, for the court cannot lend its support to reap the benefit of a criminal act, ***Dann v. Curzon (1911) 104 LT 66.*** Again, an agreement to take shares in a company in order, fraudulently, to induce the public to believe that there is a market for the shares is an indictable conspiracy and is illegal, ***Scott v. Brown (1892) 2 QB 724***. Similarly, an agreement by the proprietors of a newspaper to indemnify the printers against claims arising out of labels published in the newspaper is void. ***W.H. Smith and Sons v. Clinton (1908) 25 TLR 34; (1908) 99 LT 840.***

   Equally illegal is an agreement involving the publication of a libel ***Clay v. Yates (1856) 1 H and N 73*** a debtor made a composition with his creditors to pay 6s.8d for every pound owed. He then entered into a separate agreement with the plaintiff, one of the creditors, to pay him a part of his debt in full. This agreement was declared void as a fraud on all the other creditors.

2. **Contract Affecting the Freedom of Marriage:** Contract within this category are normally treated as merely void, not illegal. However, we are classifying such contracts here under illegal contract because, such contract if actually performed, would result in the commission of a crime. For example, where a person who is already married, makes a promise to marry another woman on the death of his wife, it is against public policy if the woman knew that the man was married at all material times, ***Spires v. Hunt (1908) 1 KB 720.*** Public policy frowned upon such a contract as it would not only encourage infidelity by the man but it may even tempt the parties to the untimely death of the wife. Where however, a married man promises to marry a woman who did not know that he was married, the promise will be actionable,

Shaw v. Shawn (1952) 2 QB 429. Also, an agreement to make provisions for a wife so long as she lives apart will be void as it encourages separation and immorality.

Contract which restrains the freedom of marriage is *prima facie* void. This is aimed at maintaining the sanctity of marriage. Thus, a contract whereby a person promises to marry no other person than a particular man or woman, as the case may be, is void, Lowe v. Peers (1768) 4 Burr. 2225. And for the same reason, marriage brokerage contracts under which a person in consideration of a promised sum of money, procures a marriage between two others is illegal and void.

If an already married man concludes a statutory marriage with another woman he will be guilty of bigamy under **Section 370** of the **Nigerian Criminal Code**, and liable on conviction to a maximum of seven years imprisonment. Where a man already married under customary law, concludes a statutory marriage with another woman, or if already married under the Statute marries another woman under customary law, he will be guilty of an offence under the **Marriage Act**, and is punishable on conviction by imprisonment for five years.

Finally, it may be noted that in certain circumstances, it is permissible to restrain a person freedom to marry. Thus, contracts restraining marriage with a particular person or otherwise only partially restraining marriage are valid. For example, if Christopher insists that his maid servant should remain single while she is in his service, it is perfectly valid as opposed to an agreement between the parties whereby a woman promises not to marry for the rest of her life, which is a contract clearly in restraint of marriage and therefore void.

3. **A Contract injurious to a friendly State or Detrimental of the State:** In the interest of good relationship between States, an agreement which contemplates hostile action against a friendly State, or which involves doing an act which illegal under the law of a friendly State, is illegal. Therefore, any contract which is hostile or injurious to another country that is friendly with Nigeria is unlawful and unenforceable. Hostile activities may include things done to cause a breach of the laws of a foreign and friendly country or actions done to bring about anarchy in a friendly state. An obvious example is an agreement to obtain arms and other materials in Nigeria for the overthrow of a friendly Government. Even a loan meant to be used in supporting an armed attack on such a country is illegal, ***De Wutz v. Hendricks (1842) 2 Bing. 314.***

   In ***Regazzoni v. KC Sethia (1944) Ltd. (1958) AC 301 at p. 322***, a contract was concluded for the export of Indian jute to Italy with a view to re-exporting it to South Africa. Indian law prohibited any trade between Indian and South Africa, including exports from India to South Africa. The House of Lords refused to order the enforcement of the contract, because it was contrary to the laws of a friendly country, India, prohibiting the export of Indian goods to South Africa.

   Also, in ***foster v. Driscoll (1929) 1 KB 470,*** a partnership was formed in England for the purpose of smuggling whisky into the United State in contravention of the

American prohibition legislation. In proceedings between the partners in the English courts, it was held that the partnership agreement was illegal in English law; consequently, the Court refused to enforce the contract, for it was in violation of the laws of a friendly State.

Furthermore, any contract which tends to damage the stability of the State is illegal. For example, a contract between citizens of this country and nationals of another State at a time this country is at a war with the foreign country is illegal. At common law, and also by virtue of the Trading with the Enemy Act, 1939, all contracts made with a person voluntarily residing in enemy territory in time of war are illegal unless made with the licence of the Crown. In the words of Russell, J., in ***Re Badische Co. Ltd. (1921) 2 Ch. 331, at p.373***

> ***Contract made directly with enemies as contracting parties are declared illegal on the ground of public policy based upon one of two reasons, either that the further performance of the contract would involve intercourse with the enemy or that the continued existence of the contract would confer upon the enemy an immediate or future benefit.***

4. **Contracts prejudicial to the Administration of Justice:** We shall treat such contracts under two headings:
   a. *Contracts Relating to Criminal Prosecution and Bankruptcy:* An agreement to stifle a persecution for a criminal offence is void, because the public has an interest in the proper administration of justice. However, where the offence for which the defendant is persecuted is essentially civil in nature, even though it could also be criminal, an agreement to settle it out of court would be valid and enforceable. In other words, if the offence was one of which the injured party could sue and recover damages as well as one which could be the subject of criminal proceedings, an agreement for compromise will be valid. Offences which com within this category include libel and assault.

      In ***McGregor v. McGregor (1888) 21 QBD 242,*** a separation agreement between husband and his wife who had earlier brought cross-summons against each other for assault was held valid in spite of the fact part of the terms of the agreement required that the parties should withdraw the suits for assault. An agreement between a prisoner and a person who has stood bail for him to indemnify him against the bail is void, as tending to defeat the object for which bail was granted. ***RV Porter (1910) 1 KB 369.***

      A contract tending to defeat the bankruptcy law is void. Thus, in ***John v. Mendoza (1939) 1 KB 141,*** M owed J £852 and promised that if J would tell M's trustee in bankruptcy that the money was a present, M would notwithstanding, still be J's debtor. It was held that, the agreement was void.

   b. *Contract of Maintenance and Champerty:* It is illegal for a person to contract with another whereby encouragement is given to another to litigate by offering

financial aid towards its execution. One commits the tort of 'maintenance' when he improperly encourages another to litigate.
Maintenance has been defined as:

> ***Improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.***

In other words, maintenance is a tort whereby a person who having no legal interest in civil proceedings or the subject matter (and with no lawful justification) assists one of the parties with money or otherwise to institute, prosecute or defend an action. The tort is actionable at the suit of the other party.

Champerty (The word champerty' is derives from the latin words Campi partition i.e, division of the spoils of litigation.) is that special category of maintenance whereby the assistance is given for share in the proceeds. It is a contract or arrangement whereby a person obtains a promise of a share in the proceeds of an action, in return for giving evidence in court or providing financial assistance to the person who conduct the litigations. Contracts having maintenance or champerty as their object tend to pervert the course of justice and are illegal.

However, it is not maintenance when the person giving assistance is near relation, or acts from motives of charity, or has a common interest with the person assisted. In modern law, the term 'common interest' is interpreted widely, and it has been held in ***Martell v. Consett Iron Co. Ltd (1955) Ch. 363***, that a person who has 'a legitimate and genuine business interest in the result of an action', must be taken to have such interest.

'Trafficking in litigation', i.e., the assignment of a bare cause of action, is champerty unless the assignee has a genuine and substantial interest in the litigation. Tredax Trading Corporation v. Credit Suisse (1982) AC 679. It must be noted that giving financial assistance to another to enable him to litigation on a matter in which he has a good cause of action is not maintenance, excepts where some impropriety is established against the donor.

The person against whom the maintained action is brought may, if he sustains special damage, sue the maintainer. The fact that the maintained action was successful is no her to his recovering damages. Neville v. London Express Ltd. (1919) AC 368.

Witness's Contract Not To Give Evidence: A contract by which a witness binds himself not to give evidence before the court on a matter on which the judge says he should give evidence, is contrary to public policy and is not enforced by the court. ***Harmony Shipping Co. S.A. v. Saudi Europe Line Ltd (o1979) 1 WLR 1380, 1386.***

5. **A Contract that Tends to Promote Corruption in public Life:** It has been stated by Anson in his book, *Principle of the English Law of Contract at p.317* that:

> ***The public has an interest in the proper performance of their duty public servants and is entitled to be served by the fittest persons procurable.***

Thus, any contract whereby a person is to be appointed into a public office for a private consideration or gratification received by those in a position to make or influence such an appointment is contrary to public policy and void. Thus, in ***Montifiore v. Menday Motor Co. Ltd.(1918) 2 KB 241***, it was held that a contract whereby a member of a government board was to use his office in order to obtain funds for financing a private company could not be enforced as it was contrary to public policy. According to Sharman J.:

> ***In any judgment, it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government.***

A contract to procure a title of honour for reward is also void. Thus, in ***Parkinson v. College of Ambulance Ltd. (1925) 2 KB 1***, the Secretary of the College of Ambulance promised Col. Parkinson that if he made a large donation of the College, which was a charitable institution, he would receive a Knighthood. The Colonel made a large donation (£3, 000) and promised more when he received the Knighthood. When this did not materialize i.e., not receiving the Knighthood, he sued for the return of his money. It was held that, the action was 'manifestly illegal' and failed, because the contract was against public policy and illegal.

It follows from what has been said so far that any contract, by which any person, as a result of some illicit consideration, is to obtain an undue advantage over others in a transaction of non-private nature, is illegal and therefore void. For example, the notorious ten percent arrangement under which contractors executing buildings and other projects has to pay ten per cent or more of the value of the contract to various public officers is an obvious case of bribery and corruption, which is manifestly illegal and void. In fact, contracts involving such corrupt practices have been consistently declared illegal and void by the Nigerian courts. Thus, in ***Golden Okoronkwo v. P.O. Nwoga (1972) 2 ECSLR 615***, a contractor bribed a public officer with a car and £7,500 on the understanding that the public officer would influence his being awarded a particularly lucrative government contract. When he failed to get the contract, the plaintiff/contractor reported the matter to the police, and additionally filed an action for the recovery of the £7,500 and the car from the defendant. Counsel for the defense moved the court to dismiss the plaintiff's action on the ground that the cause of action disclosed in the statement of claim was illegal and unenforceable. It was held, by Okagbue, J., that, this being an agreement under which the plaintiff gave a bribe to the defendant for the purpose of defeating fellow contractors, it was a criminal act, illegal and contrary to public policy. The claim was there dismissed.

Also, in ***Temple Koko v. Page Communications Eng. Inc. and Edwards G. French Suit No. LD/936/73, delivered in July 1975***, by Dosunmu, J., in the High Court of Lagos State (Unreported), the plaintiff alleged that he had used influence to obtain a contract from the defendants under which they were to supply broadcasting and television equipment to the Rivers State Government. The plaintiff also alleged that under the agreement, his company was to receive ten per cent of the value of the contract from the defendants. It was held that, the contract on which the plaintiff was making his claim was tainted with illegality in that it was to influence public officials from the honest performance of their duties. The contract was contrary to public policy and was therefore void.

6. **A contract to defraud the revenue:** Any contract deliberately entered into by parties with the intention of depriving the State of revenue it is lawfully entitled to, is contrary to public policy and therefore illegal and void. Thus, in ***Napier v. National Business Ltd. (1951) 2 All ER 264***, N was employed as Secretary and accountant at a salary of £13 a week with £6 a week as expenses. Both parties knew that his expense was less than £1 a week. It was held that, the contract was to evade tax and illegal. And since it was impossible to sever the part dealing with salary from the dealing with expenses, the whole was unenforceable.

   Also in ***Alexander v. Rayson (1936) 1 KB 169***, the plaintiff let a flat to the defendant for £1,200 per annum. In a bid to defraud the revenue and pay a much smaller amount of tax than he would normally be obliged to pay, the plaintiff prepared two documents for the purpose of the rent agreement. The first one disclosed that the rent for the flat and certain services, was only £450. The second one disclosed a fee of £750 for the same services, plus the use of a refrigerator. The plaintiff intended to tender only the first document to the rating authorities and thus pay tax on only £450, instead of on £1,200. When the defendant failed to pay an installment due under the agreement, the plaintiff sued him to recover the unpaid sum. It was held that the contract was illegal, since the documents were intended to be used for the purpose of defrauding the revenue. The claim was therefore dismissed.

   Also, in ***Miller v. Karlinski (1945) 62 TLR 85***, under the terms of a contract of employment, it was agreed that the employee's salary should include not only the repayment of actual expenses, but also an amount under the same head of expenses, equivalent to the amount of income tax due in respect of his salary. This meant that for that extra amount, no income tax would be computed and the State would thus lose an amount it would normally be entitled to, as income tax. In an action brought by employee to recover 10 weeks arrears of salary, and expenses, the tax evasion device was revealed. It was held that the contract was illegal for being a fraud on the revenue. Therefore, no action lay to recover even the areas of salary, since the contract for the payment of salary was part and parcel of the illegal mode of remuneration of the employee under the contract of employment.

3.2.2 Contracts Rendered Illegal by Statue

There are some contracts which are prohibited under the express or implied provisions of statutes and declared to be lawful or void in the sense that they are illegal. Statutes rendering contracts illegal can take various forms. These include:

1. The express prohibition of certain types of contracts
2. The regulation of a particular trade, profession, or the dealing in a particular commodity or resource.
3. The protection of a class of persons, the public or the promotion of an object of public policy.
4. The raising of revenue.

1. **Express Prohibition of Certain Types of Contracts:** Where statute expressly prohibits or bans the making of certain types of contracts, any such contract subsequently made it illegal and void. For example, a contract to import goods like champagne, lace materials, or ready-made clothes into Nigeria would be illegal in view of the various statutes prohibiting the importation of these items. Thus, in ***Chief A.N Onyiuke III v. G.F. Okeke Suite No. S.C 430/74 delivered on May 5, 1976 unreported)***, the plaintiff brought a claim of £1,650 being the value of 110tins of palm oil sold and delivered to the defendant in the Republic of Biafra sometime in 1969. It was admitted by both parties that the transaction was in Biafra currency. The defendant argued that the contract was illegal because of the currency in which it was expressed. The Supreme Court held that the contract was illegal, for it had contravened the provisions of Act No. 48 of 1968, which made it an offence to possess or deal in Baifran currency.

   Also, in ***Nwasike v. Onwuameze Suit No. LD/612/70 delivered on November 26, 1970 (unreported)*** the plaintiff brought a claim of £1,100 against the defendant, being the purchase price of car he had sold to then defendant in Biafran in 1969. The price of the car was £1,250 and the defendant has paid £250. This was a claim for balance of £1,000. The defendant admitted these facts, but alleged that the transaction was entered into within the Biafra during the civil war and that the car was to have been paid for in Biafran currency. He then pleaded that since the Biafran currency had ceased to be legal tender, the contract was frustrated and both parties were discharged from further performance. It was held by Adefarasin, J. that the transaction between the parties was an illegal contract which could therefore not be enforced, because it was based on an illegal currency.

   Finally, in ***Alhaji Rabiu Busari v. Olabisi Willaims (1973) 3 ECSLR 518***, the defendant who was the recipient of a hackney carriage (taxi) license issued by the Lagos City Council, hired it to the plaintiff for the operation of the plaintiff's taxi for £600. This was in breach of a the City Council's by-law which prohibited the transfer of carriage licences. When, as a result of a dispute between the parties, the defendant seized the licence from the plaintiff, the later brought an action to recover his £600. It was held that the court would not lend itself in any way to assist a person who has taken part in an illegal transaction; there the action failed.

2. **The Regulation of a Particular Trade, or Profession, or the Dealings in a particular community or resource:** There are many types of transaction that come under this head. They include enactments regulating the practice of professions like law, medicine, pharmacy, auctioneers, companies, etc. It also covers laws and regulations concerning dealings in land. Hus, by section 21 of the **Land Use Act, 1978, Act No. 6 of 1978**, it is unlawful for any customary right of occupancy of land to be alienated by assignment, mortgage, transfer of possession or sublease or otherwise, without the consent of the Governor of the State or in some cases, without the consent of the relevant Local Government Council. This same rule also applies to a holder of a statutory right of occupancy, although in this case the consent is limited to the Governor.

3. **Protection of a Class, or the Public, or the Promotion of an Object of Public Policy:** Where a Statute is enacted specifically for the protection of a class of citizens or the public generally, any contract that is entered into in breach of such a statute would be illegal and void. For example, under the **Illiterates Protection Act Cap. 83, Laws of the Federation of Nigeria, 1958**, any person who writes or prepares a document at the request of , on behalf of, or in the name of an illiterate person, must read it over and explain the consents to the illiterates person before the latter signs it or makes his mark on it. Also, the writer of the document must write his name and address on the document. Section 4 of the Act provides a fine of £50 or six month imprisonment for a failure to comply with the above stipulations. Thus, in Osefo v. Uwania (1971) 1 ALR 421, the defendant who owed the plaintiff a small sum of money, bluntly refused to pay, relying on the **Illiterate Protection Act**. He claimed that he was an illiterate person and that, since the receipt recording the loan transaction did not bear the name and address of the writer (the plaintiff), the defendant was not bound by the contents of the receipt.

   The court stated that the object of the Act was to protect an illiterate person from possible fraud, and dismissed the action for the plaintiff's non-compliance with the statute. Another statute which has been interpreted and applied in the same manner is the **Moneylenders Act of the Federation of Nigeria Cap. 124, 1958**, and its counterparts in the State. The Act makes provision for a series of conditions which a moneylender must satisfy before he can enforce the repayment of a debt or retain property deposited with him as security. These include a memorandum of contract in wring signed by the parties before the money is lent. The memorandum must contain.
   a. The date of the loan was made;
   b. The amount of the principal of the loan;
   c. The rate of interest per annum, payable of the loan.

   The moneylender must issue a receipt for every payment made to him at the time the payment is made. He must also keep a book in which he shall enter in connection with every loan made by him all the information requires for the above memorandum. The book is also to show all sums received in respect of the loan or the interest thereof with the dates of payment in each case. The maximum rate of interest chargeable is also provided.

Any moneylender who fails to comply with any of the requirements listed above not only loses his right to enforce any claim in respect of the transaction, but is guilty of an offences and liable to a fine of £10 in the first instance and £5 for each day the offence continues. Thus, in the famous case of ***Kasumu v. Baba-Egbe (1956) AC 539***, Baba-Egbe mortgaged a leasehold land to a licensed moneylender as security for a loan. The moneylender kept no books recording the transaction as a required by Section 19 of the Moneylenders Act. The transaction was, therefore held to be unenforceable. Baba-Egbe now instituted an action claiming the redemption of the property and recovery of possession. The question was whether he could be made to repay to the appellant so much of the money lent as still owned with interest.

The West African Court of Appeal and, on appeal, the Judicial Committee of the Privy Council held that the appellant was not entitled to recover, because the mortgage transaction, not having been recorded in a book as required by section 19 of the Act, was unenforceable. The Privy Council therefore ordered the cancellation of the mortgage and the delivery of the cancelled deeds and titled deeds to the administrators of the borrower's estate. According to the Court:

> ***When the governing statute enacts that no loan which fails to satisfy of these requirement is to be enforceable, it must be taken to mean what it says, that no court law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the law imposes. There is no room to reform the terms of the law since the statute is not concerned with the vice of the contents but with the vice of the conditions under which it was made. The provisions of section 19 are not purposeless; they seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognized at law.***

It the lender fails to comply with the requirements of the statute, he cannot escape the consequences of illegality by bringing an action to recover the bare capital without interest and by claiming that the transaction was not a loan under the Moneylender Act, but a friendly loan, As stated by Onyeama, Ag. C.J. (as he then was) in ***Nnadi v Akanni (1962) 2 All NLR 171 at p.174.***

> ***In my judgment a moneylender does not escape the net of the Moneylenders Ordinance by calling a loan a friendly loan or by saying it was made without interest… The plaintiff in this case admitted carrying on the business of money lending and has lent money to the defendant on previous occasions. There is nothing in the Moneylenders ordinance excepting from the operation of the Ordinance loans made by moneylenders to their friends or free of interest.***

In ***Akinolu v. Ogbesedanunsi Suit No. AK/21/66 delivered of March 21, 1974*** by Coker, J. High Court of Western State (Ondo), the plaintiff claimed N2,400 from the defendant as money had and received for the plaintiff's sue. He had paid the money to the defendant as loan under the Western Nigeria Moneylenders' Law, at a rate of

interest of 45 per cent per annum. But on realizing that he did not have a valid licence to practice as a moneylender, he brought this action to recover the loan, without any interest. It was held by Coker, J. that a moneylender could not circumvent the sanction attached to an illegal transaction by framing his claim for recovery of money leant as quasi-contract. Since it was an amount due upon a usurious contract, it was unenforceable under the statute.

Under Section 32(1) of the Pharmacy Act, Cap. 152, Laws of the Federation of Nigeria, 1958, a dispenser, chemist or druggist is prohibited from selling or delivering any poison without the prescription of a doctor. In Agbakoba v. Meka (1962) NRNLR. 1, the respondent a licensed chemist and druggist, supplied the appellant with drugs on credit, some of which were poisons and therefore were governed by Section 32(1) of the Pharmacy Act, above referred to. When the appellant failed to pay, the respondent brought a claim for £96:5s, being the cost of the drugs supplied. The defendant argued that since the contract was illegal the plaintiff could not maintain the action because the drugs were sold without a doctor's prescription.

It was held both at the court of first instance and in the Court of Appeal that, if the sale had been without prescription, it would have been an illegal mode of performing a valid contract, and the plaintiff would not have been entitled to recover the price of the drugs. But in this case, there was no evidence whether there was a prescription or not, and that since the onus of proof was on the defendant who made the allegation, he had failed to discharge it, and the presumption that the contract was valid must stand. In other words, the contract between the appellant and the respondent for the supply of poisons was a legal contract. However, it was one which could performed illegally, that is, by supply the drugs without a prescription. The contract was not on its face illegal. Accordingly, the onus lay on the appellant to prove illegality, but he failed to do so.

4. **Revenue Raising Statutes:** Within this category comes the Registration of Business Name Act 1961, No 17of 1961, which requires all owners of businesses to register them for a fee. One of the aims of the Act was to raise revenue. However, it does not mean that a purchaser of goods from a store whose name has not been registered by its proprietor can refuse to pay the purchase price on the ground that the owner of goods had failed to comply with the statute. The statute does not prohibit the contracts concluded by the proprietors of the business, it merely makes them liable to a penalty of £10 for everyday during which the default continues.

   Also, in the same category are the Purchase Tax Laws which were introduced by many states in Nigeria with the principal aim of raising revenue. In most of these states, an extra tax of two and a half per cent to five percent is now payable on all goods and services. In hotels, for example, the new comes tom five per cent of the bill, whereas for the purchase of cars, it comes to two and a half per cent. In cinemas all over the country, the proprietors pay a tax every time a film is shown and the audience itself pays a tax which included in the price of his ticket. Failure of any

establishment to include this tax in a purchase of goods or services will not render the contract illegal or void, rather the seller of the goods or services will pay the prescribed penalty for falling to comply with the provisions of the statute.

3.2.3 Contracts Rendered Void at Common Law

In contrast with contract that are both illegal and void, there are contracts that are regarded as merely void at common law, on the ground of public policy. These are:

1. Contracts to oust the jurisdiction of the courts.
2. Contracts involving sexual immorality
3. Contract in restraint of trade.

1. **Contract to Oust the Jurisdiction of the Courts:** A contract which ousts the jurisdiction of the court, i.e. a contract that limits or stifles the right of either party to the contract to maintain an action in a court of law, is void. In other words, any provisions in any agreement which purports to deprive the parties of their rights to resort to the courts for the settlement of any dispute arising out of the agreement, is void on the grounds of public policy. Such a provision for the ouster of the court's jurisdiction could also be in breach of Section 3(1) of the 1979 Constitution op Nigeria which states as follows:

> ***In the determination of his civil rights and obligations, including any questions or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.***

In ***Bennett v. Bennett (1952) 1 KB 249,*** W. petitioned for divorce and for maintenance for her and her son. H. convenanted with her to make certain payments if she would withdraw the petition for maintenance. Later, a decree of divorce was obtained. The husband refused to pay as agreed. It was held that, the wife could not enforce the covenant, since it purported to oust the jurisdiction of the court.

This principle does not, however apply to agreements in which the parties tacitly agree that they are only bound in honour, in the sense that they do not intend to create any legally binding relationship between them. Again, it is permissible and valid for the parties to the contract to agree that in the event of any controversy, they should go to arbitration first before going to court. Therefore, an agreement which contain a provision that disputes should first be referred to an arbitral tribunal or some other private body for settlement, but which does not prevent a dissatisfied party from appealing to a court against the tribunal decision, is quite valid and enforceable. This is today referred to as ***Scott v. Avery (1856) 5 HLC 811; 10 ER 1121*** clause which was named after that leading case. Thus, if a party to such an agreement should institute proceedings in a court without first resorting to the tribunal, it is a good to the tribunal. The court will invariably stay the proceedings until the arbitration process has been completed. Referring to the applicable provision of the Arbitration Law of Western Nigeria, in the case of ***Campagnie Miniere et Metallurgique v.***

Owners of M.V. Heron Suit No. W/74/70 delivered on July 9, 1970, by Ovie-Whiskey, J. granted the application for stay of proceedings stating:

> ***I find no reason why these proceedings should not be stayed pending the determination of the arbitration to which the two parties submitted themselves in clause 21 of the charter-party entered by both of them.***

2. **Contract Involving Sexual Immorality:** Agreement which tend to promote sexual immorality are void. Thus in ***Bowry v. Bennett (1808) 1 Camp. 348; 10 RR 697***, it was held that the price of clothes specifically furnished to enable a prostitute to carry on her trade was not recoverable.

   Also in ***Pearce v. Brooks (1866) LR 1 Ex. 213,*** where the plaintiff hired a beautifully designed brougham to the defendant with the knowledge that was going to use if to attract men for her profession, it was held that the plaintiff could not recovers the price of hire.

   In ***Uphill v. Wright (1911) 1 KB 506***, the plaintiff let a flat to a woman, the defendant. At the time of letting it, he knew that the defendant was the mistress of a certain man and that the rent of the flat would be paid with the money of the man who kept her. When the landlord sued the woman for unpaid rents, it was held that he could not recover the rent. Also he could not obtain specific performance of an agreement for a lease in such a cash, nor could he sue on it, for the agreement was 'tainted with immorality'.

   Darling J., one of the judges in case stated that since the flat was let to the defendant for the purpose of committing the sin of fornication there, there was no difference between this transaction and one in which the flat was let for the purpose of prostitution. The contract was therefore both illegal and immoral.
   Commencing on the above case Professor Sagay stated in his book:

   > ***Obviously, this was a very controversial decision. It is unlikely to be followed in modern day Britain, and it will certainly not b followed in Nigeria, where the relationship between a man and his mistress is a highly prevalent, well-recognised and accepted institution, in all the customary laws of the various ethnic groups, and also in Islamic law.***

   Some distinction must be between future and past immoral sexual conducts. If the agreement is for payment illicit sexual cohabitation, the amount is irrevocable as payment under such an agreement could encourage a person to be involved in an immoral act. But a contract under which a person promises to pay money to another person in consideration for past consideration is irrevocable, not because it tends to encourage illicit cohabitation but on the ground that the agreement is supported by past consideration. In other words, contract in consideration of the past illicit cohabitation are made for no consideration, but are not illegal. However, if the agreement in respect of past illicit cohabitation is under seal, it will be enforceable.

3. **Contracts in Restrain of Trade:** Perhaps the most important type of a void contract is one in restraint to trade. A contract in restraint of trade is one in which a party covenants to restrict his future liberty to exercise his trade, business or profession in such a manner and with such persons as he chooses. Therefore, a contract in restraint of trade is one which restricts the right of a person, wholly or partially, to carry on his trade or business as he likes.

   The older view of the court was that a contract in restraint of trade, whether general or partial, would be void on ground of public policy. But this view has been modified because the concept of the public policy is not static. What is bad for public policy at any given period of time may be acceptable as good at another period, because of changes in social, economic, political and technological developments. Thus, it was later held that partial restraints was *prima facie* valid, if reasonable. However, towards the end of the nineteenth century, general restraint was also allowed, if reasonable. If follows that, today, it has been appreciated that within reasonable limits, there may be justifiable reasons for imposing some degree of restraint of trade. The courts approach the problem from two angles. First, for a restraint to be valid, it must be shown to be reasonable between the parties in the sense that the restrain is desirable to protect a trade, the subject of the contract.

   Secondly, the restraint must be shown to be reasonable in the interest of the public. And in any given case it is a matter of law for determination by the judge whether the restraint is reasonable between the parties and in public interest.

   We may now direct our minds to three categories of person to whose relationships the restraint of trade may be applicable. It will be evident from our discussion that the doctrine of public policy applies to all, though in varying degrees. These three categories are:
   (i) Agreement between employers and employees.
   (ii) Agreement between a vendor and purchaser of business.
   (iii)Agreements between traders.

   (i) *Agreements Between Employers and Employees:* Although a restraint place on the vendor of a business in the interest of the purchaser would be valid, for the parties involved are expected to be bargaining with each other on equal basis, it would not be so obvious, however, to restrain a servant or an employee, for the parties hereto do not have equal bargaining power. Restraints imposed by an employer on his employee during the course of the employment is invariably viewed with favour by the courts, unless such restriction is imposed for any extraneous reason that goes beyond the protection of the employer's business ***Forster and Sons Ltd. v. Suggett (1918) 35 TLR 87***. But a covenant which restrains a servant from competition after he has left the master's employment is always void as being unreasonable, unless the existence of master's proprietary interests can be proved and that such proprietary interests require protection. In other words, restraints which are imposed on the employee, and are intended to operate after termination of the employment must satisfy the acid test of being reasonable in the interest of

the parties and of the public. In determining whether the restraints are reasonable or not, two major issues are usually examined.

a. The employer must establish that the employee has learnt certain trade secrets during the currency of his employment, and that it is justifiable that the trade secrets should be protected and not exploited by the employee.

But such restraints must not be excessive in duration or extensive in area of operation, otherwise that may become invalid. Thus, in ***Forster and Sons Ltd. v. Suggett (supra)*** the contract mixture of gas and air n the furnace in a glass industry was given in confidence to the works manager who agreed that, for five years the determination of his service, he would neither work for himself in such a venture, nor be interested in the glass-making industry in the United Kingdom. It was held that the plaintiff was entitled to protection as the restraint in favour of trade secrets was reasonable.

As stated above, the reasonableness of such restraint depends on the area covered by the restraint. Thus, in ***C.F.A.O. v. Gorge Leuba (supra)***, under a contract of service, an assistance employed by the C.F.A.O . in Lagos bound himself not to take part under any title (patron, partner, party-interested or clerk) in any commercial or industrial enterprise in West Africa during a period of 12 months from the moment when for any reason whatsoever he ceased to be a member of the staff of the company. This was limited to the colony or colonies where he might have been employed for and on account of the company during the three years. It was also agreed that in case of breach, the contracting company would be liable to the employee for an indemnity equal to 12 times the amount of his last month's salary in the service of the company. It was held that the restriction was unreasonable, and that area of restriction was too wide as being in restraint of trade or employment.

Similarly, in ***John Holt and Co. (Liverpool) Ltd. v. Stewart Chambers (supra)***, an employee engaged under a contract of service bound himself on the determination of the agreement for a period of three years therefore, not to trade or carry on business either on his own account or on behalf of any other person, firm or company in any of the rivers or places in Africa where he might have served his employers during his engagement. It was held that such a restriction went beyond that which was necessary for the protection of interests of the covenantee and was unreasonable by reference to the convenantor.

The obvious reason for invalidating the agreement in the above two cases was as stated by Lord Shaw in ***Herbert Morris Ltd. v. Saxelby (196) 1 A.C. 688, at p.714***, that:

> ***The contract is an embargo upon the energy and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand from being deprived of the opportunity of earning his living, and in preventing the public, on***

the other, from being deprived of the work and service of a useful member of society.

On the other hand, in ***Fitch v. Dewes (supra)***, X was a solicitor at Tamworth and Y successively his junior clerk, articled clerk, and managing clerk. In his contract of service Y agreed, on leaving X's employment, not to practice as a solicitor within seven miles of Tamworth. It was held that the agreement was good, because Y during his service with X had become acquainted with the details of the business of X's clients, and therefore, he could be restrained from using that knowledge to the detriment of X.

b. The restraints should seek to protect the employer's business connections in the sense that the employee can be restraint from taking advantage of his contracts with the employer's customers and clients.

(ii) *Agreements Between a Vendor and Purchaser of business:* The courts are inclined to uphold restraints imposed on a vendor of business more readily than those imposed on a servant. Even then, the restraint must be reasonable and a proprietary interest in need of protection must be proved; otherwise, it will be void, if the purpose is manifestly to prevent competition, for example, if the restraint has no limit of time or space. Therefore, a vendor cannot be restrained, unless the business or industry or manufacturing concern sold is actually in physical (not merely legal) existence and has as a result of its operations acquired some goodwill. Thus, in ***Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries Ltd. (1934) AC181***, the appellants held that a Brewer's licence permitting them to brew beer. In fact, they only brewed sake, a Japanese fermented liquor, made from rice. The respondents held a similar license and did in fact brew beer. In selling the goodwill of their business to the respondents, the appellants covenanted no brew beer for 15 years. Since the appellants had in fact never brewed beer, the restraint did not protect the business actually sold. It was held that by the House of Lords that, there was no proprietary interest of the respondent n respect of which the restraint could be reasonably imposed. It was therefore naked covenant not to brew beer and as was void.

Also, in ***British Reinforced Concrete Engineering Co. Ltd. v. Schelf (1921) 2 Ch. 563***, the plaintiff's company had branches all over England. They bought the defendant's business, which was only a local one and which dealt with the sales of 'loop' a variety of road reinforcement. The defendant agreed under a covenant not to compete with the plaintiff in the manufacture or sale of road reinforcements, within the plaintiff in the branches or ac as servant of any person concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom. It was held that, the covenant would not enforced, as it was wider than was reasonably necessary to protect the plaintiff's company in the enjoyment of the business that had brought. In other words, it purported t restrain the defendant from dealing in any type of road reinforcement, where as the business that was sold was of only one variety of it.

Finally, the limits, scope and period of the restraint are matters which will depend on the peculiarity of the business sought to be protected. But, as stated earlier, the validity of general and of a partial restraint depends on the reasonableness of the restraint as well as the interests f the public. Indeed the House of Lords case of ***Nordenfelt's v. Maxim Nordenfelt Guns and Ammunitions Co. Ltd. (1894) AC 535***, popularly known as Nordenfelt' case, had already established that a covenant in general restraint of trade could be valid, provided it was reasonable in the interest of the parties and of the public. In that case, the appellant Nordenfelt, was a maker and inventor of guns and ammunition. He sold his business to respondent company for £287,500and entered into a covenant that he would to for five years.

> ***Engage… either directly r indirectly in the trade or business of a manufacturer of guns, guns mountings or carriages, gun powder explosives or ammunitions, or in any business competing or liable to compete in any way with that for the time being carried on by the company.***

But he reserved the right to deal in explosives other than gun powder, in torpedoes or submarine boats and in metal castings or forgings. After some years Nordenfelt entered into a business with a rival company dealing with guns and ammunitions, and the respondents sought an injunction to restrain him from doing so.

Although the restraint entered into by Nordenfelt was of a general and not a partial nature, the House of Lords, nevertheless held that, this did not of itself mean that the covenant was void. Indeed it was held that, with the exception of the portion of the covenant prohibiting Nordenfelt from entering' any business competing or liable to compete in any way with that for the time being carried on by the respondent company, the rest of the restrain was reasonable and valid I that:

i. It protected the interest sold;
ii. Nordenfelt received a very large sum of money;
iii. The wide area over which the business operations of the company extended necessitated a wide restraint clause and
iv. Since the company was transferred from a foreign to an English Company, it was in the public interest in that it secured for England the inventions of a foreigner and increased British trade.

His covenant not to work in any business competing or liable to compete in any way with that for the time being carried on by the company was held to be unreasonable.

(iii) *Agreements Between Trader: Prima facie*, agreements by traders to regulate their output, marketing and prices are void at common law, unless they are reasonable, in the interests of the parties ad of the public. The law regards the parities so such agreements 'as the best judges of what is reasonable as between themselves'. But the court may interfere whenever it is plainly clear that the agreement is unreasonable in the interest of the public and the traders

themselves. This was highlighted by Lord Haldene in ***North Western Salt Co. v. Eletrolytic Alkali Co. Ltd (1914) AC 461, at p.471***, where he said:

> ***But an ill-regulated supply and unremunerative prices may, in point of fact be disadvantageous to the public. Such a state of thing may, if it is not controlled drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be question of circumstances, whether a combination of manufacturers in a particular trade is an evil from a public point of view.***

Also, in ***McEllistrim v. Bally Macelligot Co-operative Society (1919)AC 548***, a society was formed for the marketing of milk produced by its members. The rules of the society provided that to member should sell milk to any person other than to persons recognized by the society.

The House of Lords held that, these rules imposed a restraint far greater than reasonably necessary for the protection of the interests of the society, for it virtually compelled a member to remain a member for life. The arrangement were seen as a design for stifling competition which was not in the interest of the public.

It should be noted that for the same reason, restraints which was generally imposed on members of trading associations with regard to their trading activities are subject to the rules of governing a restraint of trade, i.e., the restraints are void if they were shown to be unreasonable. Thus, in ***Pharmaceutical Society of Great Britain v. Dickson (1966) 1 WLR 1539; (1968) 2 All ER 686***, the Pharmaceutical Society of Great Britain decided that existing pharmacies should not extend their trading activity to non-traditional goods. Boots objected. It was held that, the society decision was a restrain of trade and contrary to public policy, and the objection of Dickson (who was the retail director of boots) had to be upheld, since no attempt had been made to justify the restraint.

3.2.4 Contracts Rendered Void By Statutes

A contract may be void, although not illegal. The best example of this is what are known as wagering contract. A wagering contract has been defined by Hawkins, J. in ***Carlill v. Carbolic Smoke Ball Co. (1892) 2 QB 484, at pp.490-491***, as:

> ***One by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other and that other shall pay or hand over to him a sum of money or other stake.***

For example, Ukuele and Shagasha staked the sum of N50 with Sabukwe with regard to a football match to be played between ‘Rangers international’ and ‘ASESA Warriors’, in which either party holds an opposite view as regards the outcome of the football match.

Before the Gaming Act was passed in 1845, wagering was perfectly valid; but at common law, wagering contract were, *prima facie*, unenforceable. By the 1845 Act, wagering contract were made null and void, and since this Act was passed in England before January 1, 1900, it is a statute of general application in Nigeria, except in the Western State of Bendel State. In ***Antoine Chemor v. Joseph Sahyoun (1946) 18 NLR 113***, the plaintiff claimed a sum of money from the defendant. The latter denied borrowing any money, but agreed signing a document admitting indebtedness to the plaintiff. He disclosed that this was to be sued in full satisfaction of the amount lost at poker by him to the plaintiff. The defendant now pleaded Section 18 of the Gaming Act, 1845. The transaction was held to be a gambling transaction within the meaning of the Act. It was also held that, the Act, being a statute of general application in England, applied to Nigeria. Accordingly, the amount was not recoverable.

Although in a very narrow sense, a wagering contract looks like a contract of insurance, there is an important distinction between the two: in a contract of insurance, the party insured after payment of his premium has an insurable interest in the subject matter of the contract, unlike in a contract of wager where the interest of either staker is solely in the winnings. Therefore a contract of insurance is not a wager.
Under the Gaming Act, 1845, wagering contracts are declared void. Section 18 of the Act states:

All contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

However, the interpretation of Section 18 of Gaming Act, 1845, was not fully settled until 1949. The court earlier held the view that, though agreement in a wagering contract was null and void, a fresh promise made by the loser to pay a consideration of the winner's forbearance not to implement his threat to dub the loser a defaulter, to the injury of business, was enforceable. This view was discredited, forty-one years later by the House of Lords, in ***Hill v. Williams Hill (Park Lane) Ltd. (1949)AC 530***, where it was held that such fresh promise was enforceable.

It must, however, be noted that although the 1845 Act rendered wagering contracts null and void, the Act did not affect the rights of a staker to recover from the stakeholder his deposit before it is actually handed over to the winner. If the stakeholder neglects such request and hands over the winnings to the other party, the loser can successfully sue the stakeholder to recover his deposit. Thus, in ***Diggle v. Hill (1877) 2 Ex. D. 422***, plaintiff and one S agreed to complete in a walking match and to this end, they deposited a sum of £200 with the defendant, as stakeholder. S was declared winner in the competition, and the plaintiff requested the defendant to return his deposit, but he paid over the two stakes to S. the plaintiff sued to recover his stake. It was held that, he could recover as the money had not at the time of the request been paid over to the winner.

3.3 THE CONSEQUENCES OF ILLEGAL CONTRACT

Void Contracts: As far as voids contract are concerned, they have no legal effect; therefore they create no right or liabilities. They cannot be sued upon as ordinary legal contract. The maxim is, *ex turpi causa non oritur action* (there can be no cause of action upon a base ground). The law gives no assistance of any kind of the guilty party in such a case, and consequently, he cannot recover any money paid or goods if, in order to be such a contract, nor can he sue for damages or the price or goods if, in order to be successful, he has to rely on his own illegality. Thus in ***Berg v. Sadller (1937) 2KB 158***, B a tobacconist, was put on the stop-list by a tobacco association for the breach of its rules. Concealing his identity and by means of an agent, he induced S to sell him cigarettes, and paid £72:19s for them. Later S suspected the fraud and refused to deliver the cigarettes. It was held that B could not recover the £72:19s paid, because it was paid for an illegal purpose, namely to obtain goods from S by false pretences.

However, damages may be recoverable at the suit of the innocent party. Moreover, a person who pays or transfers property under such a contract may be able to recover it, because of the total failure of consideration. The interest of the public is not affected, if he recovers. But there are circumstances where court denies the recovery of any property that has passed between the parties to a void contract. For example, under the Gaming Act, 1845, a person who pays his wagering losses cannot recover it for he has waived the protection of the Act.

Illegal Contracts: In the case of Illegal contracts, the effect may depend on whether the contract is *ex facie* illegal or *ex facie* lawful. Where the contract is *ex facie* illegal, i.e., illegal as formed and therefore completely prohibited either by statute at common law, neither party can derive any right or interest from it. It is void *ab initio.* Under these circumstances, the intention of the parties is immaterial. It may be that one party that has innocent intentions and that it is only other party that has guilty intentions. However, subject to a few exceptions that will later be discussed under the *in pari delicto* rule, 'innocence' in the context of a contract that is absolutely prohibited, is relevant.

However, where the contract is *ex facie* lawful i.e., lawful per se or formed, but has been performed in an illegal manner, then the issues of guilty intention and innocence become very material. In such a situation, at least the innocent party can exercise his rights under the contract. In other words, where the illegality arises from an unlawful performance, the innocent party may refuse to complete the contract. He may also maintain an action for breach as well as recover damages. In ***Anderson Ltd. v. Daniel (1924) 1 KB 138***, a statute required that an invoice stating percentages of chemicals in the goods should be given to the purchaser by every seller f artificial fertilizers. The omission to give such an invoice would lead to a fine on summary conviction. A seller delivered some quantity to a purchaser without the invoice. It was held that he was not entitled to recover the price.

Also, where one party is not *pari delicto* with the other, he can recover the property transferred. Thus, in ***Item v. Paul (1957) WRNLR 66***, the plaintiff paid £215 to the defendant who agreed to let part of a building on a State land to the plaintiff. The plaintiff refused to go into occupation on the ground that a family was already there. The plaintiff

sued, for the refund of the advanced paid, while the defendant counter-claimed for £85, the balance of the agreed annual rent. It was discovered that the defendant had not obtained the consent of the Governor.

The court held that, an assignment of State land without the consent of the Governor, though a ground for forfeiture was not illegal; and that the plaintiff was right to repudiate the contract and, since the parties were not *pari delicto*, the plaintiff was entitled to recover the advance payment. It is necessary to note that if a contract is lawful per se, a collateral contract or transaction arising from it is also illegal.

3.4 Recoverability of Money or Property Transferred Under and Illegal Contract

It is generally agreed that a person who has involved himself in an illegal contract whereby he has parted with any money or chartel cannot maintain an action in law to recover that property. In other words, money paid or property transferred by one guilty party to the other under the contract is irrecoverable. This being the case, the position of the guilty party to whom the money or property is transferred (i.e., the defendant) is stronger in law, and he therefore keeps what he gets. This principle is expressed in the Latin maixm *in pari delicto potior est condition defendantis* (where the parties are equally at fault, the position of the defendant is stronger). Thus, in the event of illegality on the part of both parties to an agreement, the court cannot lend its aid enable either party to recover what he has transferred thereunder; therefore, the defendant will be entitled to retain the property so transferred to him. This principle was aptly illustrated in ***Parkinson v. College of Ambulance (1925) 2 KB 1***. There, the plaintiff who was misled by the secretary of the defendant, a charitable body, gave £3,000 donation to the charity on the understanding that they will help to procure a Knighthood for him. The charity received the money but failed to secure the Knighthood and the plaintiff sued for the return of his money as money had and received to his use. The court held that, the money was irrevocable as the transaction was illegal to the knowledge of the plaintiff and the defendant.

Also, in ***Taylor v. Chester (1869) LR 4 QB 309***, the plaintiff brought an action to recover the half of a £50 note which he had deposited with the defendant, an inn keeper, by way of pledge to secure the repayment of money due to the defendant for services rendered to the plaintiff. The money owed, was in respect of wine and suppers, supplied by the defendant in a brothel and in his inn, for the purpose of being consumed by the plaintiff and various prostitutes in a debauch in the inn. The plaintiff argued that since the debt arose from an immoral transaction, the defendant acquired no rights under the agreement, and he was not entitled to be paid for the wines and suppers; consequently, he could retain the half of the £50 note.

It was held that, since the plaintiff himself handed over the half note to the defendant in the performance of his own part of the illegal contract, it was therefore, impossible for him to recover except through the medium and by the aid of the illegal transaction of which he was a party. Under such circumstances, the maxim in *parii delicto potior est condition possidentis*, clearly applied, and the suit was dismissed.

Similarly, in ***Ramekhal Singh v. Harihar Signh AIR. 1962 Patna, 343***, the parties entered into a contract under which a certain amount was paid as *tilak* by a bride's father to a bridegroom's father in consideration of marriage. Such payment was in contravention of Sections 3 and 4 of the Bihar Dowry Restraints Act of 1950. The contract was thus prohibited by law. When subsequently the marriage did not take place, the bride's father sued for the recovery of the money paid as *tilak.* It was held that, the contract was an illegal one, and that since both parties were in *pari delicto,* i.e., equally guilty, in entering into the illegal contract, the court would not assist the plaintiff to recover the money paid to the defendant.

This principle was also in operation in ***Alhaji Rabin Busari v. Olabisi Williams (1973) 3 ECSLR 518***, where as we have seen, the plaintiff had paid £600 to the defendant under a contract in which the defendant unlawfully agreed to transfer her non-transferable hackney carriage licence to the plaintiff. When the defendant seized her licence, it was held that, the plaintiff could not recover his £600, because he has paid out the money to the defendant under illegal contract.

3.6 PUBLIC POLICY

The common law tends to distinguish between contracts which are strictly illegal and those which are void for public policy. In Nigeria in addition to these common law considerations, statutory implications play an important role. It is therefore a common law offence to bribe a public official to procure a benefit from the Government, and a contract directed to that end would clearly be unenforceable ***(R. V. Whitaker (1914)***. On the other hand, this type of conduct is prohibited in the Criminal Code and the Penal Code, which make it an offence for Government or public servants to solicit or accept advantages and bribes.

'Public policy' is a broad concept and, like many other aspects of the law, may mean different things to different people at different times or even at the same time. Often, judges will take into account considerations of public policy. One must consider whether a particular contract is against the interests of the community at large. Sometimes this is not an easy task. In common law, freedom of marriage is considered to be in the public interest and a promise never to marry would be void. A line of cases in England involving prostitution provides interesting reading on just what is considered 'pubic policy'.

Space does not enable us to reprint these precedents, but the following may provide an insight into our judicial approach:

The court had to consider a claim for the price of shark fin's soup delivered to a brothel. It was held that the consumption of the soup, not in itself objectionable, could not offset the fact that the service at the premises would be enhanced. The contract was considered illegal. See also ***Pearce V Brooks (1866), Franco V. Bolton (1797).***

However, as already noted, while the courts may not approve of a contract which is against public policy, they are not treated as severely as a contract which prima facie (on the face of it) is illegal. One marked difference between these two forms of contract (bearing in mind an illegal contract is void and hence does not exist) is that in matters of public policy, money paid and property transferred may be recoverable; It is safe to regard contract which offend public policy as belonging to a class of its own. Some of the contracts which was declared illegal by reason of public policy some time ago, may be decided differently to-day in the light of changing public conceptions of morality.

Compare the following cases.

Herman V Charlesworth [1905] 2 KB 123: the Plaintiff successfully recovered a 'marriage brokerage' fee when the Defendant failed to introduce her to suitable, eligible husband. That is not so with an illegal contract. See Pearce V. Brooke (1866) and Franco Bellon (1797), Lowe V. Peers (1768)

Courts are suspicious of contracts which tend to restrain administration of justice or oust the jurisdiction of courts: ***R.V Andrews (1973). Elliot V. Richardson (1870)***

4.0 CONCLUSION

You have learnt of situation in which a court may find that a contract is tainted with illegality because it offends against public policy. You also learnt about the consequences of such illegality.

5.0 SUMMARY

Contracts, which affend public policy are illegal, but the categories are not static because public policy itself is not. The result is that some cases that have been declared illegal by reason of illegality some time ago may likely now he decided differently. Generally, contracts which are tainted with illegality are unenforceable. In some cases, however, and especially where parties are not in pari delicto, the public policy consideration in preventing illegal contracts may be outweighed by the desire to prevent one party from retaining a benefit which constitutes an unjust enrichment.

6.0 TUTOR-MARKED ASSIGNMENT

Summarize the law on illegality and public policy and propose an amendment of the Law to your Law Reform Commission. Support your recommendation with decided cases.

7.0 REFERENCES/FURTHER READING

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)

T.O DADA, General Principles of Law, 3rd ed., T.O. Dada & Co. (2006)

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MODULE 2 PRIVTIY OF CONTRACT

Unit 1 Meaning and Nature of the Doctrine of Privity
Unit 2 The Doctrine of Privity
Unit 3 Operation and Application of the Doctrine
Unit 4 Rules and Exceptions

UNIT 1

CONTENT

1.0 Introduction

2.0 Objectives
3.0 Main Content
3.1 Nature of Privity
3.2 Historical Development
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

Privity is the relationship that exists between parties to a contract. The rules states that a person who is not a party to a contract cannot enjoy the benefits nor suffer the burdens of that contracts; that is, a stranger (non-party) to a contract cannot sue or be sued on it.

The general rule is that only party to a contract may sue on it. In ***Dunlop v. Selfridge (1915) A.C. 847.*** A sold tyres to B & Co. on terms that B & Co. could not resell, B & Co. resold to Selfridge, S below stated prices. A (Dunlop) sued for a breach.

It was held that Dunlop was a stranger and could therefore not sue on it. Similar decisions were reached in the following cases: ***Chuba Ikpeazu v. A.C.B Ltd. (1965)NMLR. 374, R.T. Briscoe v. Universal insurance Co. (1966) 2 A.L.R. Comm. 263*** and ***Tweedle v. Atkinson (supra).*** In ***Chuba Ikpeazu v. A.C.B. Ltd. (supra)*** where the respondent sued a debtor and joined the appellant o the assumption that he was a trading partner and a guarantor to the overdraft in question, it was held by the Supreme Court (in reversing the Lower Court's Judgment) that a contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue upon it.

2.0 OBJECTIVES

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

- Define or describe what the doctrine of privity of contract is
- Explain the two aspects of the doctrine of privity
- Discuss the strengths and weaknesses of the doctrine of privity.

3.0 MAIN CONTENT

3.1 NATURE OF PRIVITY

A contract cannot confer enforceable rights or impose obligations arising under it o any person, except parties to it. Thus, only parties to a contract can sue on it. It also follows that only those who has furnished consideration toward the formation of the contract can bring an action on it. The classical exposition of the principle is contained in the Lord Haldene's judgment in ***Dunlop v. Selfridge (1915) AC 847, at p. 853.***

> ***My lords, in the law of England, certain principle are fundamental. One is that only a person who is party to a contract can sue on it. Our law knows nothing of a jus qua estitum tertio arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger, to a contract as a right in personam to enforce the contract.***

Thus, the doctrine of privity is to the effect that a contract cannot confer enforceable rights or impose obligations under it on any person except parties to it. Accordingly, only those who has furnished consideration towards the formation of a contract can institute an action on it.

However, it does not follow that a contract can not affect the legal rights of a third party to it indirectly. Therefore, the non-party may have some other cause of action (e.g. in tort) arising from the contract. For example, such a contract may operate as a license to the third party to be on the premises, hereby raising a duty of care in tort between him and them.

In ***Driver v. William Wilet Contractors Limited (1969) 1 All ER 655***, in the case, a safety consultant employed by X was to held to owe a duty of care to X's servant.

Also, this common law rule does not indicate that a third party cannot by his action benefit either of the parties to a contract. For instance, if a owes money to B and C pays off the debt, C a non-party has by his benefit one of the contracting parties, A.

The doctrine can be summarized as follows:

a. A person cannot enforce right under a contract to which he is not a party.
b. A person who is not a party to a contract cannot have contractual liabilities imposed on him.
c. Contractual remedies are designed to compensate parties to a contract, not third parties.

It should be noted from the above that the scope of the doctrine is to prevent the third party from being entitled to enforce rights or rely on defenses which arise only under a contract between two parties. Also, the privity doctrine prevents a contract from being enforced in favour of, or against someone who is not privity to it.

3.2 HISTORICAL DEVELOPMENT OF THE DOCTRINE

English legal system was first to adopt the Doctrine of Privity of Contract. In the middle of 19th century, the common law judges came to a decisive conclusion on the scope of contract can sue it. Accordingly, this was not the case in the earlier common law, the principle was not accepted universally. As a matter of fact, in the middle ages the action for debt and account was readily available to third parties who wished to reap the benefit of an arrangement made by others on their behalf. And so it happened that there, the Doctrine of Privity was established in it present form, there was as conflict of authority

on the question whether a person could enforce a Contract to which he was not a party. In some cases decided in the 17th and 18th centries such as ***Crow v. Roggers (1754) 1 STR 592***. In the case, Hardy owed Crow £70. By an agreement between Hardy and Roggers, roggers promised to discharge his debt in return for Hardy undertaking to convey a house to him. Crow sued Roggers on his promise and failed. It should be observed that the reason why the court gave judgment against the plaintiff was because he was a privity to the contract.

However, it should be noted that this doctrine is not closed to this circumstances, there are some case where judgment was given in favour of third party.

In ***Dutton v. Poole (1677) 2 LEV 201***, in this case. A father wanted to sell his property to generate money for his kids, but his eldest child promise to pay £1,000 each to the younger kind and asked is father not to sell his belongings. He default and one of these children sued. And the suit was allowed. However, in 19th century. The principle of privity was properly laid down in 1915 in the landmark case of ***Dunlop v. Selfridge (1915) AC 847*** and the doctrine of privity became firmly established.

4.0 CONCLUSION

In this unit we learnt about the doctrine of privity of contract, incapacity to enter into contract, contracts for necessaries, beneficial contracts of service, void, voidable and unenforceable contracts and recovery of property paid or handed over in a non-binding contract. You are now in a position say what the doctrine of privity is about, explain its two aspects with illustrations and by reference to decided cases. Similarly you can establish what contracts for necessaries and beneficial contracts of service are and why trading contracts are treated differently from contracts of employment.

5.0 SUMMARY

We discussed the nature of privity of contract. We have also discussed the historical development of privity of contract. At the end of this module you should be able to explain the general principle of privity of contract and give the historical account.

6.0 TUTOR-MARKED ASSIGNMENT

Write short note on the following:

1. Nature of Privity
2. Give a detail account of the historical development of privity of contract

7.0 REFERENCES/FURTHER READINGS

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)

T.O DADA, General Principles of Law, 3rd ed., T.O. Dada & Co. (2006)

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UNIT 2 DOCTRINE OF PRIVITY

CONTENTS

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  3.1 Operation and Application of the Doctrine
  3.2 Rationale Behind the Doctrine
  3.3 Reform of the Doctrine
4.0 Conclusion
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1.0 INTRODUCTION

As earlier pointed out, the doctrine of privity of contract is to the effect that an individual cannot acquire benefit or be subjected to the burden arising out of a contract to which he is a stranger. In other words, a person cannot obtain rights or subjected to liabilities of contract to which he is not a party. Going by the above, if A promises B to pay the debt incurred by B to C, the doctrine of privity will prevent C from suing A for the debt.

2.0 OBJECTIVES

At the end this unit you should be able to understand

- Operational and Application of the Doctrine of Privity
- Rationale behind the Doctrine
- Reform of the Doctrine

3.0 MAIN CONTENT

3.1 OPERATION AND APPLICATION OF THE DOCTRINE

In ***Tweddle v. Atkinson (1861) All ER 369***, the plaintiff's father was promised a sum by the defendant if the plaintiff married his daughter. He did but the defendant refused to pay the sum to the plaintiff's father. The plaintiff sued, the House of Lords held he could not enforce the promise because he was not a party to the contract. However, in as much as the nature and operation of the doctrine recognizes that performance by a third party may discharge one of the contracting parties from his obligation on his behalf.

However, the case of ***Price v. Easton (1833) 4 B. & Ad. 433***. Illustrates, this point Easton promised A that if he worked for him, he would help him to discharge his debt to price, price's action to get Easton to fulfill his promise failed, the reason being that he was a stranger to the contract. Again, if a contract between the original parties t it, contain a term purporting to impose a liability upon a third party, the privity doctrine will operate to prevent either of the contracting parties from relying on that term.

In classical case of ***Dunlop v. Selfridge (1915) AC 847***, in the case the plaintiffs sold tyres to certain dealer on the understanding that he would not resell below a certain price and that in the event of a sale to customers the dealer would extract the same promise from him. The dealer sold tyres to Selfridge who agreed to observe the restrictions and pay Dunlop 5 pounds for each type they sold below the restricted price. Selfridge sold some tyres below the restricted price to a customer and Dunlop brought this action to enforce the promise to pay 5 pounds tyre, for the breach. It was held that while Selfridge had committed a breach a breach of the contract him and the dealer, the Dunlop company was not a party to this contract and had finished no consideration for the defendant's promise. The principle of privity of contract has been affirmed in many cases in Nigeria. Thus, in ***Chuba Ikpeazu v. African Continental Bank (o1965) NMLR 374***. The appellant entered into an agreement with one Emodi, who was a debtor to the respondent bank under which the appellant was to run Emodi's business with the intention that all the proceeds should be paid into the bank until Emodi's debt was completely liquidated. The appellant manage the business for sometimes and transferred back the business under a new agreement without the knowledge of the bank. The bank sued the appellant as the

guarantor of Emodi's debt. It was revealed that the terms and content of the document was between Emodi and the appellant only. It was held that bank, not being a party could not acquire rights under the deed.

Also, I ***Etco Nig. V. Estern Nigeria Development Corporation (WNDC) Suit No. 1/30/69 delivered on June 8, 1970 (unreported)***. In the case, the plaintiff company claimed from the defendant corporation the sum of 2,213 pounds 19 shillings 11 pence. Eing cost of the work done by them for the defendant at the premier hotel, Ibadan, sometimes in 1966, the fact of the case disclosed that although the hotel was owned by the defendant, they had awarded the contract for its constructions to Nigersol Construction Company, and it was the later company that commissioned the work to the plaintiff. The counsel for the defendant submitted that there was no contract between the plaintiffs and the defendant cannot confer rights or impose obligations arising under it n any party, except parties to it.

In more recent cases, although the facts have been more complex, the principle of privity of contract has been consistently applied. Thus, in ***Shuwa v. Chad Basin Authority (CBA) (1991) 7NWLR (pt. 205) p. 550***. It was held that by the court of Appeal that not being a party to the contract between Akam and CBA, the appellant could not challenge it validity or implementation.

The same principle was applied by the court of appeal ***(Benin Division) in Unon Bank of Nigeria (UBN) Plc. V. Sparkling Brewaries Ltd. & ORS (1997) 5 NWLR (pt. 505) 344 at 373***. The court of appeal held that, the respondent had no locus stand to institute the action because the appellant was not involved in the arrangement between the respondent and the four other companies and was not a party to it. It could therefore, not e sued by the respondent. In other words there was no privity of contract between the respondent and the appellant.

It should empazied that since a person who was a party to a contract cannot bring an action to enforce it, so too can he not be made liable under the contract only the parties to the contract can enforce it or have it enforced against them. Thus, in Ilesa Local Planning Authority (LPA) v. Olayide (1994) 5 NWLR (pt. 342) 91. The respondent was appointed by the governor of Oyo State, under an enabling law as the chairman of athe appellant authority. Under the relevant law, the authority could not appoint or dismiss its chairman. This power was vested in the governor, acting on behalf of the government of the state. When subsequently the governor relieved the respondent of his appointment, he turned round to sue the authority for breach of contract and areas salaries unpaid after his removal. The action was declared invalid by the court of appeal. Although the respondent was party to a contract of employment, the other party to it was the government of Oyo State and not the appellant authority. The latter not being privy to the contract of employment between the respondent and Oyo state government. It could be sued and made liable for its breach.

A contract cannot be enforced by a person who is not a party, even if the contract is made for his benefit and purports to give him a right to sue upon it. The scope of the doctrine of privity means that a person cannot acquire rights or be subjected to liabilities arising from a contract to which he is not a party.

3.2 RATIONALE, APPRAISAL AND REFORM OF THE DOCTRINE

3.2.1 RATIONALE BEHIND THE DOCTRINE

The main reason for the principle is that only a person who is a party to a contract can sue and be sued on it. That is, the parties to the contract and they are always free to vary it or discharge it by agreement.

The two fundamental principle of the doctrine of privity are:

i. No one except a party to a contract can acquire rights under it;
ii. No one can be subjected to liability under the contract to which he is not privy

As a general rule, a person should not be imposed with contractual obligations without his consent or without his general knowledge and understanding. However, the following are the rational behind the doctrine.

i. It is the parties to contract that are always free to vary or discharge it by consent. The creation of a third party right will delay this freedom unless an agreement for such third party involvement has been made part of the agreement.
ii. It would not be just to allow a person to sue on a contract or derive benefit from a contract in which he would not be sued.

Appraisal of the Doctrine

The following are the argument against the doctrine which are:

i. The application of the doctrine could sometimes lead to injustice.
ii. The doctrine failed to give effect to the express intention of the parties as was pointed out in Tweedle v. Alkinson (1861) 1 B&S 398.
iii. The doctrine is commercially inconvenient and only stand to defeat the legitimate expectations of the third party.

It should be noted that all these criticism have led to the development of exceptions to the general rule of the doctrine of privity which will be discussed in chapter four of this work.

3.3 REFORM OF THE DOCTRINE

The doctrine of privity of contract illustrate that someone who is not a party to the contract is unable to enforce the benefit created or subjected to liabilities imposed under the contract made between two others parties. To some extent, rights may be conferred on a third party, and also liabilities may be imposed under a contract depending upon the nature of the agreement.

In a modern day, accordingly, the law has recognized that with the current complex world of commerce, there must be some changes to accommodate certain exceptions to the

general rule and guarantee restitution to the aggrieved subject to certain extent. The doctrine of privity gives rise to considerable injustice and inconveniences.

Many exceptions have been developed to ameliorate the harshness of the doctrine in the province of law and equity. However, the fact that a number of established common law and statutory exceptions to the doctrine were resorted to by the court, to prevent injustice in many cases, has not served as a doctrine of covering the field in commercial transactions. The law reform commission considered this aspect for reform of the general rule which has been preventing a person from enforcing a right under a contract to which he is not privy even when such contract is for his benefit. In its reports, contract for the benefit of third parties law No. 242(1996) supported the reform of the third and recommended that the contracting parties are ti provide for enforceable third party rights without to the various evasions which had developed to circumvent the privity rule.

4.0 CONCLUSION

Notwithstanding the reasons enumerated for the operation and application of the doctrine. The privity doctrine has been a subject of criticism. As for back as 1937, the law revision committee in its sixth interim report, para 590 (a) proposed as substantial reform of the doctrine. In ***Trident General Ins. Co. Ltd. v. MC Niece Bros Pty Ltd. (1988) 80 ALR 574***. The majority of the High Court of Austrialia (Mason CJ, Wilson J and Tohey J) though the time had come to dispense with the doctrine of privity of contract whereas, Brennan J, Deane J and Dawson J. though the doctrine still law.

Similarly, in ***Wooodar investment Development Ltd. v. Winpey Construction (UK) Ltd (1980) 1 All ER 571 at 590***. Lord Scarman forcefully urged the desirability of the House of Lords reconsidering the rule. Lord Denning also showed his dissatisfy with the doctrine in ***Beswick v. Beswick (1968) AC 58; (1967) 2 All ER 1197.***

Their view is that it is commercially inconvenient and only stands to defeat the legitimate that the doctrine in its incidence has worked injustice and proved inadequate to modern needs. Moreover they based their criticisms on the contention that the doctrines undermind the social interest of the community in the security of bargains. Also it critics have argued that the doctrine of privity of contract is absent from the Scotland, and generally from the legal systems of United States. Amilder criticism put forward by some is of the opinion that:

> ***"The law can only be put on a rational footing if the privity principles applied in a more discriminating fashion, there by facilitating proper consideration of whether it is appropriate to treat particular contractual relationship as transitive or intransitive. As a foist step in his process of rationalization, we propose that the range of the privity principle should be severely be a significant sphere in which contractual relationship should be treated as transitive."***

Accordingly, some of these criticisms have led to the development exceptions to the general rule to ensure consistency with needs of the modern day. Thus in insurance

contracts, for instance, third parties have been allowed in certain circumstance to sue on marine, fire or motor accident insurance policies. However, legislations have been passed to this effect, notwithstanding, some critics are of the opinion that development of exceptions to the privity doctrine is inadequate, what they desire is a complete eradication of the doctrine.

5.0 SUMMARY

We have discussed the Operational and Application of the doctrine of privity, the Rationale and Reform of the doctrine. Note the argument against the doctrine of privity of contract. Bear in mind the two fundamental principle of the doctrine of privity. The main reason for the principle is that only a person who is a party to a contract can sue and be sued on it. That is, the parties to the contract and they are always free to vary it or discharge it by agreement.

6.0 TUTOR-MARKED ASSIGNMENT

1. Write short notes on the following
   a. Operation and application of the doctrine of privity
   b. Rationale behind the doctrine
2. The doctrine of privity of contract is now well established, its operation often caused hardship in practice. How true is this statement.

7.0 REFERENCES/FURTHER READINGS

OLUSEGUN YEROKUN, Modern Law of Contract, 2nd ed., Nigerian Revenue Project Publishers (2004)

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UNIT 3 PRIVITY OF CAPACITY

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3.1.1 Exceptions to the Privity Rule

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3.3 Capacity

3.3.1 Void, voidable and unenforceable contract
3.3.2 Parties lacking legal capacity
3.3.3 Necessary to life
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 Reference/Further Readings

1.0 INTRODUCTION

The law would not permit a contract to impose a duty or confer a benefit on a person who is not a party to it. The reason is that agreement or a bargain is private to parties to it. The doctrine of privity of contract is not about what may be necessary to form a contract nor is it concerned about the contents of a contract. Its concern is "who can enforce a contract". In the law of contract, certain principles are fundamental.

One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitium tertio arising by way of contract. It has no room for a busy body. Another is that only the parties to a contract can derive rights and obligations from their contract. These two principles constitute the doctrine of privity of contract, which forms the focus of this unit.

2.0 OBJECTIVES

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

- Define or describe what the doctrine of privity of contract is
- Explain the two aspects of the doctrine of privity
- Illustrate the difficulties to which the doctrine of privity gives rise.
- Discuss the strengths and weaknesses of the doctrine of privity.

3.0 MAIN CONTENT

3.1 PRIVITY OF CONTRACT

The doctrine of privity is simple: X and Y enter into an agreement in which they confer benefits or obligations upon Z, a stranger to the agreement. Can Z receive the benefits or incur the obligation? The doctrine of privity says "No", and that is it.

You should by now have grasped the complexities of consideration and be capable of analyzing whether or not it exists in certain situations raised in the cases you have read. Normally,but not always, the contractual process involves two parties and with respect to consideration, the promisee will provide that to the

promisor. However, what if the promisor directs that the promisee's undertaking should be received by someone else? Say, A promises to pay B provided B will perform a service for C. Can B, by performing that service to C, guarantee that he will be entitled to recover from A? Here, the answer is 'yes', because in law, when a promisee furnishes consideration, it need not move to the promisor, provided the consideration moves at the promisor's request, as in the example above with A, B and C.

These concepts form the foundation of the doctrine of privity of contract that the legal relationship between the parties to a contract is exclusive to them and only those who are privy (the parties) can sue or be sued, thereby participating in the benefits of the contract and being subject to its burdens. A and B agree that A will pay C N2 million if B agrees to pay C (B's son) N1 million. C to marry A's daughter. In writing, it was further agreed that C could recover from A and B in the courts upon default, which there was. C sued A. C's action failed as there was, in the agreement, no consideration between A and C regarding A's promise to pay the N2 million, (Tweddle V. Alkinson (1861). Note how this principle was applied by the House of Lords in Beswick V Beswick (1968).

If Isah buys a new BMW from Globe Motors Ltd. and the car is defective, Isah will be unsuccessful if he sues the manufacturer as there is no privity between them; his remedy lies with Globe Motors Ltd. This simple example raises two points.

- First, that in practice, manufacturers give warranties which would protect Isah

- secondly, and more importantly, the relationship between the three parties (Isah, BMW and Globe Motors Ltd) embraces aspects of the Common Law concept of agency, which is a critical factor in Commercial and Corporate Law. It should be obvious to you by now that the doctrine of privity conflicts with and seeks to defeat the intentions of the parties to a contract. In some cases it may probably cause also some substantial injustice.

Consider the following cases.

i. Dunlop Pneumatic Tyre V. Selfridge & Co (1915)

ii. Seruttons V. Midland Silicones (1962)

iii. Beswick V. Beswick (1968)

Cases like these justify innovation or devices directed at circumventing the application of the doctrine. Interpretation and employment of these strategies have brought about exceptions to the rules to which we shall now turn.

3.1.1 EXCEPTIONS TO THE PRIVITY RULE

- The legal principles which you encounter in this course, provide the basis for your understanding of the law; however, as you have already learned, they are not necessarily etched in stone, and what appears to be a solid principle is often subject to exceptions. Take privity of contract as an example: you have just seen that basically only

the parties to a particular contract have any rights or obligations to it. But there are exceptions or modifications to this concept, for example"

- in the equitable concept of trust, where A holds legal title of the property or land of B but is holding it as trustee for the beneficial or real owner, C. Ultimately, if A refuses to honour the trust and hand the property to C, C can proceed against A.

- in insurance matters, a person who contracts with an insurer to pay the proceeds to the family of the insured when he/she dies and third parties (not privy to the insurance contract between the insurer and the insured) can also sue on a fire insurance policy (Conveyancing and Property Law).

- In the assignment or transfer of contractual rights and obligations to a third party. A's receipt of monies on a debt owed him by B does not need B's consent if he chooses to transfer the payments to his wife. But B's obligation to pay A would require A's consent if B suddenly wants C to pay his debt to A.

- Negotiable instruments (Bills of Exchange, cheques and promissory notes) constitute an important part of the world of commerce, of which only passing reference can be made in this course. Consider these exceptions of the privity to contract rule before considering the concept of agency, which has long occupied a place of vital importance in the business world. We can only introduce you to this, yet another vast body of common law. A detailed examination of the law of agency is beyond the scope of this course but it is important to business in both common law and civil jurisdictions. In Nigeria, for example, the employment of an intermediary or agent (comprador) has been standard practice for many years in almost any transaction of significance (including the arrangement of marriages). However, we will mention it very briefly:

3.2 AGENCY

Strictly speaking, agency is not an exception to the privity of contract rule. As one who negotiates a contract with a third party on behalf of a principal an agent creats rights and liabilities that exist solely between the third party and the principal. In other words, once the contract is in place, the agent 'drops out', the agent's work on that particular contract being over.

A 'true legal agency' is an individual, which the law recognizes as being capable of creating a contract which is binding on a principal and the third party with whom the agent has dealt. This is the essence of 'pure' agency, a point which is made to distinguish it from other forms of agency, which do not attain the same status in the eyes of the law.

These are often referred to as 'commercial agents' and include:

- An automobile agency or dealership – not a true legal agency partly because there is no privity of contract between a car buyer and the car manufacturer. The dealer does not act as 'agent' for either the manufacturer or the customer.

- An advertising agency – also not a true legal agency as it places, say, advertising space on behalf of its clients and for which it is reimbursed.

- A travel agent – this raises complex and interesting concepts as it has varying degrees of responsibility to its customers but also to the tour operators with whom it may deal, often in faraway destinations. The Judicial Committee of the Privity Council examined the complexities of both contract law and negligence in case of Wong Mee Wan v. Kwan Kin Travel services Ltd and other cases. In that case a Hong Kong schoolgirl was fatallyinjured in a boating accident on a lake in the PRC. The Privy Council held that the Hong Kong tour operator be held responsible for the two PRC defendants, which acted as its agents in the operation of the tour; that is, it had a duty to use reasonable skill and care in selecting its agents.

These and other 'agents', then (including insurance brokers and agents, and sole agents) who buy goods from the manufacturer for re-sale to the customer, within the provisions of the Sale of Goods Act, are not true agents. A true agent must:

- follow its principal's instructions strictly;

- avoid conflicts of interest;

- maintain confidentiality of its principal's business affairs and not disclose that information to the principal's competitors;

- maintain proper accounting records;

- disclose to his/her principal any personal interest which might influence his/her decision-making.

Carefully bear in mind these five aspects of an agent's obligations to his/her principal as you will later learn their applicability, among other things, in his/her fiduciary (or good faith) duties and in relation to ratification (approval) of a contract and apparent authority.

The following reading is brief but it introduces you to one of the elements of a contract – capacity – together with the important concept of contracts which are void, voidable and unenforceable, all of which we will cover in this section of the unit.

3.3 CAPACITY

Capacity is the right recognized by law wherein a person may enter into a binding agreement You have already considered in unit 1 the importance of 'freedom of contract'. An adult with full mental capacibility has capacity to enter into a contract. However, in some cases, this important doctrine may not exist; say, when there is a large discrepancy in the bargaining power of the parties. Another potential threat to this principle is that certain persons may be exploited if they lack maturity or competent understanding. Once again legal capacity is a creature of both Common Law and Statute; and both have prima-facie excluded certain persons from having full contractual capacity. For example, a person who is considered a minor (often referred to as an 'infant') lacks that requisite capacity whilst under the age of 18. Over the years, the Common Law has protected people of unsound mind and drunkards who enter into contracts. Individuals who fall into any of these categories lack full capacity to enter into a legally binding agreement. But what if an infant, or a mentally ill person or

drunkard does enter into a contract? This raises some interesting concepts: the difference between void, voidable and unenforceable contracts, and the extent to which such arrangements may be binding on the individual who lacks legal capacity.

As we proceed in the unit, you should pay particular attention to issues of

- Contracts for necessaries
- Beneficial contracts of service
- void, voidable and unenforceable contracts particularly voidable contracts
- Money had and received pursuant to non-binding contract
- Effects of the infants Relief Act.

We have noted that every 'Legal person' may enter a contract but certain circumstances may deprive the following either wholly or partly of the capacity to enter into contract:

Infants

Married women

Persons of unsound mind

Drunken persons

Aliens

Foreign Heads of Government and their Representatives

Corporations.

3.3.1 VOID, VOIDABLE, ENFORCEABLE CONTRACT

Let us return to the important concepts of Void, Voidable and Unenforceable Contracts. We turn first to the distinction between a void and voidable contract. This is quite crucial to your study of Contract law, particularly when you study misrepresentation and other aspects which some legal textbooks describe as 'vitiating' factors or flaws in the contracting process.

a) Void Contracts

State simply, a void contract is not a contract; it does not exist. Strictly speaking then, this is a contradiction in terms or a 'paradox; in truth there is no contract at all. See Faircett V. Star Car Sales Ltd, (1960). For that reason it is often referred to as void ab initio, or from the beginning. There can be no rights or obligations flowing from a void contract. However, as you will learn later, special considerations may be applied by the courts, depending on the circumstances by which a 'contract' is to be void.

b) Voidable Contract

On the other hand, a voidable contract has an 'optional' quality in that the contract is valid and stays that way unless one or both parties decide to rescind or avoid the contract. In other words a voidable contract exists, but which one party has a right to set aside or render void. Rescission is an equitable remedy. For example, if A and B have

agreed to buy and sell a flat on January 15 and the flat is totally destroyed on January 14, then the contract is void as its subject matter no longer exists. However, if there is insurance available whereby there is sufficient money to restore it, then the parties may therefore mutually agree to complete the contract on July 15, when the restoration work is finished. In other words, the contract is voidable at the parties option.

c) UnEnforceale Contract

Finally, in addition to these key elements of void and voidable contracts, there are also contracts which are deemed to be unenforceable. These are contracts which are not void or voidable. In fact, they are perfectly 'good' but the courts will not help either party to sue on them or seek a remedy under the judicial process. A contract of guarantee need not necessarily be in writing, but it will not be enforceable in court if the terms of the guarantee have not been expressly written by the guarantor or his/her agent.

Briefly, the courts will not enforce agreements which are:

- void by statute or ordinance;

- unenforceable by some statute or ordinance;

- against public policy;

- illegal;

- entered into under duress or undue influence or some other vitiating circumstance.

3.3.3 PARTIES LACKING LEGAL CAPACITY

Turning our attention once more to contracts entered into between parties who lack legal capacity: An infant (or minor) who agrees with a department store to buy N10,000 worth of computer software is legally in an interesting position. Is the contract valid, void, voidable or unenforceable?

At Common Law, he/she would only be obliged to pay for the software if they are deemed 'necessaries'. The textbooks reveal dozens of cases which attempt to define what is a 'necessary'. The problem is that what may be a necessary to one person may not be a 'necessary' to another. Sale of Goods Act provides as follows:

> ***Where necessaries are sold and delivered to an infant or minor, or to a person who, by reason of mental capacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefore. See Nash V. Inmam (1908). Also Peters V. Fleming (1840) on the effect of the minors condition in life.***

Sales of Goods Act provided the law but sadly neglected to define the term "necessary"

Hence, if the goods – or services – in question are 'necessary to theinfant's condition in life' then the department store can obtain a reasonable price for the software, but not N10,000: Nash V. Inmam (1908). Hence the agreement between the infant (or mentally ill person or drunkard) and the store starts off being void,

remains voidable to the extent that the infant can choose to pay what is due under the contract and, if they are necessaries, it is enforceable by the store to the extent of a reasonable price.

3.3.4 'NECESSARY' TO LIFE?

Distinguish between 'necessaries' and 'necessities'. We are concerned with necessaries – i.e. goods which are suitable to the minor's condition in life and his actual requirement.

The rule regarding necessaries is also applicable to contracts entered into in which the person lacking legal capacity contracts to purchase certain personal and beneficial services: medical attention or apprenticeships and education or training, to name a few. In assessing whether the nature of these contracts is beneficial to the infant, the courts would examine the entire contract as distinct from deciding that certain clauses do not appear to be so. (See Doyle V. White City Stadium Ltd. (1938). We will examine the significance of an 'entire' contract in due course.

Necessaries include services: Beneficial contracts of services may be, in certain cases, another form of necessaries. See Roberts Raray (1913).

You will recall when you studied 'consideration' that there are execute contracts (an infant marches into the store and collects the software, promising to pay within a week) and executory contracts (where he/she merely orders the software for delivery in one week). In the latter instance, he/she can, being an infant, change his/her mind and repudiate (reject) the contract and the store will have no recourse against him/her. However, if the subject matter is a contract for services, he/she may not be so lucky and the store may successfully proceed against him/her. In one case, an infant contracted to go on a world tour with a professional billiards player in order to improve his game. He repudiated the agreement before the left on the tour. The professional successfully obtained damages from him. (Roberts V. Gray (1913)

In Common Law, there was little distinction between infants on the one hand and mentally ill and drunken (intoxicated) or drugged person on the other, in terms of their overall capacity to contract. In the latter, the contract is voidable on their part but the onus is on them to show that at the time the contract was made they were not aware of what they were doing and the other contracting party must have realized that. In an Australian case (Blomley V. Ryan (1956) the Plaintiff sought to enforce the sale of a farm in which the Defendant, who was drunk at the time the contract was made, agreed on a price that was well under the market value. The action failed as it was shown that the Defendant, to the Plaintiff's knowledge, was incapable of forming a rational decision although he was aware of the general nature of the transaction.

Sales of necessaries to the mentally incompetent or drunken or drugged persons are covered in the same way as infants in the Sales of Goods Act. In addition, the Mental Health Act may formally deprive a person of his or her contractual capacity. Other individuals and bodies corporate, who similarly lose this right to a greater or

lesser degree, are bankrupts; company directors acting ultra vires (outside their power, a concept you will study in company Law); aliens (foreign nationals in a time of war); and prisoners.

Finally, we should note that at Common Law, married women lacked contractual capacity and upon marriage, all property vested in the husband, (Eastwood V. Jenyon (1840). Happily (for women), statutory enactments have eliminated this discrimination. Now a married woman has the power to contract on her own responsibility in all respects as if she was a fame sole, and may hold property on her own, sue and be sued independently of her husband both in contract and in tort.

SELF ASSESSMENT EXERCISE 3

i) What is the essential difference between a 'true legal agency' and individuals and businesses which may describe themselves as 'agents' say travel or advertising agents?

ii) Young Henry, 17, orders three Italian suits from his tailor in Johnson Mart and when later asked by the proprietor to come in and pick them up, he says, 'I've change my mind. I don't want them. 'What is the legal position?

Would your answer be different if Henry had agreed to improve his French language and had contracted to travel to the Republic of Benin withMfom, a well-known linguistics teacher, to do so?

4.0 CONCLUSION

In this unit we learnt about the doctrine of privity of contract, incapacity to enter into contract, contracts for necessaries, beneficial contracts of service, void, voidable and unenforceable contracts and recovery of property paid or handed over in a non-binding contract. You are now in a position say what the doctrine of privity is about, explain its two aspects with illustrations and by reference to decided cases. Similarly you can establish what contracts for necessaries and beneficial contracts of service are and why trading contracts are treated differently from contracts of employment.

5.0 SUMMARY

We discussed the doctrine of privity and capacity to make contracts in this unit. These are two aspects of doctrine of privity:

i. That only parties to a contract are bound by it.

ii. That only parties to a contract can derive rights and benefits from it.

Note the exception to the rule On the other, we saw that minority is not a defence in a contract of necessaries and for this purpose, necessaries may either be goods or a contract for services. A contract of employment is binding on a minor if as a whole, it is beneficial to him. Examples are contracts of apprenticeship training, or employment and professional engagements. Trading contracts are excluded from this category.

6.0 TUTOR MARKED ASSIGNMENT

1) a) what is the position of a minor who purchases and pays for non-necessary goods but who now wants to cancel the transaction

b) Distinguish between the contracts which have been performed and those which are still executor

c) Has a supplier any prospect of recovering the goods from the minor?

2) Explain the doctrine of ultra vires as far as applicable to the contractual capacity of a corporation. Whose a corporation enters into a contract ultra vires, can it later ratify the contract?

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UNIT 4 RULE AND EXCEPTIONS

1.0 Introduction
2.0 Objective
3.0 Main Content
- 3.1 Exception to the Doctrine of Privity under the Law of contract
- 3.2 Covenant
- 3.3 Concept of Trust
- 3.4 Insurance
- 3.5 Interference
- 3.6 Agency
- 3.7 Assignment of Choses
- 3.8 Banker's Commerial Credits

4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
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1.0 INTRODUCTION

The doctrine of privity indicates that someone who is not a party to a contract is unable to enforce the benefit created or be subject to be burdens imposed under a contract made between two other people. In pratical term, many commercial transactions involve many parties for example in an international trade, there is a complex of relation between buyers, sellers, carriers and other involves in shipment of a cargo. Also in contracts for the contraction of a building, it may involve a number of subcontractors or sub-engineers.

2.0 OBJECTIVES

By the end of this unit, you be able to define

- Exception to the Doctrine of Privity under the Law of contract
- Covenant running with land
- Concept of Trust
- Insurance and contracts etc

3.0 MAIN CONTENT

3.1 EXCEPTIONS TO THE DOCTRINE OF PRIVITY UNDER THE LAW OF CONTRACT

The doctrine of privity gives rise to considerable injustice and inconvenience. However, many exceptions have been developed to ameliorate the harshness of the doctrine, which are, but not limited to the following.

3.2 COVENANT RUNNING WITH THE LAND

In land matters contract concerning it can benefit or bind persons other than the original parties to lease agreement, a person who acquires interest in the property or in reversion may be able to enforce a covenant affecting land made by his predecessor in title.

According t the rule in ***Tulk v. Moxhay (1848)2 Ch. 774, 18 LJ Ch. 83***, a restrictive covenant voluntarily accepted by a purchaser of land as part f a contract of sale will in certain circumstance bind person subsequently acquire the land.

In the case of ***Tulk v. Moxhay (supra)***, the plaintiff owned several plots of land, sold the garden in the centre to one Elms, who agreed not to build upon it, but to preserve it in its existing condition. After a member of conveyances, the garden was sold to the defendant, Moxhay, who though, knew of the restriction imposed on the use of the land, proposed to build it. The plaintiff sought an injunction against the erection of the proposed buildings and it was granted on the ground of defendant's awareness of the existence of the restrictive covenant.

However, the rule in ***Tulk v. Moxhay (supra)*** has been further developed in restrictive covenants. The original vender must have some other land in the neighborhood for the benefit and protection of the restrictive covenant. In ***Formby v. Barker (1903) 2 Ch. 539***,

the plaintiff husband sold a land to a company which subsequently sold it to the defendant. The restrictive covenant undertook not to build on the land any beer house or shop or any hotel of less value than £50. The covenant was expressed to include successors and assigns of the company on the death of Mr. Formby, the widow became the heir and administrative. The company sold the land to the defendant who in breach of covenant spared a shop on it. The plaintiff sought for an injunction to restrain the defendant from opening the shop. The Court of Appeal held that only a bee shop was prohibited and the all shops for a person to enforce the benefit of covenant was made or the covenant runs with the land.

3.3 CONCEPT OF TRUST

In the many and vigorous attempts at getting the restrictions of privity, one of the sources most often tapped has been equity, particularly the use of the trust concept.

A trust is an equitable obligations to hold property on behalf of another, the use of trust has been a general exception to the doctrine of privity. A trust may be created expressly or impliedly. A person maybe a trustee not only the physical, object but also a sum of money or clause in action such as debt for instance, if A lends a sum of money to B and stipulates that the money is to be used only for paying a debt which B owes C. B holds the money in trust for C.

In ***Tomlinson v. Gill (1756) AMB 330*** the defendant promised a will to pay her late husband's debts. The court held that the widow was a trustee of the promise for the husbands creditors who could enforce the promise against the defendant. Also in ***Re: Flave (1883) 25 Ch. 83; (1943) 2 All ER 768***, a partner retired and the continuing partners promised him that they would after his death, pay an annuity to his widow. The held that there was a trust in favour of the widow.

Equity allows the application of the common law principle of privity of contract. The application of the common law principle of privity of contract. This is done by the use of the trust concept. By this principle, a promise under a contract either at the time he entered into it or thereafter many constitute a trust of the right to which he is entitled in favour of the third party. This does not arise by way of contract because the third party's right to enforce the trust in his favour and as with the thing demanded, in this case, the contracting party who has constitute himself a trustee must generally be a party to the action. The action should be in the name of the trustee if however, he refuses to sue, the beneficiary can sue joining the trustee as co-defendant.

The effect of trust in favour of a third party are:

1. The third party can sue a promisor to enforce the contract; however he must join the promise as a party to the action.
2. The third party is beneficially entitled to any money paid or payable under the contract. The promise has no right to such money.

3.4 INSURANCE CONTRACTS

The law of insurance provides good example of a statutory exception to the doctrine of privity. See. II of the married women's property Act 1882 provides: where a man insures his life

> ***"for the benefit of his wife, or where a woman insures her life for the benefit of her husband or children, the policy shall create a trust in favour of the objects there in named"***

This provision is restricted to polices for the benefit of spouse and children and may apply in favour of other named personal for specified obligations insured by the policy holder. Similarly with regards to Motor Vehicle insurances, **Section 6(3) of the Motor Vehicle (third party) Insurance Act, Cap. M22 LFN 2004** provides as follows:

> ***Notwithstanding, anything in any written law contained, a person issuing a policy of insurance under it is section shall be liable to indemnify the persons or class of person specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or class of person.***

This means that only person or class of persons this indemnified can bring an action against the insurance company, even though such person or persons were not privity to the insurance contract.

In Sule v. Norwich Fire Insurance Society Ltd. Suit No: 10/74/70 delierverd on March 11, 1971 (unreported), the plaintiff was the driver of a car belonging to the Group Parthy of Nigerian, and the defendant was an insurance company the owner and the car was insured against all liabilities intended to be covered under the motor vehicle (othrid party) insurance act 1958. The plaintiff was involved in an accident with one Mr. Bada, an action group party leader, a third party in the position of the driver derived the right to claim directly against the insurance company even though he was not a strict sense a party to the contract.

3.5 INTERFERENCE WITH CONTRACT RIGHTS

It should be noted that at common law it is a legal wrong (to tort) for someone to knowingly interfere with the contractual right of others. In ***Lumley v. Gye (1855) 2 E&B 216,*** the plaintiff had employed one Johanna wager as an opera singer. The defendant, knowing of this contract will fully induced her to refuse to perform it, he was held liable to the plaintiff for what letter become known as the tort of wrongful interference with contractual rights.

3.6 AGENCY

Agency relationship arises where one party (the principal) authorizes another person (the agent) to act on his behalf and the agent agrees to do so. According to ***Black's Law***

Dictionary 8th Ed. By Bryan A. Garner, it is defined as a fiduciary relationship created by express or implied contract by law. In which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.

In ***University of Calabar v. Ephraim (1993) 1 NWLR pt. 271 p 551*** the court of Appeal define agency as the relationship which exist between two persons, one whom expressly or impliedly consents that the other should represent him or impliedly consents that the other should represent him or act on his behalf and the other of whom similarly consents to represent the former or so to act. In consequency of the agency relationship, the principal has rights and incurs liabilities under the contract made by the agent on his behalf with a third party. The principal is not liable where the agent perform any authorized act except the act is ratified by the principal. Under this relationship, the principal can sue and be sued though, he was not a privy to the contract.

3.7 ASSIGNMENT OF CHOSES IN ACTION

Assignment is a process whereby the contractual rights of a person is transferred to someone other than the original creditor with the consent of the original debtor the benefit of a contract may be transferred to a third party by assignment. The transaction is between the assigner and the third party assignee who becomes entitle to sue the debtor who is not a party to the assignment. It is the express used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. These include debts, shares negotiable instrument, copyrights becomes entitled to sue the debtor who is not a party to the assignment.

In ***Alfotrin Ltd. v. Attorney General Federation (1996) 9 NWLR (pt. 1475) 634***, the court said, it is a general rule that who is not a party to a contract cannot make a claim in respect unless he has acquired some legal interest, say by way of assignment of any right under. However assignment of choses in action constitutes a clear exception to the doctrine of privity of contract.

3.8 Banker's Commercial Credit

Banker commercial credit is an economic device to facilitate the importation and exportation of goods. The commercial device has great relevance in Nigeria as the foreign suppliers of goods from overseas have little or no confidence in the creditworthiness of oversea consignee who ordered the goods. They may not have enough money for payment of the goods supplied. The overseas consignee sometimes rely on credit, that is look forward to payment after the goods have been supplied and sold. To obtain the intervention of the bank is therefore necessary as a way out between the overseas suppliers and the consignees. To obtain a banker commercial credit involve the following process.

a. **Opening a letter of credit:** A clause must be inserted in a contract of sale to open an irrevocable letter of credit in sellers favour.

b. **Agreement between banker and buyer:** The buyer concludes an agreement of undertaking to open such a credit and said in return, the buyer promises, to reimburse the bank to pay commission and allow the bank a lien on the shipping document.
c. **Notification of irrevocable letter of credit in favour of the seller:** This could be draw immediately after the seller presents the shipping document. The issue of privity of contract comes in where the buyer fails can the seller sue the bank after tendering of shipping document? Once the seller fulfills his own side of the obligation of shipping the goods and delivery of the shipping documents, the seller can sue the bank. This constitutes another exception to the doctrine of privity of contract.

Section 81 of the property and conveyancing law, Western Nigerian:

> ***A person may take an immediate or other interest in land or other property, or the benefit of an condition, right of entry, covenant or agreement over respecting land or other property, although he may be named as a party to the conveyance of other instruments".***

Giving a general interpretation, this section which is a verbatim copy of section 56 of the **English Law of Property Act 1925**, would not swept away the doctrine of privity, and would entitle any third party named in a contract to bring an action to enforce any provision relating to any type of property made to his benefit. The House of Lords has however reduced the scope of this provision in the case of ***Beswick v. Beswick (1968) AC 58*** and its effect is now restricted to land or agreement relating to the use of land only. This means that even if a third party to a contract is expressly mentioned as a beneficiary under the contract, he still the conditions for the creation of trust are present or unless the rights or interest conferred on him is one in land.

4.0 CONCLUSION

5.0 SUMMARY

In this module, you have learnt about the meaning and the nature of privity, capacity in privity of contract, and most importantly, the operation and application of the doctrine as well as the rules and exceptions.

6.0 TUTOR-MARKED ASSIGNMENT

Write short but explanatory notes on at least three exceptions to the doctrine of privity under the law of contract.

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M.C. OKANNY, Nigerian Commercial Law, Revised Ed., Africana First Publishers Plc (2009)

MODULE 3 DISCHARGE OF CONTRACT

Unit 1 Discharge by Agreement
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UNIT 1 DISCHARGE BY AGREEMENT

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1.0 INTRODUCTION

A contract comes into existence by agreement of the two or more parties. The same parties may also resolve to terminate the contract by agreement. This, expression latin mamix is in ***eodem modo quo oriter, eodem modo dissolvitur,*** which means, what has been effected by agreement can be undone by agreement. As a general rule, in terminating a contract by agreement, the provision of consideration will be required and must be part of the consideration. In considering the termination of a contract by an agreement, the state of the contract agreed originally must be considered or how far the contract has been implemented.

It follows, therefore, that a distinction must be made where the contract has been fully performed by the one party, leaving the other to perform his part of the agreement, and those contracts where both parties are yet to perform their share of the obligations or both parties have more obligations to perform or the contract is still executor or simple language, the principle of law is difference where the contract is executed or executor. As in many reported cases in executed contract, it is the party who has not performed his own part of the bargain that is usually the one seeking to be discharged by agreement and this, in effect, means he seeking, that he is looking for a unilateral discharge.

To obtain a valid discharge by agreement, a party must prove that he has been released by agreement under the seal or that some forms of consideration has been offered by the parties seeking discharge by agreement to the other party and such consideration mush be accepted. Where there is mutuality and one party accepted consideration in place of an unfulfilled obligation, there is then an accord and satisfaction.

2.0 OBJECTIVES

By the end of this unit you should be able to explain

- Meaning of Agreement
- How a contract can be discharged
- When a contract has been discharged

3.0 MAIN CONTENT

3.1 MEANING OF AGREEMENT

A contract can be discharge in precisely the same way as it was formed for there is nothing whatsoever preventing the parties from calling off the contract by mutual agreement if they so wishes but it could be seen that a consideration is necessary for such an agreement where neither of the parties had performed its obligation, each parties simply agrees to forgo their right under the contract.

Discharge of a contract can be by rescission, variation, waiver, accord and satisfaction.

3.2 RESCISSION

Rescission is possible where both parties still have some obligations under the contract to perform. A contract may be rescinded by mutual agreement to make it effective. Rescission is based on the consent of both parties.

The case of ***Tsokwa Oil Marketing Co. v. B O N Ltd. (1999) 11 NWLR (pt. 777) 163*** captured the ways of discharging contract. The Supreme Court held that a valid contract between parties may be discharged in one of four ways known to the namely:

(a) By performing; or
(b) By express agreement; or
(c) The doctrine of frustration; or
(d) By breach

In the instant case, the applicable way of discharging the contract is the last method. The appellant, a limited liability company carrying on the business of oil marketing and bridging throughout Nigeria, by a letter dated 8th May 1989 requested from the respondent a performance bond for N300, 000 to enable it bridge petroleum products from the NNPC Depot. In response, the respondent gave conditions for the appellant to comply with before the performance bond could be released to it by letter dated 23rd November 1989. The appellant wrote accepting the conditions and later forwarded the deed of legal mortgage in respect of the first condition and leaving conditions (ii) and (iii) unsatisfied.

Subsequently, the respondent wrote the appellant as a reminder to satisfy the two remaining conditions. Also, all the documents submitted by the appellant in respect of the legal mortgage were found to be defective. While the application was waiting consideration, the appellant wrote fresh letter altering the first request by increasing the value of the performance bond from N539, 000. In reaction, the appellant challenged the cancellation that it did not accept the respondent's offer but also fulfilled all the conditions in exhibit 75 in an action filed in the High Court of Taraba State, the appellant claimed against the respondent N4, 707, 752 damages for the breach of contract and interest on the said sum.

The trail court granted the appellant's claim. Dissatisfied, the respondent appealed to Court of Appeal. Usually manifested by express words or through implied conduct. A party to an agreement can rescind the contract caused by vitiating factors such as mistake, misrepresentation, fraud, duress or undue influence in which case the person who is responsible can be made to pay damages. Where a contract is rescinded, the money paid or the property or goods transferred must be returned.

Rescission may be considered under the following:-

a. Executory Contract
Where both parties have not completed their part of the contract, or where they have some obligation to perform under the contract, such contract can be rescinded by mutual agreement. It is based on the consideration that the two parties have

abandoned the right of performance. In this situation rescission is based on the mutual consent of both parties to be gathered from their action and conduct arid out unilateral declaration by one of the parties. The parties to the agreement are completely discharged and the contract cannot be revived. In such satiation, money paid on property transferred must be returned to the parties.

b. Contract Under Seal

In a contract under seal such contract can be rescinded under the common law by another contract under seal.

The Judicature Act

However, in equity, a contract under seal can be rescinded by a simple oral or written. Thus, in ***Berry v. Berry (1929) 2 KB 316*** a husband agrees under a deed of separation with his wife to pay £8 a month, some years later, he agreed to pay £9 a month and 30% of his earning if they pay exceeded £350. It was held that the simple contract validly/varied. The obligation of the parties under the original contract under seal.

c. Contract Required To Be In Writing

In a contract is which required to be evidenced in writing, such contract can be rescinded by oral or written agreement. In land matters, an agreement in writing to dispose of an interest in land can be rescinded orally. The principle was illustrated in ***UAC v. John Argo (1958) 14 NLR 105***, the defendant was employed on a written agreement as a store-keeper, and the undertook not to sell goods on credit and to take personal responsibility for any debit or losses incurred where he is in breach of his undertaking. Contrary to the agreement, the defendant sold goods on credit to customers and this resulted in a loss. The plaintiff sued and it was held that the written agreement had been validly rescinded by oral agreement and that the defendant was therefore liable to make good the loss.

3.3 VARIATION

A contract can be varied at any time before it is completely performed. However, a contract in writing can only be varied by an agreement by an agreement evidenced in writing. Similarly, an oral contract can be varied by oral evidence so, where a contract is by law required to be writing, it cannot be rescinded by an oral agreement. Any variation must be by an agreement in writing. This principle is illustrated with land cases. Thus, in ***Goss v. Nugen (1833) 5 B & AD 38*** there was a written contract for the sales of land and the defendant refused to pay for the land when the plaintiffs titled turned out to be defective. The defendant pleads the defective title but the plaintiff replied that the defendant had orally agreed to waive the defect and accept the title. The court held that the contract was required to be in writing or evidenced in writing, an oral variation was therefore not permissible. The defendant succeeded on the ground that a good title had not been made.

The difference between rescission and variation was clearly distinguished in ***Morris v. Baron & Co. (1913) AC 1***. The plaintiff agreed to sell clothes to the defendant, and he

delivered only part of the goods and months later he began proceeding to recover his money. The defendant counter-claimed for non-delivery of the while goods. Before the trial began, the parties compromised the disputes by an oral contract. Ten months later, when the original debt remained unpaid, the plaintiff brought a second action to recover the sum. The court held that the action failed since the original contract was rescinded by the compromised and oral agreement. The court inferred that the parties intended to rescind the original contract and replaced it with new one therefore what happened was a mere variation. Since the Sale of Goods Act governed the contract, it requires that the contract must be in writing; the plaintiff could not enforce the compromise. The compromise operated to extinguish the first agreement, but it did not replace it with a new one. The court may consider when making a decision whether it is variation from parties from their words and conduct. In the interest of commercial relationship, and commercial necessity, the court may not be bothered distinguishing between variation or rescission. The House of Lords, in ***British & Beningtons Ltd v. N W Cachar Tea Co. (1923) AC 48***, the appellants agreed in writing to buy tea from respondent who dealt in tea grown in India. Due to acute port congestion in London, the ships could not dock in the original port in London, but diverted to outlying ports. Bu a subsequent oral agreement, the parties agreed to take the tea from the outlying ports instead of London. As it was in the previous case, it was a Sale of Goods Act 1893 which required it to be in writing. When the appellant repudiated the contract, an arbitration panel found in their favour. The appellant contested it in the House of Lord and it held that the oral contract did not operate as implied rescission of the original contract because there was no evidence of an intention to rescind.

In any contract, the court must distinguish what was in the minds of the parties as to the original contract. As Lord Summer rightly observed;

> ***"The question is whether the common intention to the parties at the oral agreement was to abrogate, rescind, supercede, or extinguish the old contract by a substitution of a completely new and self contained or self subsisting agreement containing an entirely the old terms as modified by the new terms."***

In ***Prospect Textile Mill v. I.C.I.(1999) 6 NWLR (pt. 457) 668, Enterprises Ltd v. Saeby Jerntobery of Maskinfabric (1992) 4 NWLR (pt. 235) 361***, the respondent was a foreign company. In 1981, the parties reached an agreement by which the respondent allowed the appellant to pay for goods supplied in naira and by installments. In 1976, the worth of the goods was then $44. 162. 83 which amounted to N28, 897.37 at the prevailing exchange rate of N1 to $1.5283 plus additional 3% of the amount payable. The appellant in 1985 paid N19.382.19 into two installments. In 1989, the respondent demanded for the balance of N10.382.10 was not met. The respondent instituted $16.234.22 or its equivalent N123,380.07 an action in court. The appellant paid the balance and the respondent accepted same, but thereafter amended its claim to read $41.64 or its equivalent. The relevant point is on the variation of contract that the new terms of the agreement in relation to urgency of the payment of the debt, the amount to be paid and mode of payment amounted to a variation of the contract of the original agreement between the parties.

The court stated a variation of contract involves a definite alteration or contractual obligations by the mutual agreement of both parties. A mutual abandonment of the existing rights of the parties under the agreement between them as district from forbearance to sue is a sufficient consideration to support a variation of the original agreement. The new terms in relation to the currency of payment, amount and mode of payment is a variation.

3.4 WAIVER

A waiver involves a promise not to insist on the mode of performance fixed by the contract, rather than substances of the contract. A waiver occurs when a party to the contract voluntarily accepts to forgo some of his rights under the contract at the request of the party. In real fact, waiver involves renunciation, abandonment or surrender of some claim, privileges or of the opportunity to the advantage of come defect, irregularity or wrong. Waiver involves a unilateral act of one of the parties to a contract. In principle, it is equitable rule which Lord Denning regards as a promissory estoppel. Thus, in ***Charles Richards Ltd v. Opprenheim (1950) 1 KB 616; See also Hughes v. Metropolitan Rly (1877) 2 App. Cas. 439,*** he said***:***

"Whether it is called waiver or forbearance or an agreed variation or substituted performance does not matter, it is a kind of estoppels. By his conduct, he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his legal right that promise was in fact acted on. He cannot afterwards go back on it"

Mohammed Jack in ***Prospect Textile Mills (Nig) Ltd. v. Imperial Chemical Industries Plc, England (1996) 6 NWLR (pt. 257) 688*** similarly stated the same principle. He said the defence of Estonia by waiver is always set up as an answer to the contention of a creditor that the letter of the original agreement must be observed. Thus, what one party by its conduct or words made to the other a promise or assurance which was attended to affect the relations between them and to be acted upon accordingly, then once that other party had taken the promisor for his words, and dated on it, the promisor cannot afterward be allowed to revert to the previous legal relations as if no such promise or assurance had been given to him. In the present case, the conduct of the respondent in 1981 and 1989 is such that it should be stopped from falling back on the original debt of $44, 164 the respondent demand N29,764.29 in 1981 in full and final settlement and accepting N19,382.19 leaving a balance of N10,382.19, the respondents letter demanding the balance of N10,382.19 finally barred him from going to the original agreement. The Nigeria Court in ***Navarro v. Edosomiwa (1996) NWLR (pt. 457) 668. See also Tiakatore Press to Ltd v. Abina (1973) All NLR (pt.1) 244*** explained the significance in discharge of contract. The judge said: 'A waiver must be an intentional act with knowledge and for it to discharge a contract, it is important that the following condition must be present, namely:

(i) a distinct act (ii) that act must be intentional i.e. such as either expressly or by implication of law indicates an intention to treat the matter as if the condition did not exist and with knowledge of the necessary facts are established, looking chiefly to the conduct and position of the person who is said to have waived the condition in order to see whether he has approbated so as to prevent him from reprobating'

There is little difference between a waiver and a promissory estoppels. A waiver may be oral written or waiver inferred from conduct. Waiver may be in form of variation. It is, however, called a waiver when the court is willing to give effect to the intention of the parties. In fact, judges use the terms (waiver) and (variation) interchangeably.

Waiver simply means where there is mutual agreement by both parties to regard the contract as varied. To discharge a contract, the nature of waiver must go beyond the level of suspension. It must completely abrogates the right of the promisor. This was clearly illustrated in the Nigerian situation. Thus, in ***Navarro v. Edosomiwa (1996) NWLR (pt. 457) 668. See also Tiakatore Press to Ltd v. Abina (1973) All NLR (pt.1) 244***, the plaintiff engaged the defendant to build a house. The contract was signed in November 1968, the building was to be completed by January 1969 but was not completed. The plaintiff instead of treating this as a breach of contract, urged the defendant to complete the building as soon as possible. In May, 1969, the defendant completely abandoned the building and was then sued for breach of contract. The defendants accepted that they were in breach but it has been waived. The court noted that the plaintiff having waived his right to sue for breach of contract by accepting the performance beyond stipulated time, lost his right. The court, however, held that he did not abandon his legal expert observed that the question of waiver could not have been considered, and the plaintiff could revert to the original contractual stipulation when the defendant failed to carry out the work within the extra period, since the plaintiff gave him materials to work on and paid part of his money. My view also is that the question of waiver should not have been entertained by the court it is a typical Nigeria situation as regarding it as a waiver will give a person in breach of contract an excuse. As it was rightly said by an English judge, that it will be most reasonable, if having been lenient and having waived the initial expressed time, he should be prevented from ever insisting on reasonably quick delivery.

3.5 ACCORD AND SATISFACTION

Accord and Satisfaction import an agreement supported by consideration and the question whether an accord has been arrived at the parties is one of fact and not of law. In ***Shell Petroleum Dev. Company Ltd. v. F B R Ltd. Suit No UCH/34/69 delivered on July 31, 1970 Ughell. Judicial Division, Ogbobine J. High Court of Midwest***, accord and satisfaction was described as

"the purchase of a release from the obligation whether arising under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operational.

In contractual obligations, where a party fails to perform his own part of the agreement, he can get a valid release if he furnishes some consideration which must be acceptable by the other party. Consideration is crucial to get a valid release and where there is no consideration the discharge, is unenforceable except the new agreement is under seal. The common form of accord and satisfaction is the form of a compromise.

A compromise is arrived at where a claim is asserted and disputed, the parties may reach a compromise on mutually agreeable terms. Once a compromise is reached, the parties abandoned their original positions and they can claim within the compromise arrived at as accord and satisfaction. To establish an accord and satisfaction, there must be an agreement.

In ***CBN v. Beckiti Constr. Ltd (1998) 6 NWLR (pt. 553) 238 CA,*** the Court of Appeal stated the effect of valid compromise on rights and obligations under pre-existing contract. It held that where there is valid compromise agreement, the rights and obligations of the parties are sought to be enforced to the new contractual relationship created by the compromise agreement.

In ***Alhaji Sanusi Dere v. Pacific Insurance Co. (Nig) Ltd. Suit No Ld/325/73 delivered in June 4th 1976, Agoro J at High Court of Lagos***, the plaintiff insured a lorry for N22, 000 and as a result of accident, the vehicle was written off as irreplaceable. The plaintiff and defendant solicitor met to negotiate the claim. The plaintiff claim was N21, 000 i.e. N22, 000 less a compulsory excess of 900. The plaintiff solicitor wrote stating the point of agreement as a total of N16, 000 plus the cost of financing the litigation against the party at fault. The defendants solicitor disputed the correctness of the terms of agreement stating that they agreed to pay N13, 000 and no more. He then forwarded N10, 000 as advanced payment, which the plaintiff received and then sued the original claim of N81, 000. The defendant argued that since the plaintiff had collect N10, 000 from the defendant company he should not be allowed to withdraw to sue upon the policy of insurance Agoro J. held that since there was disagreement, about the amount to be paid, the parties had not come to any legal agreement and the plaintiff was entitled to continue his action. There was no accord and satisfaction. In cast where a party agrees to pay or accept a lesser sum in discharge of a large sum, except there is a true agreement, the defence of accord and satisfaction can be refuted ***DC Builders Ltd v. Rees (1966) 2 QB 617.*** Similarly, there can be no true accord an satisfaction strictly so called.

Where a party merely accepts the payment of a smaller sum in discharge a larger liquidated sum this cannot constitute accord and satisfaction. There is an accord but not satisfaction and such a situation can only give to promisor the right to sue on promissory estoppels. In the unreported case of ***Graham v. Gilles (WA) Ltd. v. West African Automobile & Eng. Co Ltd. Suit No Ld/244/170 of May 23, 1975 by Agoro J. Lagos High Court***, the plaintiff claimed from the defendant the sum of N3, 396.75k being the balance of an amount for services rendered by way of advertisement.

According to the document produced, the total value of the business with the defendant is N26,849.20k on the document signed at the time he received part payment, it was written full and final settlement.

The court considered the legal effect of the phrase whether it could be regarded as extinguishing the plaintiff's right to maintain an action for the balance. The court held that the receipt by the plaintiffs of the lesser sum N23,425.45k did not operate to extinguish the larger and original debt of N26,849.20k. The judge reinstated the principle in ***Fakes v. Beer (1884) 9 App. Cas 665*** that:

> ***"payment of a lesser sum than the amount of debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is accord and satisfaction"***

Agoro J. further stated if accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and cause him to act upon that view. In the recent English case, ***Ferguson v. Davies***, in a country court, in accepting £150 cheque in true settlement, the plaintiff so had nevertheless compromised this claim by a binding accord and satisfaction. The court held that acceptance by a plaintiff from a defendant of a lesser sum than the amount claimed did not constitute accord and satisfaction so as to compromise the action between them unless the plaintiff received some additional benefit by way of consideration.

4.0 CONCLUSION

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

By now, you should appreciate that if a new agreement is to replace an existing one or an old one, consideration is necessary. Where obligations remain outstanding on both sides there is no problem, as there are mutual promises by the parties to give up those rights which constitute consideration of the one for the other. If the obligations between the parties are unequal, and one party has no further obligations to perform, then there could be a problem and new consideration may be necessary to discharge those obligations.

5.0 SUMMARY

In this unit, you have learnt about how a contract can be discharged between parties to a contract. One of the four ways in which contract can be discharged is by Agreement between such parties to the contract. A contract can be discharged precisely the same way, it was forced, for there is nothing what so ever preventing the parties from calling off the by mental agreement if they so wishes.

6.0 TUTOR-MARKED ASSIGNMENT

What do you understand by the following terms in a contract?

1. Discharge of contract
2. The different between recession and variation in a contract.
3. Explain the concept of Accord and Satisfaction

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 DISCHARGE BY PERFORMANCE

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1.0 INTRODUCTION

The performance by the parties to a contract brings an end to that contract. The contractual relationship between the parties automatically comes of an end and the parties are free from the obligations they assume under the contract. Performance may be as a result of both parties performing their own part of the obligation of the contract, or it may be one of the parties and in such a case, he is discharged under the contract. Generally speaking, contractual relations do not come to an end so neatly and tidily as to free the parties of disputes.

In many circumstances, disputes do arise, one party, alleging that he has completely performed his own part to the agreement, and that the other party claiming to have also performed his own part, has in fact not. Other situations are where one party is claiming to perform his party of the bargain, or that he is interested in performing his part, but the other party has prevented him from doing so. The contract may involve this fulfillment of a condition precedent and therefore laming the failure to perform on the party who has refused to fulfill the condition. In another instance, where one of the parties is claiming performances as a discharge from contract, the other party may reject on the ground of lateness, as to where time is the essence of the contract. See ***Rainer v. Miles (1981) AC 1050.***

2.0 OBJECTIVES

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

Explain the following contract terms

- Discharge by Performance and Substantial Performance
- Acceptance of Partial Performance
- Time of Performance
- Place of Performance
- Tender of Performance
- Payment of Performance

3.0 MAIN CONTENT

3.1 DISCHARGE BY PERFORMANCE

A party to a contract may be discharge by performing it in accordance with the terms of the contract. As a general rule, the contract must be exactly performed. A performance of an indivisible contract is not sufficient, see the case of ***Thomas Aplin & Co. Ltd. V. N.N.D. Corp (1972) 1 All NLR (pt. 2) 461***, however with doctrine of the *de minimis* rule, minute and unimportant deviation will be ignored where the contract i9s divisible. The performance of a contract may affected by the fact, as each part may be separately performed. In a bilateral contract, the order of performance will depend on whether the mutual obligations are concurrent or whether they are independent on each other. It may also depend in a condition precedent, for instance, in a building construction contract, the employer maybe under an obligation to pay mobilization fee to the contractor before the commencement of work.

The agreement may also provide that one of the parties can claim only after the work has reached certain level of performance. In these cases, performance of the contract by one party is dependent on the performance by the other party. Under the Sales of Goods Edict, the obligations of the seller and the buyer are mutually concurrent. The seller must be willing to deliver and the buyer must be willing to pay.

The buyer may agree to pay before the goods are delivered, in which case, he is obliged to perform which means payment musty be made in advance. Where the agreement envisaged independent action by the parties, each party can enforce irrespective of the fact that he has performed his own party. An aggrieved party can sue by counter-claiming for the enforcement of what the party has promised to perform. A party who has performed has obligation except fro matters of a minor character will be allowed to enforce the obligation on the other party subject to a counter claim for damages in respect of the defect see ***Phillips v. ArCo Ltd. (1971) 2 NCLR 164 per Lewis JSC***. The doctrine of de *minimis* rule does not apply where the intention of the parties is that there should be exact performances.

In ***Oroyinyin v. Raman (1997) 2 NWLR (pt. 489) 72 CA*** the court said, where a party to a contract undertakes to do an act the performance of which depends entirely on himself and the contract is unclear or silent as to the time of performances, the law implies an obligation to perform the act within a reasonable time having regard to all circumstances of the case.

3.2 SUBSTANTIAL AND PARTIAL PERFORMANCE

Contracts may be performed fully, substantially and partially. The law takes cognizance of the level of performance to allow for a discharge of contract.

Substantial Performance

In all contractual obligations the parties envisaged some level of performance before they can be discharged from liability under the contract. The court had established the rule that the entire performance of a contract was a condition precedent to payment. This rule is established with a qualification that if the contract has been substantially performed, though, some part of it had been badly done, the contractor is entitled to the stipulated price less deduction to serve as remedy for the defects.

The innocent party will have an action for damages for what he has sustained. Thus, in ***Darkin & Co Ltd. V. Lee (1961) 1 KB 366,*** the plaintiffs contracted to execute certain repairs on the defendant's premises, they carried out a substantial part but failed to perform it exactly in these respect. The referee appointed held that the plaintiffs were not entitled to recover any part of the contract price.

On appeal, the court decision was set aside holding that the contract had been substantially performed despite the fact that the work was badly done in a minor respect did not mean that the contract had not been performed. He was entitled to recover the price minus a reduction fro the defective work.

In another decision, the court held that in a contract for work and labour for a lump sum payable on completion, the employer cannot repudiate liability on the ground that the when substantially performed is in some respect not in accordance with the contract. In this case, the plaintiff entered into a contract to decorate and furnished a one-room flat

with the agreed price of $750 to be net cash as the work proceeds and the balance on completion. The defendants paid installments of $300 and claimed $ 450.

The defendant complained of faulty design and bad workmanship, the plaintiff sued for the balance and the official referee held that there was substantial compliance with the contract and that the defendant was liable to pay the sum due. ***Hoeing v. Isaacs (1952) 2 All ER 176*** the court of Appeal affirmed the decision of the trail court.

The interpretation of what amount to substantial performance will depend on the facts of each case and it is always one of construction. Where the defects in the performance of the contract are relatively minor, the court will hold that there has been substantial performance. The doctrine of substantial performance is merely a qualification and not an exception to the basic rule that where a contractor fails to meet the standard of substantial performance he will not be entitled to claim for what he has done. ***Cutter v. Powell (1795) 6 TR. 320***

3.3 PARTIAL PERFORMANCE

A party to a contract can ask for a discharge where he has partial performed his own part of the contract. The basic rule, however, is that where a party contracts to do an entire work for a specific sum money, unless he has performed the whole of the contract, he is not entitled to claim any remuneration.

The performance must be precise and complete before any claim can be made. The principle was that where a party by the terms of the contract was to perform a given duty, before he could call on the other party to pay, it was a condition precedent where he did not perform his duties completely; he was not entitled to remuneration. In Cutter v. Powell (Supra), the defendant agreed to pay 30 quires to cutter provided he proceeds, and continues and does his duties as a mate in sailing the ship from Jamaica until it arrived at Liverpool. The ship and arrived Liverpool on 20th September. His wife claimed payment in *quantum meruit.* The action failed.

Similarly, in ***Sumpter v. Hedges (1898) 1 QB 673*** the plaintiff contracted to build two houses and stables for a lump sum. The plaintiff completed about 35 and then informed the defendant that he had no money to continue. The defendant completed the buildings himself using certain materials left on the site by the plaintiff. In an action, the court award damages for the value of materials but dismissed the claim for quantum *meruit.* On appeal, the court dismissed the claim and held that where there is a contract for a lump sum, the price of it cannot be recovered until the work is completed.

3.3.1 ACCEPTANCE OF PARTIAL PERFORMANCE

The general rule is that a party whose performance falls below the substantial performance level cannot claim any remuneration for his labour or materials used in executing the contract. The position is however different if innocent party accepts the

partial performance. In that case, the innocent can sue on a *quantum meruit* and recover what is proportionate to the work he has performed. ***Gutter v. Powell (1795) 6 TR 320.***

Acceptance of partial performance is statutorily recognized under Sale of goods Edict. It provides where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

In ***Omoleye v. Okeowo (1973) 3 U ILR. 180***, the plaintiff agreed to supply 6000 yards of textile materials to the defendant at the rate of 41s per yard. The defendant deposited £2500 for the purpose. The plaintiff was unable to obtain the stipulated material unilaterally supplied 2910 ½yards of a different and more expensive material at 50s per yard. The defendant was entitled to reject, but he took delivery of the substituted material and in fact resold it. The court held that the plaintiff was entitled to payment for the material accepted by the defendant at the rate of 41s per yard, the price stipulated in the written contract.

3.3.2 TIME OF PERFORMANCE

In contractual agreement, time may be fixed for the performance by a party to the contract. Under the common law, where time is fixed, this is considered as the essence of the contract. The party affected can repudiate the contract and claim damages where the other party failed to perform within a stipulated period. It is the duty of that party to perform the obligation within a reasonable time.

In equity, the approach is less rigid than under the common law as to time of performance. Where a date is fixed, the court will look at the intention of the parties and hold that the contract is not broken if the party concerned performs outside the time stipulated but within a reasonable time. The judge will grant equitable relief against a failure to perform at the date where to do so will create injustice to the parties. In the recent case, ***Union Eagle Ltd. V. Golden Achievement Ltd. (1997) 2 All ER 215***, the court held that in the absence of conduct amounting to a waiver or estoppels, the court would not intervene to provide equitable remedy such as specific performance in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time. In the instance case, as the time for performance of the contract had passed, performance of the contract by the purchaser was no longer possible.

The operation of equity will not extend to the following agreements.

i. Where the contract states expressly that time is of essence of the contract. ***Steedman v. Drinkle (1916) 1 AC 275***

ii. Where time was not originally of the essence of the contract but was made so by one party giving reasonable notice to the other who has failed to perform the contract with sufficient promptitude. ***Stickney v. Keeble (1915) AC 386***

iii. Where from the nature of the contract, time must be taken to be the essence of the agreement. ***Lock v. Bell (1931) 1 Ch 315 Hare v. Nicholl (1966) 2 QB 130.*** Whether

time is of the essence of the contract is a question of construction unless it is made so expressly in the contract. ***The Osterbek (1973) Lloyds Rep. 86 CA.*** In most commercial contract, time is usually the essence of the contract. ***The Mihalis Angetos (1970) 3 All ER. 125.***

In ***Dawodu v. Anderson & Co. Ltd***. the defendant contracted to deliver fish which should be shipped August/September from Norway by a third party, the non-delivery of the fish by December did not constitute a breach of that contract is that time of delivery was reasonable since time of delivery was not specified.

3.3.3 PLACE OF PERFORMANCE

If the place of performance is specified in a account, it must be strictly complied with unless strict compliance is waived or an alternative place of delivery and payment is specified. In ***Nasser v. Smith (1925) 6 NLR 106***, the defendant agreed to deliver certain goods to plaintiff CIF Lagos. The court held that the place of performance was the port of shipment and not port of delivery.

In a contract, where no place of performance is specified either expressly or y implication, and the act is one which requires the presence of both parties for implementation, the general rule is that the promisor must seek out the promise and perform the contract wherever he happens to be fund. The rule also applies to contract for the payment of money.

3.3.4 TENDER OF PERFORMANCE

In a contract between two persons, one party cannot perform his own part without the co-operation of the other part. Where the other party rejects an offer by one party, it will discharge the offeror from liabilities under the contract. This is often the case in a sale of goods where the seller satisfies the requirement as to delivery, the purchaser, nevertheless refuses to accept the goods; such a tender of performance discharges the seller. The seller can sue the other party for damages for breach of contract. This position has been statutory blessing in the section of the Sale of Goods Edict, which provides.

> ***"When the seller is ready and willing to deliver the goods and request the buyer to take delivery, and the buyer does not within a reasonable time after such request to take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and for reasonable charge for the care and custody of the goods".***

In an old English case ***Startup v. Macdonald (1843) 6 M & G 593,*** the plaintiff agreed to sell and deliver certain quantity of oil to the defendants within 14days of March. The plaintiffs tendered delivery but was refused by defendant on the ground of lateness. The court held that it was a valid tender and the act of the plaintiffs was equivalent to performance.

The judge stated:

> ***"The law considers a party who has entered into a contract I deliver goods or pay money to another as having substantially performed it if he has the goods or the money provided on that the tender has been made under such circumstances that the part to whom it has been made had a reasonable opportunity of examining the goods to the money tendered in order to ascertain that the thing tendered really erase what purported to be. Indeed without such an opportunity, an offer to deliver or pay does not amount to a tender."***

3.3.5 PERFORMANCE BY PAYMENT

The performance of a contract may not relate to good but to the payment of money. For instance, where a person tenders money in discharge of a debt, the rejection of the money will not discharge the debt. However, the payment money will constitute a good defence to an action by the creditor. In this type of relationship, it is the duty of the debtor to seek the creditor and pay him the debt when it is due. If the creditor refuses to accept the money, the debtor may make no further tender. The debtor can pay the money into the court since the obligation to pay remains. A tender of more money than the debt is valid performance and a good tender.

In performance by payment, it must be in legal currency or legal tender usually in naira and kobo. The debtor must tender the full amount and payment of lesser sum will be a good tender.

4.0 CONCLUSION

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

Strict compliance with 'performance' can obviously lead to inflexibility, and the courts have tried to balance rigidity with plain common sense if microscopic variations lead to hardship for one of the parties. However, more serious implications arise when a party has partially or substantially performed his obligations, or has failed to

complete the entire contract. Three cases are used to illustrate difficulties in defining 'partial' or 'substantial'.

5.0 SUMMARY

You have learnt that a contract can also be discharged by performance. When a contract is discharged it means, the performance by the parties to the contract brings an end to that contract. The contractual relationship between the parties automatically comes to an end and the parties are free from the obligations they assume under the contract.

6.0 TUTOR-MARKED ASSIGNMENT

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

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 DISCHARGE BY FRUSTRATION

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1.0 INTRODUCTION

The Court of Appeal in ***Nigerian Bank for Commerce and Industry v. Standard (Nig.) Eng. Co. Ltd. (2002) 8 NWLR (pt. 768) 104***, defines frustration as the premature determination of an agreement between parties; an agreement lawfully entered into and in course of operation at the time of its premature determination, owning to the occurrence of an intervening even or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when entered into the agreement.

Frustration occurs whenever the law recognizes that without no fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would make it a thing radically different from what was undertaken by the contract, to lead to frustration, the intervening circumstance must be one which must be so fundamental as to destroy the basis of the agreement. The principle of frustration assumes that the frustrating event was not caused by the default of either party to the contract.

2.0 OBJECTIVES

When you have completed this unit, you should be able to explain:

- The Theories of Frustration
- The Application of the doctrine of Frustration
- Effect of frustration
- Statutory provision dealing with Frustration

3.0 MAIN CONTENT

3.1 MEANING OF FRUSTRATION

The Court of Appeal in ***Nigerian Bank for Commerce and Industry v. Standard (Nig.)p Eng. Co. Ltd (2002) 8 NWLR (pt. 768) 104***, defines frustrations as the premature determination of an agreement between parties; an agreement lawfully entered into and in course of operation at the time of its premature determinations, owning to the occurrence of an intervening even or change of circumstances so fundamental as to be regarded by law both striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement.

Frustration occurs whenever the law recognizes that without no fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would make it a thing radically different from what undertaken by the contract, to lead to frustration, the intervening circumstance must be one which must be so fundamental as to destroy the basis of the agreement. The principle of frustration assumes that the frustrating event was not caused by the default of either party to the contract.

The doctrine of frustration was related that if the performance of a contract depends on the existence of affairs, then the destruction of or disappearance of that of that state of affairs, without the default of either of the parties, will discharge them from the contract. To this must be added that frustration occurs under situations that are totally out of the control of the parties. In such a situation, it is the court that can determine whether an event constitutes a frustrating event as to grant an automatic discharge to the parties to the contract.

3.2 THEORIES OF FRUSTRATION

Many writers have devoted substantial portion to the juristic basis of the doctrine of frustration. The rationale for projecting the theories is to justify the doctrine and to involve some general formula for describing the conditions in which it operates.

Identify theories of frustrations are implied theory, just solution, foundation of contract, Construction and failure of consideration. However the two main theories of frustration are implied term theory and foundation of the contract.

3.2.1 IMPLIED TERM OF THEORY

The implied theory is that a contract is discharge where it impliedly provides that in the frustrating events which have happened, it shall cease to bind. The implied theory was the legal classic exposition in ***Tamplin S.S Co Ltd v. Anglo Mexican Petroleum Products Co. Ltd. (1916) 2 AC at pp.403-404.***

The court stated that:

> ***"a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it in order to see whether or not from the nature of it. The parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied; though it be not expressed in the contract".***

The point which has been raised against the theory of implied term is that at the time the contract come into existence, the parties have no common view as to the frustrating event and they could not have provided for the consequences in the terms of the contract. It has been established that frustration occurs by law, not by the intentions of the parties. If it is the intention of the parties, the contract will be frustrated, when the frustrating events occurs. It merely gives effect to their intention. In ***United Cinema & Film Distribution Co. v. Shell BP Petroleum Dev. Company (1973) 3 UILR 439.*** The court held that it was ideal the contract did not make specific provision for that eventuality. It is not left to the parties to say that there has been frustration or not, it is the duty of the contract. Therefore, the contract was discharged by frustration when the Baifran government took over the properties of the defendants. This also illustrates the construction theory. In most cases, the parties did not anticipate ort provide for what actually happened. Implied term provided for something the parties either expressed or foresaw. The implied theory is at variance with the doctrine of frustration. It is therefore, an artificial theory.

The construction theory is similar to or an alternative ways of describing implied term. The two, to some extent "shade" into one another. Thus, Blackburn J said in ***Taylor v. Cadwell*** said that "the contract is not to be constructed as a positive contract, but subject to an implied condition that the parties shall be exercised before performance becomes impossible.

3.2.2 FOUNDATION OF THE CONTRACT

The foundation of the contract theory was based on Lord Haldane statement in the Tamplin case which stated "when people enter into a contract which is dependent for the possibility of performance on the continued availability of a specific thing comes to an end by reason of circumstances beyond the control to the parties, the contract is ***prima facie*** regarded as dissolved. This statement was regarded as the surest ground to rest the doctrine of frustration. This no doubt, is the appropriate way to describe frustration as the performance of a contract may depend on the availability or existence of certain thing. It may be rightly described as the foundation of the contract. As in the ***Suez Canal*** cases, the availability of Suez Canal for navigation is regarded as the foundation of a charter party, ***W.J Tatem Ltd v. Gamboa (1939) 1 KB 132.***

In addition, the radical change of circumstances so fundamental to the root of the contract has also been described as the destruction of the foundation of the contract; Thus in ***Davis Contractors Ltd v. Fareham UDC (1956) AC 696***, Lord Radcliff stated the true test as follows:

> ***"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 performances is called for would render it a thing radically different from that which was undertaken by the contract. Nonh'aec in foedera veni: it was not this promised to do.***

The Supreme Court adopted this approach in ***Araka v. Monier Construction Co. Ltd. (1863) 3 Bds 826***, The appellant leased his house the respondent company for use as a residence by the company employees to be occupied when the Biafran authorities expelled all expatriates personnel under their control in June 1967. The Supreme Court considered whether the contract became frustrated Bello J.S.C held that the contract had been frustrated because its foundation had disappeared. The important thing is that there must be such a change of circumstances that if the contract was not brought to an end, the parties would be performing obligations different from what they originally had contracted to perform. The foundation of the contract or the destruction of a specific thing which makes performance impossible can be said that he is discharge by failure of consideration. The theory of failure of consideration has been rejected because when it applies to frustration, the failure of consideration must be total. Frustration can occur in cases of partial destruction or part performance of contract.

3.3 THE APPLICATION OF THE DOCTRINE OF FRUSTRATION

The application of the doctrine of frustration applies in the following circumstances;

1. **Destruction of the subject-matter**
   The application of the doctrine of frustration has been applied to cases where the subject-matter of the contract is destroyed. So, the cases of ***Taylor v. Caldwell (1896) 1 QB 13***, (destruction of the hall) ***Astar & Co. v. Blundell*** (a cargo of dates sunk and affected by water are informative). A contract is brought to an end when the subject-matter of the contract is destroyed. The contract is thus terminated by frustration.

In the Nigerian case ***Benthworth Finance (Nig.) Ltd v. Alhaji Sanni Bakori (1973) NCLR 426***, the defendant obtained a lorry under high purchase agreement for the sum of N5428 payable by 18 installments. The plaintiff claimed the sum of N1574 as balance and claimed that the defendant was in default of payment and thereby terminated the agreement. The defendant stated that the vehicle was involved in an accident and the plaintiff took possession. The insurers paid N2247 to the plaintiffs and also sold the vehicle for N500. The defendant pleaded that the agreement had been discharged by frustration. The court held that the accident constituted parties from liabilities. Physical destruction of the subject-matter of the contract before performance falls due as always been accepted as frustrating event. It is note worthy that a contract may be frustrated where what is destroyed is not the subject-matter but something essential for its performance. For instance, a contract to install equipment in a particular factory may be frustrated by the destruction of the factory.

2. Death or Incapacity

Certain personal contract such as contracts of employment, apprenticeship are discharged by the death of either party ***Cutter v. Powell (1795) 6 TR 320***. Some commercial contract requires the use of personal skill in which case the death of that party can discharge the contract. A contract may be frustrated where the continued performance involved serious risk of the health of person to the contract, ***Condor v. The Baron Knight Ltd. (1966) 1 WLR 87***, for instance, a contract to write a book or where a person who has booked a course was so seriously injured.

3. Unavailability of subject-matter

A contract may be frustrated if the person or the thing essential for its performance becomes unavailable. For instance, a ship may be seized, or detained or requisitioned, the charter parties are frustrated. The ***Gulf War*** cases illustrated this point. The acts of seizure, detention or requisition are frustrating events. During the Nigeria Civil War, the Federal Government was empowered by a decree to requisition any property which is subject-matter of the contract, ***Decree 39 of 1967 as amended by Decree 43 of 1969***. Section 2 provides

> ***"where anybody having in his possession, custody or control any land, vehicle, or article relating to a vehicle or vessel falls to comply with any requisition lawfully made in accordance with provision of this Decree, the authority may seize the possession of an appropriate the land, vehicle, vessel, or vehicle as the case may be".***

In ***Benthworth Finance (Nig) Ltd v. Basiru Adeyemi (1973) 3 UILR 453*** it involved an alleged seizure of vehicle, which was the subject-matter of a contract. The plaintiff's lorry was under hire purchase agreement under monthly installment.

For months thereafter, the Nigerian Army requisitions the lorry. The defendants stopped payments of the installments and when sued, he pleaded that the army requisitioning the lorry had discharged the hire purchase agreement. Adefarashin J. held that the defendant failed to prove satisfactorily that the vehicle had been

requisitioned. Secondly, that if there had been requisition, it appeared to have been intended to be a temporary nature. For this reasons, the court held that the contract had not been frustrated. The requisition by the army was not intention to affect the rights and liabilities of the parties.

Temporary unavailability may frustrate a contract if it is clear from the nature of the contract that it was to be performed within the time specified. For instance, a contract to sing or to perform in a party on a particular day can be frustrated if the performer is taken ill that day, ***Robinson v. Davidson (1871) LR 6 Ex. 269***. In ***Jackson v. Union Marine insurance Co Ltd (1874) LR 10 CP. 125***, a ship was chartered to carry rails in January, she went aground and was not repaired until August, the delay frustrated the contract as the ship was riot available at the time for the particular voyage. So also in ***Bank Line Ltd v. Authur Capel & Co (1919) AC 435***, a ship was chartered for 12months from April 1915 to April 1916. She was requisitioned before delivery and the owner could not procure the release till September 1916. In action, the House of Lords held that the charter party was frustrated. The court stated

> ***"the requisitioning destroyed the identity of the chartered service and made the character as a matter of business a totally different thing".***

In ***Metropolitan Water Board v. Dick Kerr of Co (1981) AC 199*** wartime restrictions imposed an indefinite delay on the performance of a contract to build reservoir. It was held that the contract was frustrated since it was likely that there would be a total change in conditions by the time the restrictions might be lifted. The question whether the contract is frustrated depends on the ratio which the interpretation bears to the contract period. The higher that ratio the more likely if it that the contract will be frustrated. This may not be so in all cases, ***The Nema (1962) AC 724.***

The Biafran situation produced cases which are illustrative of frustrating events. In ***Sylvanus Uzoma v. Shell B. P Petroleum Co. Suit No LD/1868/74 September 10, 1976 High Court of Lagos***. The plaintiff in 1966 hired two buses to the defendants for the conveyances of the defendants' workers in Bonny. In 1967 was broke out and Bonny came under the control of Biafran government and sequestrated all the properties of the defendants and ordered all the expatriates to leave. In 1974, the plaintiff brought an action claiming the return of the two buses ***see Acetylene Co of BG v. Canada Carbide Co. (1922) 8 LL L Rep. 450*** in the alternative, pay the sum of 5050 being their value, the court held that the contract had been frustrated by physical impossibility of performance caused by military hostilities and by requisition of the properties including the subject-matter of the contract. ***See also United Cinema film Distributing Co. vv. The shell B Petroleum Development Co. of Nigeria (1973) UILR 439 .***

Other frustrating events are illness or conscription which may interfere temporarily with the performance of the contract. The court will consider the length of interruption, and whether in resumption the event would impose on both parties or one of them obligations substantially different from those originally under taken,

Morgan v. Manser (1948) 1 KB 148. A contract of employment may be frustrated by the illness of the employee where the contract is a long term one, ***Norcott v. Universal Equipment Co (London) Ltd (1986) 1 WLR 641***. Temporary illness will not of itself frustrate a contract of employment, ***Marshall v. Harland & Wolf Ltd (1972) 1 WLR 899.***

4. Subject-matter unavailable from a particular source

A contract may be discharged where the subject-matter was to be obtained parties, for instance, where goods are to be imported from a particular country and such import is prevented by reasons of war, natural disasters, or prohibition of export or goods are to be result of general drought or disease.

The position depends on three things:

i. Express Reference

Where there is express reference that the goods are to be taken from specified source, the contract is frustrated if the source fails in ***Howell v. Coupland (1876) QBD 258***, a farmer sold 200 tons of potatoes to be ground on land specified in the contract the corp failed and it was held the contract was frustrated. It was an exclusive source of supply and if it were several sources. The contract will not be frustrated.

ii. Source by one party only

If a contract makes no reference to any source but one of the parties intended to get the supply or subject-matter from one source. The failure of that source will not lead to frustration, ***Blackburn Bobbins Co. Ltd. v. T.W. Allen Ltd. (1918) 1 KB 467***. Similarly, where in a contract of sale, the buyer's source of payment fails. A contract was held not to be frustrated merely became the buyer intends to pay with money to be remitted from a foreign country or source and the remittance is prevented by delay in changes in exchange-control regulations, ***Universal Corp v. Five Ways Properties Ltd (1979) 1 All ER 552*** or source of funds becomes exhausted ***Janes Paezy v. Haendler & Nateman Gamb H (1981) 1 Llyod's Rep. 302***. In all these cases, the buyer can get supply funds from other sources. Where however, there is no express reference to the source but both contemplated that a source will be used, the contract are sometimes construed as containing implied reference to the source. Failure of source contemplated by the parties will frustrate the contract. Where the source is contemplated by one party only, the court rejected the plea of frustration, ***Lipton v. Ford (1917) 2 KB 647.***

iii. Partial Failure

Where a contract of sale specifies the source from which the goods are to be taken the total failure of that source will lead to frustrated Blackburn Bobbins Co. Ltd. (Supra). Where there is a partial failure, the common law and statutory provisions have diverse repercussions. Thus in ***Howell v. Coupland (1876)1 QBD 256*** , the seller delivered the same quantity produced, the court held that he was not liable for the rest of the quantity sold. The view is that the seller is bound to deliver only

the quantity actually produced. The statutory provision is that the buyer is not bound to accept the quantity produced if it is less than the contracted for.
Where a seller made a number of contracts, to deliver goods from a specified source and the source fails in parts, will the total failure of the source frustrate the contract? For example, a buyer expects to receive from a buyer 1200 tons of grain which he intends to sell to six customers, but as a result of partial failure, 900 tons were delivered as a result of failure to produce enough. One view is that all the contracts are frustrated because the seller cannot perform them all in full. This is supported by statutory provisions.

Another view is that the seller can deliver 200tons each and his inability to deliver to others would be due to election, and that act cannot constitute frustrating event. The seller in Nigeria situation will keep the available goods and make a windfall from the rising prices likely to be the outcome of shortage.

This appears acceptable that some of the contracts are frustrated and other are discharged from the contract. In this case, the seller will deliver to those who are willing to accept at a higher price or to those whose contracts were the earliest that is priority. The last view is that the contract may be discharged pro-rata in which case the seller will give 150 tons to each buyers. The overriding consideration is whether the seller act reasonably in the circumstances. It must be noted as well that pro-rata division is only possible where the subject-matter is physical divisible.

5. Impossibility of Performance

A contract may provide that if a method of performance becomes impossible, the contract will be discharged. Thus, in ***Nicholl & Knight v. Ashton Edridge & Co. (1901) KB 126*** a contract was made for the sale of cotton seed to be shipped by steam-ship Orlando from Alexandra during January. The Orlando went aground so that he could not get to Alexandra in January. The court held that the contract was frustrated, ***Bremer's case v. Continental Grain Co. (1783) 1 Lioyds Rep. 269.***

The stipulated time regarded as exclusive. The seller cannot perform in a different way. The ***Suez Canal*** cases arose when the Suez Canal was closed as a result hostilities in the Middle East in 1956 and 1967 during the Israelis and Arab conflict. The method of performance became impossible when the Canal was closed. The question is whether the contract was stipulated for the particular method of performance. Thus, in ***Tsakirolou & Co. Ltd. v. Nobble Throl GMBH (1962) AC 92***, a contract was made for the sale of Sudanese groundnut to cover the cost, insurance and carriage to Hamburg. When the contract was made, both parties contemplated that the shipment would be vie Suez Canal. The seller ought to have shipped the goods Via the Cape of Good Hop, although it would have taken two and half times as long and would have doubled the cost of carriage. The court stated that the difference between the two methods was not sufficiently fundamental to frustrated the contract. Again, if the contract could not have been frustrated the same way, see the case of ***Palmco Shipping & Co v. Continental Ore Corp (1970) 2 Lioyds Rep. 21, The***

Washington Trader (1972) 1 Lioyds Rep. 463. The decision maybe different where the contract involved the carrying of perishable goods, it seems the contract would be frustrated.

The contract may provide also for alternative methods of performance, the contract is not frustrated if one more of them become impossible as long as one method is possible, The ***Furress Bridge (1977) 2 Lioyds Rep. 367***, such contract is, described as giving the party performance option that is an option, as to various methods of performance. Performance option must be distinguished from contract option which confer a right on a party to choose which of two thing is to be performed. For instance, seller may deliver on A or B and if he chooses to deliver on A, the contract is discharged or where in a time charter party of a named ship, he gave the owners the option to substitute vessel with a similar vessel. The ***Didymi & Leon (1984) 1 Lioyds Rep. 5835. The Badagry (1985) 1 Lioyds Rep. 395.***

The use of the term impossibility and impracticability was distinguished in the doctrine of frustration. The term 'impossibility' depends on the current state of technology and party the amount of trouble and expense one if prepared to achieves it. Thus in ***Taylor v. Cadwell (1863) 3 B&S 826***, it would taken the expenditure of large sums of money to rebuild the music hall in time for the concert and no person is financial healthy enough to incur such expenditure so, the current trend is to abandon impossibility and use instead impracticability which includes extreme and unreasonable difficulty expense, injury or loss to one of the parties. Increased cost alone does not excuse performance but a price increase well beyond the normal range could lead to discharge of contract. It seems a dangerous contention that a man can be excused from performance of his contract when it is commercially impossible not to be admitted unless the parties plainly contracted to that effect. ***Tenants (Lancashure) Ltd. v. C.S. Wilson & Co. Ltd. (1917) A 495, 510.***

Generally speaking, impracticability is not sufficient to frustrate a contract. Thus, in ***Davis Contractors Ltd. v. Fareham U.D.C. (1956) AC 696***, contractors agreed to build 78 houses for a local authority in eight months for N94, 000. Because of labour shortage, the work took 22 months and cost N115, 000. They claimed the contract had been frustrated. The House of Lord rejected the claim Lord Radchiffe said

"It is not hardship or inconvenience or material loss calls the principle of frustration into play. There must be as well as such a change in the significance of the obligation that the thing undertaken would, if performed, would be different thing from that contracted from".

Similarly, in Suez Cases, Lord Simon said;

> ***"An increase of expense is not an excuse or a ground for frustration. However, in view of change circumstances that would not merely cause extra expenses but acute personal hardship to one party, it has been equitable relief may be refused. The contract may not be discharge but the defendants may be liable in***

damages on the ground of severe hardship" Tsakirolou & Co. Ltd. v. Nobble Throl GMBH (1962) AC 92.

Exceptions have been recognized in a number of situations and these are:

i. Long delays in performance resulted from wartime restrictions, ***Tradax Export SA v. Andre & Cle SA (1976) 1 Lioyd's Rep. 416***. In ***Metropolitan Water Board v. Dick Kerr of Co (1981) AC 199*** , it was held that performance need not resumed in the totally altered condition, which prevailed when those restrictions were removed. Under express contractual provision, contract may be discharge if the specified events prevent performance. Such events are ***force majeure***, prohibition of export clauses.

ii. Impossibility of obtaining goods undertaking to deliver from a supplier can only be recognized where it would be unreasonable to require the seller to perform because attempts to do so would drive prices up to unheard of levels ***Tradax Export SA v. Andre & Cle SA(supra)*** or where it would be impracticable and commercially insurable, ***Bremer Handels Gesellschaft mbH v. Vande Avenue Izegem P.V.B.A (1978) 2 Lioyds Re***p. ***109.***

iii. Inflation – Increase in the cost of performing a particular contract making the contract unprofitable to one party or if a fundamentally different situation were to emerge.

In ***Wates Ltd. v. GLC (1983) 25 Build LRI***, a building contract to some extent protected the builder against inflation by means of a price – escalation clause and it was said that the fact that inflation was invoked with success increased not at a trot or at canter but at a gallop was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract.

3.4 CHANGE IN LAW

A well recognized frustrating event is a subsequent change in the law. A new change can occur by the promulgation of a new law or decree or edict or local government bye-law which renders contract illegal. An example is **Decree No 16 of 1977** which prohibited the importation and sales of sparkling wines, ready-made dresses, cars with engine capacity in excess of 2500 cc. The consequence was that all contracts for the importation of these goods became frustrated from the date the decree took effecy. The case of ***Obayuwana v. The Governor of Bendel State Suit No SC 214/1973 (unreported)*** is illustrative of frustrating event by subsequent legal change.

The appellant was appointed a member of Oredo Customary Court in 1977, the contract was to be effective until March 1981 the Governor of Bendel State revoked the appointment by virtue of Customary Court (Revocation) Order with effect from Jan. 1980. The plaintiff sought a declaration that the purported revocation of his appointment was null and void and that he was entitled to his salary up to March 1950. The trial court

held that although the revocation order by the Governor is unlawful and unconstitutional, the plaintiff's appointment was effectively terminated by frustration as from March 1980 by consequent legal change. The Supreme Court up held and confirmed the judgement of the trial court.

3.5 OUTBREAK OF WAR

The outbreak of war renders illegal all contractual transactions between citizens of countries at war. A Nigerian citizen cannot enter into contractual obligations with an alien enemy or a person resident or who carries on business in an enemy territory.

The case of ***Chief Oguaga v. Armels Transport Ltd Suit No SC 214/1973*** provided a test decision at the Supreme Court on the issues of frustration of contract. During the war, the plaintiff took his Mercedes Benz car to the defendant's garage at Aba for repairs. Aba was under the control of the Biafran authority. The car was in the garage for 18 months because the defendants were unable to obtain spare parts for the repairs as a result of the embargo the Federal Military Government placed upon the importation of goods.

The defendants also argued that they had to evacuate their garage from Aba to Ihiala when the Federal Army overrun Aba, and eventually abandoned the car in the garage. The court invited the defendant's counsel to provide judicial authorities in which civil war had been successfully established as aground of frustration of contract. The trial court held that the contract was not frustrated because the defence could not cite any authority. The decision was confirmed by the Supreme Court that there was no frustration since both parties were resident in Biafran, and the contract was concluded during the civil war. The issue of alien enemy, therefore did not arise and contract could not have been frustrated by the civil war. The only material facts were that the defendants were forced to flee in the face of the advancing federal troops. This constituted a frustrating event but by physical impossibility of performances and the subject-matter of the contract fell into hands of the enemy troops.

On a clear analysis of the facts, the Supreme Court was wrong in stating that there was no frustration. The statement in that cases that the civil war could not operate to frustrate a contract was misleading. The Nigeria Civil war frustrated so many contractual obligations and the distinction whether the war is civil or international is untenable civil war, whether then or now provided many frustrating events to persons resident within the enemy territory and those within or outside the enemy territory. The Supreme Court happily has corrected itself in subsequent decisions and held that civil war operated as a frustrating events to discharge parties from their contracts.

The second illustrative case is ***Haco Brown v. Itaco (1970) 2 All NLR 47***, the plaintiff brought an action for arrears of salary and repatriation expenses' from Lagos to Kano. The plaintiff was employed in Kano as a clerk in 1957 and entered into a services agreement under increased to 261 in 1966. In 1958 he was transferred to Lagos on a salary of 40 per month. In 1966 he was transferred to Port Harcourt and in July 1967 as a

result of war, the defendants moved to Aba in 1968, when Port Harcourt was recaptured, the plaintiff found his way to Lagos and reported to the defendants. He claimed his salary from July 1967 to the date, the defendant contended that since the parties had lost touch as a result of civil war, the contract of employment had become frustrated. In the circumstances, there had been a change of circumstance, as to frustrate the contract. The court treated the case as physical impossibility of performance as a result of war conditions. Dosumu J. stated;

> ***"If there is an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole and beyond what was contemplated by the parties and such contract existing between a Nigerian and alien enemy is discharged automatically by the outbreak war 1967-1970 provided illustrative instances of contractual obligations, which became frustrated. That to hold them something which they would not have agreed had they contemplated that event, the contract is frustrated by that event".***

In the other judicial case of ***United Cinema and Firm Distributing Co. v. The Shell BP Petroleum (1973) 3 UILR 439***, the court hammered on the same issue of impossibility of performance caused by civil war.

The parties were physically unable to perform the contract on account of forces beyond the control of the parties. The court did not consider the legal effects of war and the destruction of the contract as frustrating events.

Another contract of employment was provided in the case of ***Ajuna Uche Johnson v. U A C (Nig.) Ltd Suit No CO/1443/72 May 23, 1975 (unreported),*** the plaintiff was employed as a manger in subsidiary company. The contract contained a provision that the company was entitled to terminate the plaintiffs by a two-month notice or by two months' salary in lieu of notice. In 1967, the plaintiff left Lagos for his hometown, and while he was there, war broke out and was unable to return to Lagos. Instead, he reported to another subsidiary company in Port Harcourt under the control of Biafran government claiming that he has been re-absorbed. The defendant company was not aware of this. At the end of war, in 1970, the plaintiffs wrote to the defendant for reposing to Lagos. He was informed that his appointment has been terminated since 1967. He brought an action claiming he was still in employment and was entitled to 10years arrears of salary. The defendant contended that the contracted had become frustrated by civil war. Upholding the argument, Kazeem J. held that the contract of employment had been frustrated by the civil war, which made performance impossible. The judge summarized the law so finely when he said:

> ***"where on the outbreak of war, the contract would involve intercourse with the enemy, the effect at common law is to abrogate any substituting right to further performance, other than the right to the payment of a liquidated sum of money which will be suspended during the war. The doctrine of frustration therefore***

applies generally to contracts of employment because of the impossibility of performance of the contract during the period. The outbreak of the Nigerian civil war could therefore be no exception to the general principle". Bentworth the Finance (Nig.) Ltd. v. Alhaji Sanni Bakori (1973) Suit No NCHI 4 6171 Davis Contractors Ltd v. Fareham UDC (1956) AC 698.

3.6 THE LEGAL CONSEQUENCES OF FRUSTRATION

Once the court decides that a contract has been discharged by frustration it must follow this up by a consideration of the legal consequences of this state of affairs, and decide who is retain or return money or other property, who is to bear any loses, or how such losses are to be apportioned between the parties.

Frustration discharges a conduct automatically when the frustrating event occurs. The court can determine that the contract was frustrated even when the parties continue to regard the contract as subsisting after the frustrating event has occurred. The legal effect does not depend on the opinions for the parties to the contract. What the parties believe is not the determining factor, but the relevance cannot be regarded. ***Hirji Mulji v. Cherog Yue SS Co. (1926) The Wenjiang (No 2) 1983) 2 Lioyds Rep. 400 AC 497.***

Since frustration operates automatically, it appears the contract is determined without putting any of the parties to the election particularly the innocent party, either party can invoke frustration. In a breach of contract, the innocent party may determine to terminate the contract. In case of frustration, both parties can invoke the frustrating even to ask for a discharged from the contract. In ***Bank Line Ltd v. Arthur Capel Co. (1919) AC 415*** a ship was under charter was requisitioned, frustration was claimed by the shipowner, even though the charter was willing to pay the agreed hire, and the shipowner will actually profit from the frustration. As it happened in ***Tamplin case (1916) AC 397***, the court rejected the plea of frustration on the ground that the shipowner will make a profit from the contract.

Right Accrued before Frustration

Under the common law, right which had accrued before frustration remained enforceable. This was illustrated in Chandler v. Webster (1904) 1 KB 493 where the hirer was liable to pay the remaining £41.155 although the contract was frustrated. The hirer claimed to recover £100 already paid but since there was no total failure of consideration, the court refused to grant the request. The common law rule did not allow injustice to prevail by allowing the innocent party to recover the sum of money due on the ground that there was no total failure of consideration. In previous decisions, payment could only be recovered only where the consideration had wholly failed. ***Whincup v. Hughes (1871) LR 6 CP.***

Right not yet accrued

Under the common law, rights not yet accrued at the time of frustration are unenforceable if a contract agrees to build MBA building for N20 million payable on completion, he cannot recover if the contract is frustrated before completion. The rule seems reasonable

as it will be unjust to make the owner of the building to pay the full price for the unfinished building.

However, under the common law, the contractor cannot recover any money for a party performance, he could not even recover on ***quatum***. Thus in ***Cutter v. Powell (1795) 6 TR 320***, a seaman whose wages were to be paid at the end of the voyage died during the voyage. The wife could not recover for the services rendered. Similarly, in ***Appleby v. Myers (1867) LR 2 CP 651*** the plaintiff agreed to erect machinery in a factory. After part of the machinery was erected, accidental fire destroyed the factory and frustrated the contract. It was held that the plaintiff could not recover anything for the machinery, which has been erected. The common law rule as shown in the case of ***Chandler v. Webster (1904) 1 KB 593*** came under criticism in the House of Lords in ***Fibrosa Spolka Akyina v. Fairbarn Lawson, Combe Barbour Ltd (1943) Ac 32***, the respondent an English company was agreed to manufacture and sell certain machinery for £4800 to a Polish company. The sum of £200 was paid at once and delivery as to only £1000 was in fact paid in advance. On September 1939, Britain declared war on Germany, and September 23, Germany invaded and occupied Poland. It thus became impossible and illegal for the English company to deliver the machinery to the Polish Company.

The London agent of the Polish Company brought an action to recover the £1000 paid in advance contending that the contract has been frustrated. By Germany occupation. The House of Lords allowed the plaintiff to recover their £7000 under the rule in ***Chandler v. Webster (Supra)*** the money would have been irrecoverable. The court pointed out that an action for the recovery of the money paid was not an action on the contract, which had ceased to exist, but an action in quasi-contract to recover the money paid on a consideration which had totally failed. The claim was to recover for money for which the defendant had no right to keep since there was no performance, so the law allows recovery under a quasi-contract. Without doubt the Fibrosa case thus found a way out of the harshness of the previous decisions.

Viscount Simon provided an insight that the common law has no machinery for appointment of losses in frustration cases. He said

> ***"while the result obviates the harshness with which the previous view in some instances treated the party who had made a prepayment, it cannot be regard as dealing fairly between the parties in all cases, and must sometimes have the result of leaving the recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connection with the partial carrying out of the contract, which are equivalent or more than equivalent to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons which are not his fault. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left in his hands. These result follow from the fact that the English Law does not undertake to apportion a prepaid sum in such circumstances" Ibid at p. 48***

3.8 STATUTORY PROVISIONS DEALING WITH FRUSTRATION

In Britain, the **English Law Reform (Frustrated Contracts)** was enacted in 1943. In Nigeria, the former Western Region enacted with minor modifications the English Law as Contracts law of Western Nigeria in 1959, **Cap. 25 of 959. In 1961**, the Federal Government enacted the **Law Reform (Contracts) Act** which applied to Lagos, Oyo, Ogun and Bendel States. The other regions, the East and North operated the English common law on frustration. The provisions of Section 4 of the **Law Reform (Contract) Law**, 1961 provides that the Act applies only to contracts that have been discharged by frustration and equally to contracts that have been discharged by frustration and equally to contracts to which the government is a party.

Section 4(1) where a contract governed by law has become impossible of performance or has been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract the follow provisions of this section, shall subject to the provisions of Section 3 of this Act have effect in relation there to. The Law Reform (Contracts) Law 1961 confirms the decision in ***Fibrosa*** case by permitting the recovery of money prepaid towards the performance of a contract and abolished any liability to pay, if in fact, payment had not been made.

Provision of Section 4(2)

All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharge shall in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid and in the case of sums so payable cease to be payable. This section allows the recovery of advance payment where there has been a failure of consideration. The subsection provides that the money is recoverable as money recoverable as money received and not as money recoverable on a consideration which has failed as in ***Fibrosa*** Case.

Section 4(2) further provides if the party to whom sums were so paid or payable incurred expense before the time of discharge in or for the purpose of the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or as the case may be, recover the whole or any part of the sums so paid or payable, not been an amount in excess of expenses so incurred. The court has discretion to decide whether or not the party who has incurred expenses towards the execution of the contract can recover, and the amount. The court, however, cannot allow him to recover above the expenses incurred. However, the party is only entitled to retain any sums already paid to him. So, if no sum has been paid to him, he cannot recover any amount whatever the expenditure incurred toward, execution of the contract. Section 4(3) of the Act allows a party who has done something towards execution of the contract, which constitutes a valuable benefit to the other to recover a sum of money not exceeding the value of the benefit so conferred by him.

The Section provides where any party to the contract has, for reason of any thing done by any other party thereto in, for the purpose of or performance of the contract, obtained a valuable benefit (other than payment of money to which subsection 22 applies) before the

time of discharge, shall be recoverable from him by the said other party such sum (if any) not exceeding the value of the said benefit to the party obtaining it, as the court considers first having regard to all the circumstances of the case' what is valuable benefit as contained in provision of the section it has been suggested that valuable benefit should be interpreted widely to include a situation where work has, in fact, been done on the defendants land by the plaintiff, even though this may have been destroyed before the defendant derived any advantage from it.

Sagay however, was opposed to the suggestion as being contrary to the express provision of the Act. He said, valuable benefit can only mean one thing, something of benefit, and of material value, something which can be assessed in monetary terms. A national benefit is not a valuable benefits and the concept is far too subjective to have a place in the law of contract. If may impose on the courts the unenviable task of quantifying and assessing sentimental rather than material benefit.

The provision of the Act was applied in ***BP (Exploration) Libya Ltd. v. Hunt (1979) 1 WLR 783)*** 'there was an elaborate agreement between BP and Mr. Hunt B P were to do all the work of exploration and to provide the necessary finance and they were also to make certain farm in payment in cash and oil. In return, they were to get a half share in the concession and as soon as the field began to produce oil, they were to receive reimbursement oil' until they had recouped 125% of their initial expenditure. A large oil field was discovered, and oil began to flow from it in 1967 in 1971, the contract between B P and Mr. Hunt was frustrated when their respective interest in the concession were expropriated by Libyan Decree. At this time, BP had received only about one third of the reimbursement oil to which they were entitled in respect of their initial expenditure and they brought a claim under **section 1(3) of the 1943 Act**. The claim allowed upheld by the Court of Appeal and the House of Lords.

The learned judge held that in considering a claim under the section, the court must proceed in two stages.

1. It must first identify and value the benefit obtained,
2. Assess the just sum which it was proper to award

The court held that 'benefit' on the true construction referred not to the cost of performance of the contract or the cost incurred by the claimant, but to the end product received by the other party. The end product in this case was the enhancement of the value of Mr. Hunt's share in the concession resulting from BP's work. The court considering the effect of section 1(3) considered the circumstance given rise to frustration and reduced the value of that benefit obtained by Mr. Hunt was the net amount of oil he had received from the concession plus the compensation paid to him by the Libyan government. The value of the benefit was qualified to $85million. In assessing the just sum, Robert Goff J adopted a criterion viz the cost to BP of the work to the extent that it was done by Mr. Hunt to this was added the value of the 'farm in' oil and the resulting total was then reduced by the amount of reimbursement oil already received by B.P on this basis, the 'just sum' was estimated $34.67 million.

The principles that emerged from the above decision on the 'valuable benefit' are as follows:

i. The court must first ascertain whether the defendants have by what is done by the plaintiff in the execution of the contract obtained a valuable benefit.

ii. The benefit should not be equated to services rendered, but in appropriates cases, the end product of services could constitute a benefit.

iii. The benefit is to be valued at the time of frustration.

iv. From the benefit so valued, there has to be deducted the amount of expenditure incurred by the defendant before the time of the discharge and for the purpose of the performance of the contract.

v. In assessing what is a 'just amount', the court may have regard to the contract-consideration, that is, the benefit the plaintiff was expected to derive from the contract. It would be unjust to award more than a ratable part of it.

It is important to note also that the Act provides that the provisions of the Law Reform (Contracts) Act 1961 does not apply to the following contracts

i. Charter-party except a time charter-party or by the way of demise;
ii. Any contract for the carriage of goods by sea;
iii. Any contract of insurance and;

Any contract for the sale of specific goods where the goods perished before the risk passes to the buyer or any other contract for the sale and delivery of specific goods the contract is frustrated by reason of the fact that the goods have perished.

4.0 CONCLUSION

At law, it is not my fault is no defence to breach arising from frustration. The harshness of this provision of the law led to (a) implied condition in contract that the subject matter would not cease to exist; (b) Quasi contract and (c) Quantum meruit. These three shall be discussed in the next module.

Note, the court decides when a contract can be said to be frustrated and it may so decide in the face of outbreak of war, official interruption or upon evidence of destruction of the subject matter. It is importance for parties to consider the terms of the contract before they go into it.

5.0 SUMMARY

We have discussed in the previous units, that a contract can be discharged by performance and agreement. Another way in which a contract can be discharged is by frustration. Frustration arises from subsequent physical impossibility or illegality. It means that, parties to a contract are discharged from further performance of the

obligation if unexpected events occur before or during the contract, making it impossible to fulfill the contract, without the fault of either parties to the contract.

6.0 TUTOR-MARKED ASSIGNMENT

1. When does frustration occur in a contract.
2. What is the effect of frustration in a contract
3. Discuss the statutory provisions dealing with frustration in a contract.
4. What do you understand by the term theories of frustration?
5. Discuss, making reference to citing relevant decide cases.

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 DISCHARGE BY BREACH

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1.0 INTRODUCTION

A breach of contract start when a party fails to perform his obligation, either totally or by refusing to perform at all or partially. Discharge of contract by breach can be repudiation either express or implied can may be fundamental breach. However, in certain fundamental breach discharge can follow automatically, for instance, where a carrier in breach of its obligation loses or destroyed the goods entrusted to him, in such a case, the owner of the goods have no real alternative but to treat the breach as discharge the contract and sue for breach but where this not so the innocent party has a choice.

2.0 OBJECTIVES

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

- Meaning of Breach of Contract
- Repudiation
- Fundamental Breach
- Effect of Discharge by Breach

3.0 MAIN CONTENT

3.1 MEANING OF BREACH

A breach of contract occurs where one party fails to fulfill or does not intend to fulfill his obligations under the contract. A breach of contract entitles the innocent party to sue for damages against the guilty party the breach occur as a result of repudiation of contract obligation or a fundamental breach, the innocent party, may, in addition from further liability to perform his own part of the obligation.

The innocent party can make a choice as he is not bound to treat the contract as discharge where the injured party repudiates or in breach of fundamental terms. He may choose to sue for damages instead and keep the contract alive in certain circumstances.

The methods of breach can have a decisive effect on the right and liabilities of the innocent party. It is important to consider, where the contract is repudiated, or there is fundamental breach as some breaches entitle the innocent party to sue for damages, and more serious breaches entitles the innocent party, in addition to damages, to treat himself as discharged from the contract. Serious breaches are generally described as ***"repudiatory breaches"*** where the innocent party can make an election either to repudiate or affirm the contract.

In a deposit account, what constitutes a breach is the failure of a bank to pay money due to the deposit account on demand by the operator of the account. Thus in ***Nigerian Merchant Bank Plc. V. Aiyedun investment Ltd. (1998) 2 NWLR (pt. 537) 221 CA***, the court held that such a breach will justify a claim for compensation. It does not matter if the compensation claimed is described as interest or damages. In ***UBN Plc v. Jeric (Nig.) (o1998) 2 NWLR (pt. 536) 63*** it was held that in a contract on goods imported the respondent did not pay for the value of the goods and other expenses incurred by the appellant, the appellant did not breach any terms ot its agreement by withholding on to the goods. The appellant has to option than to hold on to the goods and this cannot be a breach of contract.

3.2 REPUDIATION

Repudiation occurs where there is a contract between two or more parties to be performed at a future date and one party declares an intention not to perform his own side. Repudiation is sometimes described as 'anticipatory breach' or renunciation, whatever ever language repudiation is described, a guilty party indicates by words or conduct that he is no longer interested in performing his own side of the contract,

whenever the time for performance arrives. In anticipation of the breach, Coker J. once stated,

> ***'It is open to a party to a contract to sue the other party for breach of contract, if it is manifested by his conduct and his acts that the defaulting party had made himself unable to fulfill his part of the contract at the agreed time" Solomon Nassar v. Oladipo Moses Suit: No LD/222/58 High Court of Lagos delivered Coker Jon May 20, 1960.***

In fact and in truth, repudiation is anticipatory, the innocent party prevents further damages by taking an action for breach of contract. As Lord Esther explained the meaning of anticipatory breach in ***Johnstone v. Milling (186) 16 QBD 460 at 467***. Where one party assumes to renounce the contract, that is by anticipation refuses to perform, declares his intention then and there to rescind the contract, the innocent party, in most cases, adopts the renunciation, which is another word as repudiation, and bring the contract to an end. Fr other purposes involving a wrongful renunciation, he may wait for the arrival of the time when the course of action would arise. He must therefore elect the course recognized by law which he will pursue in anticipatory breach. The court, however, has formulated principles of law applicable when it involves anticipatory breach. Thus, in Agufor v. Arab Ltd Suit No WN/205/69 delivered September 28, 1969 High Court of Western State Ibadan (unreported), Somolu J clearly stated the principle of law as follows:

> ***"It is an indisputable point of law that the breach of agreement entitles, the other party who is damnified by it to bring an action on it. Such a breach may take place before the time fixed for performance or of completing the performance of the contract has arrived. Where a promisor by his own act or default disables himself from performing his promise, the other party is entitled to treat the contract as at an end and to sue him for damages for the breach without waiting for the time fixed for performance and without further performing his own part of the contract."***

In the recent court decision the court, stated the effect of an unaccepted repudiation of contract. Thus, in ***NEPA v. Isieveore (1997) 7 NWLR (pt. 511) 135***, the court stated an unacceptable repudiation of a contract is of no value to anybody, it confers no legal right of any kind. This is because repudiation by one party standing alone does terminate the contract. It takes two to end it by repudiation of the one side and acceptance of the repudiation on the other. Further the court stated, where there is a unilateral repudiation of a contract, this is treated as an offer by the guilty party to the innocent party of the termination of the contract. It is the acceptance to the offer by the innocent party which acts as a discharge of contract. It is open to innocent party to sue for damages since the acceptance of the repudiation, the contract comes to an end. There the innocent party refuses to accept the repudiation, the contract remains in existence. This proposition is founded on the elementary principles of the formulation of contract obligation. ***Olaniyan v. University of Lagos (1985) 2 NWLR (pt. 9) 599.***

Repudiation may be expressed or implied or it may be words or by conduct. In the ***Nigerian Supplies Manufacturing Broadcasting Corporation (1967) 1 All NLR 35***, a company leased certain property to the defendant for a term of 5 years at rent of N26, 000 with an option to renew for a further of 5years which was to be exercised by notice in writing two years before the determination the original term.

The Director-General of the Corporation wrote that the board had refused ratify the exercise of the option to renew and purported to withdraw to exercise of the option. The plaintiff issued write claiming a declaration that the option to renew had been validly exercised. On an appeal, the Supreme Court head that the action of the defendants by their letter was an attempted repudiation or renunciation of the contract which could be treated as an anticipation breach of contract or on the other hand, the plaintiff could have waited till the date of performance was passed and then sued.

Repudiation may be as a result of reasonable inference that the defend no longer intends to perform ts part of the contract. The plaintiff is entitled to treat the contract as discharged. In ***Frost v. Knight (1872) LR 7 Exch. 117***; See also ***Federal Commerce Navigation Co. Ltd. v. Molena Alpa Inc. (1979) AC 757***, K agreed to marry the plaintiff on the death of his father's. He broke off the engagement during his father's lifetime.

The court held that the plaintiff was entitled to sue for breach of contract. The promise has an inchoate right to the performance of the bargain, which becomes complete when the time of performance has arrived. In the meantime he has right to have contract as a subsisting and effective contract.

Refusal to perform may be conduct. In such a situation, the test is to ascertain whether the action or omission is such as to lead a reasonable person to conclude that he no longer intends to be bound by the provision of the contract. Where the repudiation does not go the root of the contract or have a profound effect so that the breach do not go to the root of the contract or have a profound effect so that the breach does not deprive the innocent party substantially of the whole benefit of the contract. He will only be entitled to claim damages but not to repudiate the contract. A party to the contract must be both ready and willing to perform but could not perform, he can be equated to a person who refuses to perform. He then has to repudiate the contract. In ***Universal Cargo Carriers Corporation v. Cltati (1957) 2 QB 401 at 437,*** Delvin J stated;

"unwillingness and inability are always or often difficult to disentangle, and it is necessary to make attempt."

In ability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness, it means simply an intent to perform. If when the day comes for performance a party cannot perform, he is breach quite irrespective of how he became disabled. The inability which justifies an anticipatory breach can be of any different character.

Anticipatory breach is devised as a whip to be used for the chastisement of deliberate contract breakers, but from which the shiftless, the dilatory r the unfortunate are to be spared. It is not confined to any particular class of breach, deliberate or blame worthy or otherwise it covers all breaches that are bound to happen.

In the case of ***Tewogbade & Sons Ltd v. Funso Adeolu Suit No: 1164/80 High Court of Oyo State, Ibadan delivered June 25, 1981q Adeyemi J.*** the defendant agreed to supply steel water tanks and pipe to the plaintiff. There is a condition in the agreement that the defendant must deliver within ten weeks of the signing of the agreement. The contract is N200,147.88, the plaintiff paid 50% N100,73,94k, the balance to paid on delivery. Eleven weeks after, the defendant informed the plaintiffs that he could not procure the material from London and purpose to procure in Nigeria for N561,599,48k. Three times the contract price the plaintiff rejected and demanded a refund. The plaintiffs brought an action for a refund and damages for breach of contract.

The defendants agreed that it is the plaintiffs who terminated the contract despite the fact that the defendant is willing to perform. Adeyemi J held that

> ***"the defendant by his words spoken or written and conduct repudiation the agreement by way of anticipatory breach and the plaintiff was obliged to choose to accept the repudiation and treat the contract as at end and immediately sue. The plaintiff has there accepted to opt for treating the contract as end and is covered by the law"***

Similarly, in ***Johnson Bekedermo v. Colgate Palmolive (Nig.) Ltd Suit No B/47/43 of High court of Midwest Benin, Delivered June 14th 1974 by Ogbobure J.,*** the plaintiff was a distributor of the company's product on commission and they both entered into dealership agreement. The agreement required him into three months notice in writing to terminate the agreement. The plaintiff alleged that the defendant terminated the agreement without giving necessary notice and brought a claim for damages for breach of contract. The defendant rejected and averred that he had failed to make reasonable and regular payments for goods delivered and that this constituted non-compliance and thus discharge the defendants from their obligation.

The judge in dismissing the claim considered the issue of repudiation. He said, if an essential condition of a contract is broken, the innocent party ordinarily has a right eight to treat himself as discharged and to recover damages for the particular breach. Turning to the principle applicable, the judge said, if in a contract for goods to be delivered or paid for or by installment, it is a question of fact whether failure to deliver one or more installments or pay for one or more deliveries constitutes repudiation. To determine the nature of the breach, the test is whether the breach is of such kind as to lead to the inference that similar breaches will be committed with respect to subsequent installments. The court held that the condition by the plaintiff to pay cash for each delivery formed a substantial condition of the contract and failure to observe will enable the company to treat as a breach.

3.3 FUNDAMENTAL BREACH

Another circumstance in which a party to contract can treat himself as discharged for the breach of contract is where a party to the contract commits a fundamental breach.

Lord Diplock in ***Photo Productions Ltd. v. Securities Transport Ltd. (1980) AC 827***, defined a fundamental breach of contract as an event resulting from the failure of by one party to perform a primary obligation which has the effect of depriving the party of substantially the whole benefit of the contract which was the intention of the parties that he should obtain from the contract. Before 1966, it was the general belief that a party who is guilty of fundamental breach of contract could not avoid liability by reliance on an exemption clause inserted into the contract. The decision in ***Suisse Antlantique case (1967) AC 361,*** however, reversed the general opinion. Fundamental breach is a breach which goes to the root of the contract and has the effect of depriving the innocent party of achieving the main purpose of the contract.

In essence, the breach discharges the innocent party from further performance, and lead him to terminate the contract. A breach of essential term in a contract can lead to a fundamental breach. Since the breach of fundamental term is rather subjective in nature, the parties themselves must have regarded the fundamental term as of major importance when the contract was made.

The court is empowered to determine whether the term is major, minor or fundamentally important so as to constitute a breach. It is often observed that there is no difference between the breach of fundamental term and a breach of condition in contract. A condition is an important stipulation in the contract that goes to the root of the contract, the breach of which entitles the innocent party to a discharge or repudiation.

In essence a condition is a fundamental term of a contract which has the same effect as a breach of fundamental term. In the Sale of Goods Edict, it was stated that a breach if condition will gives rise to a claim for damages but as Sagay righty observed, the right to repudiate does not apply to fundamental breach of fundamental terms.

3.4 EFFECT OF DISCHARGE BY BREACH

The effect of repudiation of contract or a fundamental is that such a party is discharged from the performance of all future obligations. The rationale for an award of damages is restitution in intergrum that is so far as the damages claim are too remote, the plaintiff shall be restored as far as money can do it into the position in which he would have been if the breach had not occurred. The measure of damages is the loss flowing naturally from the breach and incurred in direct consequence of the violation. In ***Kauri Construction Ltd. v. Agbana (1998) 9 NWLR (pt. 539) 581***, there was ample evidence showing that the respondent would have been entitled to N41,000.00 for the construction of the one house and out of this amount, N1,000 was advanced t him. He is therefore entitled to a balance of N13,000.00 only.

The contract is not rescinded ***ab initio***, it only discharges the party from obligations that are not due at the time of discharge. According to Lord Diplock in ***Photo Productions Ltd. v. Securities (1980) AC 827 (1978) 1 WLR 856,*** where the innocent party elects to terminate the contract, the court said:

"there is substituted by implication of law for the primary obligations which remained unperformed, a secondary obligation to pay money, compensates to the other party for the loss sustained by, in consequence of their non-performance in the future and the unperformed primary obligations of that other party are discharged".

The consequence of discharge differs

1. Where the innocent party treats the contract as still in force.
2. Where the innocent party treats the contract as discharged.

3.4.1 CONTRACT STILL IN FORCE

Where the innocent party treats the contract as still in force, the status quo ante is retained, the contract remains in force and the party maintains all their rights and obligations. Thus, in Modem Publications Ltd. v. Academy Press Publications Ltd (1968) 2 ALR 336, the plaintiff and defendant undertook to print magazines to specified measurements for the plaintiff. When the magazines were printed they were not of specified size.

Standard of production was inferior, but nevertheless, the plaintiff took the delivery and distributed for sale without objection. The plaintiff instituted action for breach of contract. The court held that when one party is in breach of a condition contained in a contract, the other party is not compelled to accept the breach as repudiation. He may waive the breach as he so wishes and elect to sue for damages. The court awarded damages in favour of the plaintiff.

In ***Bayo Kuku v. Permroof Contractor Ltd (1971) 1 UILR 161***, the appellant was engaged to do some repair work on the roof and after the sued for respondents had done part of the work, the respondent terminated the contract, nevertheless the respondent completed the job and sued for the full contract sum. In the High Court, it was argued that the respondents were only entitled for damages for the work they had done. The court rejected the argument and restated the position of the law that repudiation of the contract by one party does not of itself discharge the contract. It leaves the innocent party with an option to either treat the contract as still alive or to accept the repudiation as putting an end to the court. In essence, the letter of termination did not operate to discharge the contract.

It must also be stated that refusal to accept repudiation may be an advantage to the plaintiff in certain circumstances as in sale of goods, where instance the date of delivery is in December and the contract was repudiated in August, and the value of the goods

became higher in December than in August. The damages payable would be higher in December than August had the plaintiff accepted the repudiation in August.

3.4.2 INNOCENT PARTY TREAT THE CONTRACT AS DISCHARGED

In such a situation, the party who is at fault is liable for all the breaches committed. In ***Moschi v. Lep Air Services Ltd (1973) AC 331***, the court stated the legal consequences of repudiation. It said;

> ***"When a contract is brought to an end by repudiation accepted by the innocent party, all the obligation in the contract come to an end and they are replaced by operation of law by an obligations to pay damages. The damages are assessed by reference to the old obligations but the old obligations no longer exist as an obligation. Were it otherwise, there would be in existence simultaneously two obligations, one to perform the contract, and the other to an award of damages. But that could not be right. The only legal nexus remaining is the obligation to pay damages."***

A party to a breach of contract cannot approbate and reprobate. According to ***Bayo Kuku v. Permroof Contractors Ltd (1971) 1 UILR 161***. Once the injured party h decided to accpt repudiation, he cannot later change his mind and treat the contract as subsisting. One he has decided to treat the contract subsisting, he cannot treat the contract as terminated unless there are further breaches.

4.0 CONCLUSION

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

5.0 SUMMARY

In this module you have learnt four major ways in which a contract can be discharged between parties. A contract can be discharged in any of these ways depending on the

parties, terms and circumstances that surrounds the contract, either before or during the subsisting contract.

6.0 TUTOR-MARKED ASSIGNMENT

1. a. Outline four ways in which a contract can be discharged.

b. Dand Mark is building a hotel in Eagle square, Abuja. Nnamani is contracted to install the air-conditioning for N200 million, payable upon completion. Ten months into the one-year contract, the hotel is destroyed by a freak fire.

c. Will Nnamani recover all or part of the contract price?

2. What is 'anticipatory' breach of contract? Give two examples.

3. What is the object and limitation of Lagos Law Reform (Frustrated Contract) Act, 1994

7.0 REFERENCES/FURTHER READINGS

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MODULE 4 REMEDIES/DAMAGES

Unit 1 Remedies for Breach of Contract
Unit 2 Remedies: Legal and Equitable
Unit 3 Quantum Meruit Claims
Unit 4 Quasi-Contract

UNIT1 REMEDIES: LEGAL AND EQUITABLE

CONTENTS

1.0 Introduction
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- 3.5 Equitable Remedies
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4.0 Conclusion
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1.0 INTRODUCTION

As you have seen, a party who has suffered a loss by breach of contract has a right to seek redress in the courts for, among other things, compensation by way of damages. As you will study in the final part of this unit, the general object of damages is to place the injured party, as near as is possible, in the position he would have been in if the breach

had not occurred or, in other words, if the contract had been performed. Bear this concept in mind as the underlying foundation of this topic when you examine civil remedies in the law of contract.

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

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

2.0 OBJECTIVES

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

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

3.0 MAIN CONTENT

3.1 KINDS OF DAMAGES

1. **Nominal:** Any breach of contract gives the innocent party a right of action for damages. As already stated, the object of awarding damages is to compensate the injured party for the loss occasioned by the breach. If the injured party has not suffered any actual loss, although his legal rights has been infringed by the breach, he will only be awarded nominal damages, i.e., a small amount. Thus, in ***Solomon v. Pickering and Co. Ltd (1926) 6 NLR 39*** the defendant entered into a verbal agreement with the plaintiff in Calabar, in March 1922, whereby the defendants agreed to ship and sell palm oil in New York. The plaintiff then handed over to the defendants a bill of lading in respect of the consignment sometime in June 1922. The defendants unilaterally transferred the oil by ship to Liverpool in England where they sold it, without consulting the plaintiff. The plaintiff brought an action for damages,

for the loss suffered by him as a result of wrongful sale of the palm oil in Liverpool instead of New York as stipulated under the contract.

It was held that, the defendants nts were in breach of contract and so liable to pay the plaintiff only nominal damages, as the plaintiff could not establish special damages. It should be noted the amount payable in each case is at the discretion of the court.

2. **Contemptuous:** Sometime, particularly in actions for breach of promise of marriage, contemptuous damages (e.g., a kobo) may be awarded, vindicating the plaintiff but indicating that the action ought not have been brought.

3. **Punitive or Exemplary:** As we may recall, damages are compensatory' but there are two recognized instances in which the court may award substantial damages called punitive or exemplary damages (i.e., damages in excess of the loss actually suffered), to the injured party. The first instance is also the case of breach of promise of marriage. Such exemplary damages may be awarded substantial damages taking such factors as period of courtship, the waning in attraction of the plaintiff, the prospects of marriage to mention a few, into consideration, see the case of ***S.C.O.A Ltd. v. Ogana (1958) WRNLR 141***. Such damages are partly punitive and partly compensatory in character. The aim of punitive damages is to serve as a deterrent for such breach of contract.

   Secondly, exemplary damages are awarded in circumstances where a breach of contract gives rise to loss of reputation. This will surely be the case where a banking company unreasonably dishonours the cheque of a customer which in turn questions his credit-worthiness. If the customer is a trader, he will recover substantial damages without pleading and proving actual damages; and as a general rule, the smaller the amount of the cheque, the greater the damage to credit sustained. But a non-trader can recover nominal damages, unless he proves loss of credit or other special damages. See ***Gibbons v. Westminster Bank Ltd. (1939) 2 KB 882.***

4. **Ordinary damages:** We have also ordinary or general which is the actual sum of money necessary to compensate the injured party for the sustained as a result of the breach.

5. **Special damages:** Finally, we have special damages is the amount of money that must be paid as compensation to the injured party for the loss sustained beyond ordinary or general damages, and which is not the type that would necessarily result from the particular breach, Such damages, which arise from circumstances peculiar to the case, is compensated if it can be shown that the party at fault had at the time of contracting, sufficient knowledge of such circumstances and nevertheless entered into the contract on that basis. As stated by Lord McNaghten in ***Bolag v. Hutchinson (1905) AC 515, at p.525.***

   'General' damages are such as the law will presume to be the direct, natural and probable consequence of the complained of. 'Special' damages, on the other hand,

are such as the law will not infer the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly. In cases of contract, special or exceptional damages cannot be claimed unless such damages are within the contemplation of the parties at the time of contract.

3.2 Liquidated Damages

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

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

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

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

3.3 UNLIQUIDATED DAMAGES

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

Damages for Injured Feelings

This is a complex area of the law, as its underlying foundation is predicated (based) on trying to place the injured party in the same position as if the contract had been performed. So where does that leave the potential Plaintiff in our tour example, in which he has suffered disappointment and perhaps physical discomfort or injured feelings? The early judicial view was that such compensation would not be awarded in cases involving, among other things, mere inconvenience, annoyance, disappointment and without any resulting real physical inconvenience; *Hobles v London & South Western Rowley Co (1875).* _ This approach was based on policy considerations, in that the courts did not want to open the floodgates to damage claims in such circumstances. However, judicial thinking has advanced since then and does not necessarily disregard the fact that such feelings can arise from a breached contract. In *Jarvis v Swan Tours Ltd (1973),* where Jarvis experienced disappointment, distress, upset and frustration resulting from glowing promises made by Swan Tours for his Swiss holiday package, Lord Denning and Davis L J acknowledged the difficulties in assessing damages in these types of claim and the inherent policy considerations, but noted that emotional distress has been satisfactorily awarded in tort claims.

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

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

3.4 PENALTIES

Sometimes, the parties to a contract provide, in the contract itself, that a specified sum shall be payable in the event of breach. In other words, parties to a contract may fix the sum payable to the injured party in the event of a breach being committed. Such sum may be either liquidated damages or a penalty. It will regarded as liquidated damages if, on a proper construction, such a provision may be said to represent a genuine pre-estimate of the damages likely to result from the breach, and it is valid. Thus, in ***Dunlop v. New Garage Co. (1915) AC 79*** Dunlop, motor tyre manufacturers, sold tyres at a reduced rate to the defendants (wholesale dealers), on the terms that no private customer should be supplied below certain listed prices. The defendants agreed to observe this undertaking and to pay 'the sum of £5 as liquidated damages' for every tyre sold in breach of the agreement and, when sued by Dunlop, for selling below the listed prices, it pleaded that the £5 per tyre was a penalty.

It was held, by the House of Lords, that the sum was not a penalty and was therefore recoverable as it was intended as a genuine pre-estimate of the damage to Dunlop. It is necessary to note that in the case of liquidated damages, the plaintiff can recover the sum of specific in the contract, even if his actual loss is less than the amount specified. He will also recover the specified sum if his actual loss is more.

But sometimes, a clause in a contract providing for a specified sum may be challenged on the ground that it is a penalty, that is, an amount fixed arbitrarily as a threat over the head of the defendant, to try to force him to perform the contract. Therefore, where such a provision is made in terrorem with the primary motive of securing the performance of the contract, it is bad law, for as stated above, it is a penalty. If the court holds that that clause is a penalty clause, it is disregarded, and the plaintiff cannot recover more than his actual loss. In other words, if the pre-estimate and measure damages in accordance with the principles discussed earlier. Thus, in ***Udeozo and ors v. Incar (Nigeria) ltd. (1967) FNLR 90***, the parties fixed a pre-estimate of loss at £250. The court rejected this stipulation and proceeded to award £750 damages to the plaintiff.

Whenever the specified sum is liquidated damages or a penalty depends on the intention of the parties. To discover that intention, certain guidelines assist the courts in testing the genuineness of the stipulated pre-estimate.

1. To decide whether a sum is a penalty or liquidated damages, regard is given to the circumstances prevailing at the time of the formation of the contract and not at the time of the action.
2. The fact that the specified sum is described as a 'penalty' or as 'liquidated damages' (or any similar expression) is relevant but not decisive, for the court may decide otherwise.

3. The sum fixed will be regarded as a penalty if it is clearly extravagant and incommensurate with the greatest amount of loss that could conceivably have been incurred. In other words, extravagant and unconscionable pre-estimates often indicate that the pre-estimate are penalties, as well as where the pre-estimate consists only in a payment of a sum of money, and sum stipulated is greater than the sum which ought to have been paid.
4. If the breach is of a promise to pay money by a certain date and the sum fixed is greater than the sum that should have been paid, the sum will be held to be a penalty. See ***Kemble v. Farren (1829) 6 Bing. 141***
5. The sum will be presumed to be penalty when 'a single lump sum is made payable by way of compensation on the occurrence of one or more or all several events, some of which may occasion serious damage and other but trifling damage.' This presumption is however rebuttable.
6. Impossibility in estimating accurately the damage engendered by the breach does not make the sum fixed a penalty.

3.5 EQUITABLE REMEDIES

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

In addition to rescission, the other important remedies are specific performance, and the granting of an injunction or restraining order. The former is *positive* in that the defaulting party may be ordered by the court to complete the sale transaction upon which he intends to default (this remedy to the injured party would be in lieu of damages, if the court considers it equitable that the defaulting party be ordered to complete). This remedy is particularly common with real estate transactions because of the special place land occupies in our economy. *African Songs Ltd v Sunday Adeniyi.*

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

Rectification is another equitable remedy whereby it can be proven that the written document does not adequately reflect a prior oral agreement which has been made. The court therefore effectively re-drafts the agreement to give effect to the true intent of the

parties; for example, if it can be shown that the consideration had not been given when the document indicated that it had. Rectification as a remedy is a device that is an exception to the parol evidence rule. The parol evidence rule, as you have learned, states generally that a contractual document will not be altered or varied by the admission of extrinsic oral evidence.

3.6 EXTINCTION OF REMEDIES

The rights of a injured party to sue ona breach contract may be extinguished in any of the following ways:

1. By a discharge or release agreement between the parties. This may be achieved through accord and satisfaction as already discussed.
2. By a court's judgment which merges the right of action for breach of contract in the decision of the court leaving a contract of record.
3. By the affluxion or lapse of time. In such a situation, the action in relation to such breach of contract is said to be statute-barred.

   In Nigeria, the extinction of a right of action by lapse of time is governed by two systems of law:

   1. **Equity:** Claims for equitable relief such as specific performance are limited by the equitable doctrine of ***laches and acquiescence***. Equity refuses to grant relief to statute claims, in accordance with the principles that 'delay defeats equity' and 'equity aids the vigilant and not and not the indolent'. Therefore, a right of action may be lost if the injured party delays too long in enforcing his right.
2. **Statutes:** Claims for legal remedies such as breach of contract are limited by statutory rules enacted in the Statute of Limitations, 1623 (an English statute) which applies in states in the former Northern Nigeria and Eastern Nigeria, as a statute of general application, and in other limitation statutes which apply elsewhere in Nigeria. Therefore, a right of action will be lost if a statute expressly stipulated the period within which action must be brought and the aggrieved party fails to institute action within that period.

   As state above, a right for breach of contract may be extinguished by the affluxion of time in accordance with the provisions of the **English Statute of Limitations 1623** (Northern and Eastern States of Nigeria) or the **Limitation Act No. 88 of 1966** (Lagos) or the **Western Nigerian Limitation Law, 1959** (Lagos, Ogun, Oyo and Bendel States). The three statutes are basically the same in substance, but the Western Nigeria one is obviously more up to date than **Statute of Limitation**. In Britain, the current law is contained in the **Limitation Act, 1980.**

The rules enacted in these statutes are as follows:

1. Everywhere in Nigeria actions on a simple contract are extinguished after a period of six years. In other words, an action founded upon a simple contract or quasi-contract must be commenced within six years from the date on which the cause of action accrued. For speciality contracts, the limitation period is twenty years in States of the

former Northern and Eastern Nigeria and twelve years in other States. The phrase 'cause of action accrued' refers to the time when the breach takes place and not where the contract was made.

2. Time runs in each case from the date when the cause of action accrued, but where the action is based on, or the right of action is concealed by, the fraud of the defendant or his agent, or the action for relief from the consequences of mistake, time does not begin to run until the plaintiff discovers the fraud or mistake or could, with reasonable diligence have discovered it.
3. If a cause of action accrues to a person who at the time of accrual is under a disability (i.e., an infant or a person of unsound mind) the cause of action does not begin to run until the disability terminates and thereafter the action must be brought within the prescribed statutory period. In other words, if, at the time when the cause of action accrued, the plaintiff was an infant or a mentally disordered person, the action lies within six years from the cessation of the disability or from the plaintiff's death, whichever first occurs. But the suspension of the running of the statutory period does not apply where the disability supervenes after the right of action has already accrued. Again, the statutory period will not extended where a person under disability is affected by another disability, but the two disabilities are separated by a period of time in which he is not under any disability.
4. The statutory periods of limitation do not apply to any claim for specific performance of a contract or for an injunction or other equitable relief. But the exemption of claims for equitable reliefs shall, however, not affect any equitable jurisdiction of the court to refuse on the ground of acquiescence or otherwise.
5. Where the claim is for a debt or other liquidated sum, time starts to run afresh if, before or after it has expired there is:-
   a. An acknowledge in writing signed by the debtor or his agent and given to the creditor oe his agent; or
   b. A part payment by the debtor or his agent to the creditor or his agent.

   However, an acknowledgment does not bind a co-debtor, unless given as his agent, but a part payment binds co-debtors, unless given after the period of limitation has expired.
6. Finally, it must be noted that the effect of the statutory limitation is to bar the plaintiff's right of action and not to extinguished it. In other words, when a claim is statute-barred, it is only the plaintiff's right of action that is extinguished, and not his right to the debt itself. Consequently, in the case of a secured debt which has been statute-barred, the creditor may retain the security until the debtor is paid. Again, if at a future date he comes to owe the debtor, he will be entitled to deduct his own statute-barred debt and pay only the balance, if any, to the debtor. Thus, the effect of the limitation statutes is procedural not substantive.

   Since the plaintiff's right of action is merely barred but not extinguished, it follows:
   a. That a defendant wishing to rely on the plea of limitation must plead it expressly. However, this requirement may be relaxed where the parties are unrepresented by counsel and no formal pleadings have been ordered. In ***Savage v. Rotibi (1944) 10 WACA 264,*** the West African Court of Appeal held that it was set up the plea even after the plaintiff had closed his case.

b. That a debt or other liquidated debts which are statute-barred may be revived by acknowledge. The acknowledgement of the whole or part of the debt binds the acknowledger and his successors but not any other person. The acknowledgment shall be in writing and signed by the party making the acknowledgment.

The statutory provision shall not apply to actions in respect of matters which are regulated by customary law. Although the 1623 statute does not contain such a provision, it is trite law that the defence of limitations of action does not apply to suits governed by native law and custom. Thus in ***Osuro v. Anjorin (1946) 18 NLR 45,*** the defendant raised the statutory limitation of six years against the plaintiff's claim for arrears of rent and other profits collected by the defendant, the family head, in accordance with native law and custom.

The court refused that the defence could be set up because it would work substantial injustice to the plaintiff to apply the statutory limitation to an issue governed by native law and custom. However, although issues governed by the customary law have been exempted from the application of statutory provisions, it arises more complex problem of ascertaining whether the issues in controversy are governed by customary or not, in the peculiar circumstances of any case that comes before the court.

4.0 Conclusion

Generally, the party – the innocent party – who is injured by any breach of contract is entitled to claim damages and/or equitable reliefs. Damages are a form of compensation; not meant to punish any party, but to put the innocent party in the position he/she would have been but for the breach. Damages may be nominal, special, exemplary, liquidated or unliquidated. Try to understand these terms. At Common Law, contractual obligations are absolute: *Paradine V Jane* (1647): the 'Entire Contract Rules' applies. Equitable relief range from injunction, specific performance, to *quantum meruit* and rescission. Not that rescission breach terminates future obligations, not past ones. This in contrast with rescission for misrepresentation which terminates all obligations. The injured party has a duty to mitigate loss. There are problems in the area: where to draw the line between damages that are too remote to recover and those that are foreseeable and refutable; See *Hadley v Baxendale* (1854); assessment of damages and what the court may consider in awarding damages. It appears that damages are not available for a non-pecuniary damage, e.g.; injured feelings distress caused by breach except where it is a major object of the contract to give pleasure relaxation or peace of mind. See *Watts V Morrow (1991) and Farley v Skinner (2001)* the basic measure of contractual damage is the common law rule that "where a party sustained loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damage, as if contract had been performed. It is the expectation loss and this is to be distinquished from "cost of cure" reliance the loss of expenditure.

5.0 SUMMARY

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

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

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

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

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

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

6.0 TUTOR-MARKED ASSIGNMENT

1. Distinguish:

a. Remoteness of Damage b. Measure of Damage

c. *Quantum Meruit.*

2. Explain the rule of Hadley V Baxendate.

3. Explain the Principles applied by the court in awarding damages.

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UNIT 2 REMEDIES FOR BREACH OF CONTRACT

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1.0 INTRODUCTION

Within the law of contract a breach of contract is a civil wrong which involves civil liability. The sole concern will be remedies available in civil proceeding. In civil proceedings, the injured party may claim specific relief in damages or specific performance or injunction. In an action for damages, the injured party claims compensation in money for the fact that he has not received the performance for which he bargained for. Damages are the most importance and the most frequently discussed in reported judicial decisions. The bulk of judicial discussion on remedies is devoted to damages. In contractual situation, a person who has performed his own part of the contract, but has not received the agreed counter-performance from the other party may either claim back his performance or the reasonable value.

2.0 OBJECTIVES

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

- Explain the meaning of Rescission
- Known the effect of Rescission in a contract
- Understand why Damages awarded to a party in a contract.
- Understand what measurement of Damages is all about.

3.0 MAIN CONTENT

3.1 REMEDIES FOR BREACH OF CONTRACT

When a contract is broken, the injured party may have several courses of action open to him, namely:

1. To refuse further performance of the contract, i.e., rescission
2. To bring an action for damages
3. To sue on quantum meruit
4. To sue for specific performance
5. To sue for an injunction.

3.1.1 RESCISSION

The right of rescission is an equitable and exists in a number of circumstances. By way of illustration, we mention three of those circumstances: First, the right is available to a party injured by breach of a fundamental term in a contract, e.g. a condition. Secondly, it is available to a party injured by the misrepresentation of the other party. Thirdly, it is available where a contract is vitiated by mistake.

The effect of rescission in the case of misrepresentation and mistake is to terminate the contract ***ab initio*** as if it never existed. As stated by Lord Atkinson, in ***Abram Steamship Co. v. Westville Steamship Co. (1923) A.C 773, at p.781.***

> ***Such rescission terminates the contract, puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.***

On the other hand, rescission in the case of breach of a condition only terminates the contractor from the moment of rescission. Rights and obligations that have already matured are therefore not affected.

If follows, therefore, that whereas the right of rescission for misrepresentation and mistake is lost if ***restitution in integrum*** (full restoration) is no longer possible between the parties, no question of restoration arises in the case of rescission on grounds of breach. However, if in the latter case, the rescinding party is able to make restoration, the court will, in the interest of justice, require him to do so. Thus, where a buyer of goods rightfully rejects the goods for breach of a condition as to quality, the ownership of goods vests (or revests) in the seller. Furthermore, where the seller of goods rescinds the

contract because of the buyer's default, he must, without prejudice to his right to damages, return any part of the purchase price that has been paid before the rescission of the contract.

On a total breach of a contract or a breach of a fundamental term in a contract (i.e., on a breach of a condition) the injured party may, if he so wishes, treat the breach as entitling him to rescind the contract. If he opts for his right, then:

a. He is absolved from further liability on the contract.
b. He may, in the event of a total failure of consideration, recover any money paid by him.
c. He may institute an action for damages against the offending party.
d. By treating the contract as rescinded he makes himself liable to restore any benefit he has received, for example, if he has agreed to sell goods and has received all or part of the price, he must return it, unless it is a term of the contract that he need not do so.
e. If the injured party claims damages from the party who has broken the contract, he must give credit in his calculation of damages for the purchase price (or any other benefit) received by him.
f. A deposit paid by the purchaser need not be repaid if the sale goes off by the purchaser's default, but a sum give in part payment of the price is returnable.
g. If the breach has only been a breach of warranty, the injured party must perform his part, although he has a right of action for damages.

However, it is necessary to note that the right to rescission, whether it arises from breach, mistake or misrepresentation, will be lost if the innocent party has affirmed the contract, i.e., if he opted to treat it as subsisting, and also if an innocent third party has acquired the goods in good faith and for value.

3.2 DAMAGES

Whenever a party to a contract is in breach of it, the other party has a right of action for damages. Therefore, an action for damages is the one remedy which is available in every breach of contract. The object of awarding damages for breach of contract id to put the injured party, so far as money can do it, in the same position as if the contract had been performed. In other words, the aim of damages is to compensate the innocent party to the contract and place him in the position that he would have been had contract been performed. Action for damages is a common law remedy. In the award or assessment of damages, the court may ensure that the loss was occasioned by the breach and that it was not too remote.

3.2.1 Damages in Contract

The leading case of *Hadley v Baxendale* **(1854)** laid the common law foundation for the assessment of damages arising from a contractual breach. Hadley was a mill operator who contracted with Baxendale to have the latter deliver a broken mill shaft to the manufacturer for repair. The term of the contract was that Baxendale was to transport the shaft the next day. He delayed several days, so Hadley's mill remained closed for a longer

period of time. Hadley claimed damages for the profit the mill would have made had it been delivered on time. The only information Baxendale received was related to carrying the shaft on the Plaintiff's behalf. He had not been told that the mill would be closed until the shaft was returned. Furthermore, Hadley may well have had a spare shaft, as is common practice in the business (do you recall trade usage: see earlier?). Hadley's action failed and Baxendale was not liable for the loss of profit. The principle arising from that decision is now the basis for the concept of remoteness in damages, which lays down two categories of compensation which can be recovered, and which are often described as the 'first' and 'second' limbs of the *Hadley v Baxendale rule***:**

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

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

Applying the above principles to the case, the court found on the facts that the only way Hadley could succeed in his claim for damages was to show that Baxendale would reasonably foresee that the mill would be _ closed because there was no shaft, and that some special circumstances had been made known to him. He failed on both points. Hence the claim was too remote.

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

The Plaintiff claimed damages in excess of the lost revenue resulting from the closure of the laundry, and this amount was based on the fact that the new boiler was 'state-of-the-art' at the time, and would have been more profitable than the old model it replaced. On the basis of *Hadley v Baxendale,* the court rejected the claim for additional profits arising from the new dyeing process as they were not foreseeable, and not a natural consequence (the first 'limb')- Furthermore, there were no unnatural consequences pointed out by the

Plaintiff to the Defendant at the time the contract was entered into (the second 'limb'). It was held therefore, that the normal business profits lost during the period of delay were recoverable, but not the profits the Plaintiff might have received as the result of the increased efficiency of the new boiler.

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

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

As a final example, assume A breaches his contract with B and, in so doing, causes B to be in breach of his contract with C. B mitigates, or minimises his losses, by selling the goods which formed the contract with C to a third party D, at a loss. Then the measure of B's claim in damages against A will be the difference between the market price of the goods and the re-sale price to D. In other words, if B's contract price with C was exceptionally high, so that his loss on re-sale is correspondingly higher, he will be unable to claim this from A, unless A was aware of the above-market price that B was obtaining from *C: Home v Midland Railway Co.,(1873)*

3.2.2 Remoteness of Damage

In an action for damages for breach of contract two questions often arise. First, the question as to which type of damage must be accorded monetary compensation (i.e., question of remoteness of damage). Secondly, the question as to what sum must be paid as damages (i.e., question of measure of damages). As to the first question, the rule is that only the kind of damage which results naturally from the breach or which could reasonably be said to have been in the contemplation of both parties at the time of the contract must be compensated for. Thgis is the rule laid down by Alderson, B. in the leading English case of ***Hadley v. Baxendale (1854) 9 Ex. 341***. The facts of the case were as follows: The plaintiffs were millers in Gloucestershire and the defendants were common carriers of goods. The crankshaft of the plaintiffs' steam engine was broken with the result that work on the mill had come to a stand-still. They had ordered a new shaft from an engineer in Greenwich and arranged with the defendants to carry the broken shaft from their mill in Gloucester to the engineer in Greenwich to be used by the latter as a model for the new shaft. The defendants did not know that the plaintiff had no spare shaft and that the mill could not operate until the new shaft was installed. The defendants delayed the delivery of the broken shaft to the engineer for several days, with resulting delay to the plaintiffs in getting their steam mill working. The plaintiffs claimed damages for breach of contract. The court held that to decide whether the plaintiffs' damages should include loss of profits for the period of the defendants' delay.

It was held that, in the great multitude of cases of parties in a similar situation, the consequences arising in this case would not in all probability occur and the plaintiffs'

special circumstances were never communicated to the defendants. It follows therefore that the loss of profits could not reasonably be considered such a consequence of the breach of contract as could have been fairly or reasonably contemplated by both parties when they made the contract, 'for such loss would neither have flowed naturally from the breach of this contract in the great multitude of such case.. nor were the special circumstances … communicated or known to the defendants'. In other words, the defendants were not liable, for no information was given to them that a delay in the delivery of the shaft would entail loss of profits of the mill. The courts took the view that the plaintiffs might have had a spare shaft. In the words of Alderson, B:-

> ***Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the natural course of things, from such breach of contract of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to the parties, the damages resulting from the breach of such a contract which they would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most could only be supposed to have had in his contemplation the amount of injury which arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. (1843-60) All ER at p.466.***

The above pronouncement is today known as the Rule in ***Hadley v. Baxendale (supra),*** and the amount of damages for which compensation is claimed is determined in principle by the two branches of the rule, namely:

i. The damages awarded must arise as a ***natural*** result of the breach, i.e., the loss must flow naturally or directly from the breach of the contract.
ii. If there are special circumstances, causing a greater loss, them damages will only be awarded for this loss, if it was ***reasonably foreseeable*** at the time the parties entered into the contract.

We may illustrate the rule in ***Hadley v, Baxendale*** with two cases. In ***Diamond v. Campell-Jones (1961) Ch. 22***, the defendant contracted to sell some premises to the plaintiff for £6, 000. The defendants wrongfully repudiated the contract. They knew that the plaintiff was a dealer in real estate, but they did not know that he intended to convert the premises himself.

The defendants were held liable for the loss of the profit which the plaintiff would have made by resale, but not for loss of the much larger profit which he might have made by converting the premises. On the other hand, in ***Cottrill v. Steyning and Littlehampton Buidling Society (1966) 1 WLR 753***, the vendor of land knew that the purchaser intended to develop it himself. On a breach of the contract to sell, the vendor was held liable in damages for the loss of profit which the purchaser would have made by developing the property.

Let us now examine the two arms of the rule in ***Hadley v. Baxendale***.

3.2.3 Damages Arising as a Natural Result of the Breach

Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the first rule in ***Hadley v. Baxendale*** which deals with 'damages that may fairly and reasonably to considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself. Such damages will of course depend on the type of contract under reference. For example, generally, the measure of damages for breach of contract of sale of goods where market for them is the difference between the contract price and the market price of the goods at the time of refusal to deliver, or when they ought to have been delivered. In ***Mann Poole and Co. Ltd. v. Salama Agbaje (1922) 4 NLR 8,*** the defendant agreed to sell cocoa to the plaintiffs at an agreed price. On failing to make delivery, the plaintiffs sued claiming the value of all extra expenses incurred by them.

It was held that, the plaintiffs were entitled to be awarded £370 damages being the loss which directly and naturally arose from the breach of the contract but rejected the second arm of the claim as not being in the contemplation of the parties when they concluded the contract.

Statutory recognition has been given to the first arm of the Rule in ***Hadley v. Baxendale*** by sections 50 and 51 of the **Sale of Goods Act, 1893**, with respect to contracts for sale of goods.

3.2.4 Damages Arising from Special Circumstances

In addition to the knowledge which a contract-breaker is assumed to possess, whether he actually possess it or not, there may have to be imputed in a particular case, knowledge which he actually possess, of special circumstances outside the 'ordinary course of things' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the second in ***Hadley v. Baxendale***, so as to make additional loss also recoverable. This second arm of the rule deals with damages 'as 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'. In other words, the second arm of the Rule will cover the loss resulting from the knowledge specially given to the contract-breaker or the knowledge which could be imputed having regard to the circumstances. In ***Simpson v. London and North Western Railway (1876) 1 QBD 274***, the plaintiff who frequently attended cattle shows in order to promote sales of his product, delivered samples to an agent of the defendant company for carriage to the show ground at Newcastle-upon-Tyne, endorsing the consignment note as follows: 'Must be at Newcastle on Monday certain'. The defendant failed to deliver the goods in time for the show and the plaintiff sued for loss of profit at the show.

It was held that, the defendant company was liable for they had knowledge of the special circumstances, i.e., the object of carriage of the goods to the show ground and would

have appreciated that the delay on their part would occasion loss promotion of sales of the plaintiff's products.

Also, in ***Victoria Laundry Windsor Ltd. v. Newman Industries (1949) 2 KB 528***, the plaintiffs, launderers and dyes, bought from the defendants a boiler for use in their laundry. Delivery which should have been made early in June was in fact made until early in November. Consequently, the plaintiffs lost the profit on laundry work, which they could have accepted if the delivery Had Been delayed, and they were unable to take up a remuneration dyeing contract. The plaintiffs therefore sued for damages for breach of contract and claimed (i) loss of the profit they would have made the boiler been promptly delivered; (ii) loss of profit from some highly lucrative dyeing contracts. It was held:-

i. The laundry profits loss were recoverable as it was reasonably foreseeable that the laundry would be unable to do its normal work through delay of delivery of the boiler.
ii. The loss of the 'highly lucrative' dyeing contracts was irrecoverable, as this loss was not foreseeable when the contract was entered into.

3.2.5 Measure of Damages

The general rule is that the plaintiff recovers his actual loss in respect of damages which is not too remote. Therefore, subject to the question of remoteness of damages, the injured party is entitled to recover such sums as will, so far as money can do so, put him in the same financial position as if the breach had not occurred.

Although damages for breach of contract are based on financial loss, in certain circumstances damages may be recovered from the defendant for non-pecuniary losses, if they were within the contemplation of the parties as not unlikely to result from the breach. Thus, plaintiffs have been held entitled to damages where the defendant's breach of contract led to substantial physical inconvenience, pain and suffering, though normally the plaintiff will also have a right of action in tort. But these cases were regarded for injury to the plaintiff's feelings, ot for his mental distress, annoyance or loss of reputation, except in action for breach of promise to marry. Thus in ***Hamlin v. Great Northern Railways (Supra)*** it was held that, damages could not be awarded for mental distress and vexation suffered by the plaintiff on account of a breach of contract. Also in ***Groom v. Gocker (1939) 1 KB 194,*** where the plaintiff was awarded £1,000 damages by a jury for injury to his reputation r feelings as a result of a breach of contracted by the defendant, it was held, on appeal, that no damages could be recovered for such non-financial or non-jury were reduced to 40s.

In recent years, however, there has been a change of judicial attitude with regard to non-financial losses arising out of contracts. There is an indication from recent decisions that a plaintiff who has suffered a non-pecuniary loss as a result of a breach of contract would be entitled to damages if it can be shown that the distress or unhappiness was the natural and probable consequence of the breach complained of; in other words, if such a damages can be brought under the first rule in ***Hadley v. Baxendale***. Thus, in ***Jarvis v. Swans***

Tours Ltd. (1973)p 1 QB 233, the Court of Appeal unanimously held that, as a matter of principle and a proper case, damages could be awarded for 'mental distress and vexation' caused by a breach of contract. The facts of the case were that the plaintiff booked a two-week Christmas holiday in Switzerland, which was offered by the defendants and described in their brochure in grand and superlative terms. The Holiday turned out to be a great disappointment to the plaintiff because of the lack of the promised facilities and amenities. The plaintiff claimed to be entitled to compensation for inconvenience and loss of benefit. The country Court found the allegations established but awarded only £31.74 damages.

The plaintiffs appealed against the amount of damages, and it was held by Lord Denning, M.R., that, damages could be awarded for mental distress as much as for physical inconvenience. Explaining the modern position of the law, the learned judge stated:

> ***In a proper case, damages for mental distress could be recovered in contract just as damages for shock can be recovered in tort. One such case is a contract for holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages could be given for the disappointment, the distress, the up-set and frustration caused by the breach. I know that it is difficult to assess in terms of money but it is not more difficult than the loss of amenities… The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get. Looking at the matter quite broadly I think the damages in this case should be the sum of £125.***

In his own judgment, Edmund Davies, L.J., said that under modern conditions, and having regard to developments which have taken place in the law of contract since the decision in ***Hobbs v. London and South Western Railway Co. (1875) LR 10 QB 111, at pp 122-124***, which decided to the contrary, there was no authority for saying that even inconvenience that was strictly physical may be a proper element in the assessment of damages. The learned judge stated that in the particular circumstances of the present case, 'vexation', and being disappointed in a particular thing you have set you mind upon' were relevant considerations which afforded the court a guide in arriving at the proper figure of damages. According to the learned judge:

> ***When a man has paid for and properly expects an invigorating and amusing holiday, and through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that this disappointment must find no reflection in the damages to be awarded.***

This recent development in the law was followed by Akpata, J., in ***Prince Edison Eweka v, Midwest Newspaper Corporation (1976) 6 ECSLR 280***. There, the plaintiff was one of several children of Eweka II, the late Oba of Benin who died on February 8, 1923. Sometime in November 1974, the plaintiff went to the defendants and paid for an 'In Memoriam' advertisement in respect of his late father. It was regarded that the 'In Memoriam' be published on February 8, 1975. He submitted the form or the workings of

the 'In Memoriam' and a photograph of the late Oba to the Corporation. The plaintiff paid the fee of N112.82. Following the transaction with the Corporation, the plaintiff informed members of the Benin royal family, including the Oba of Benin and the Enogie of Obagie, the first and second surviving children of the late Oba respectively. The plaintiff also arranged to have a buffet dinner for members of the royal family in memory of the late Oba on February 8, 1975, the 42nd anniversary of his death. They were all invited to attend. The plaintiff gave the sum of N1, 000 to his wife to buy relevant things for the buffet dinner. The 'In Memoriam' was not published on February 8, 1975 or any other date. This the defendant explained was due to 'inadvertence'. The plaintiff thereupon brought a claim against the defendant for N50,000 'being special and general damages for breach of contract ….' The plaintiff claimed that by reason of breach of contract, he had suffered damages, humiliation, embarrassment and injury to his feelings. Part of the plaintiff's claim N 50,000 included N1,000 in respect of the buffet dinner, which was wasted because only five out of 150 members of the Royal Family turned up.

This part of the claim was rejected by the Court on the ground that the plaintiff did not notify the defendants about his intention to hold a buffet dinner when he came to make the 'in Memoriam' agreement with the defendants. The Corporation knew nothing about the dinner, and the publication of an 'In Memoriam' had no bearing on the dinner, and the latter could therefore not be tied up with the failure to publish the former. The court therefore held that, 'the only damages recoverable for breach of contract were those which were in the reasonable contemplation of both parties as a consequence of the breach at the time the contract was entered into.'

Turning to the plaintiffs next claim, which was based humiliation, embarrassment and distress he had suffered as a consequence of the defendants' failure to publish the 'In Memoriam' the court posted a question, namely 'can damages be awarded for distress and unhappiness caused a plaintiff arising from a breach of contract?' The court answered this question in the negative, having reviewed the old cases on the matter. But the court, therefore, came to the conclusion that such cases on the matter. But the court took notice of the change in judicial attitude as exemplified by modern cases like ***Jarvis v. Swans Tours Ltd. (1973) 1 QB 233, Heywood v. Wellers (1976) QB 446 and Jackson v. Horizon Holidays Ltd. (o1975) 1 WLR 1468***. The Court therefore, came to the conclusion that such cases like distress, vexation, humiliation, etc., arising from a breach of contract, should attract damages if it can be shown that the distress or unhappiness was the natural and probable consequences of the breach complained of. Applying the principles laid down in the above modern cases, Akpata, J., concluded that:

> ***In the instant case, the plaintiff had wanted to advertise the 'In Memoriam' of his late father in these words 'In loving memory of our beloved father grandfather … who departed this life on 8th February, 1933. It was 42 years since you left us. We thank God that all your labour on us bear fruit and testimony of you good life. May our soul rest in perfect peace. Amen'. In my view distress, unhappiness and embarrassment experienced by the plaintiff following the breach, were the natural or probable consequence of failure to insert the advertisement. An advertisement in a sense is a publication to the whole world. In effect, the plaintiff was denied the opportunity, which he paid***

for, to make it known to members of the public who read the 'Nigeria Observer', particularly the members of the royal family his expression gratitude to God because of his late father's 'labour on us bear fruits' and his prayer that the late father's soul rest in peace. The words may be regarded as mere sentiments, but the point it that embarrassment, distress and unhappiness were bound to flow and did flow from the breach. The plaintiff had been deprived of the inner satisfaction of having the 'In Memoriam' of his late father published. It is indisputable that the average Nigerian places great premium on the remembrance of the dead. When someone paid for an 'In Memoriam' and expects the memory of his father to be recalled in the minds of several, and due to no fault of his, his expectations did not materialize, his distress, arising from the breach, should be reflected in damages. It must also be recognized that mental anguish may, in certain circumstances, be more harmful to the health of an individual than physical injury. In the past such mental anguish or distress could be damnum abseque injuria.

However, the court held that, as far as the quantum of damages was concerned the plaintiff's claim was out of proportion to the damages suffered, and awarded N400 for the distress and embarrassment caused to the plaintiff by the defendants' breach of contract.

3.2.6 Mitigation Of Damages

The law imposes a duty on the plaintiff to mitigate his damages in the event of the breach of contract. In other words, the injured party must endeavour to minimize the loss flowing from the breach, otherwise he cannot recover any part of the loss which the defendant can prove to have resulted from the plaintiffs' failure to mitigate. Thus, in ***Economic Exports Ltd. v. Jimoh Odutola (1959) WRNLR 239***, the defendant refused to accept the last of three shipments of goods shipped to him by the plaintiffs in January 1954. The plaintiffs tried in vain to make the defendant accept the shipment and after about 14months of fruitless negotiation, the plaintiffs sold the goods by auction. They therefore sued the defendant for breach of contract, claiming, among other things, two years' interest on the goods.

It was held, inter alia, that it is the plaintiffs' duty to minimize their loss and that as the plaintiffs ought to have sold the goods within a year of the defendant's refusal to accept them, therefore, they were only entitled to one year's interest at the agreed rate. But the plaintiff is not under a duty to mitigate damages before there has been a breach of the contract. Furthermore, in an effort to minimize his damages, the plaintiff should avoid necessary loss, for he cannot recover any greater sum than would have been recoverable if he had acted reasonably.

3.2.7 Duty to Mitigate

In the last paragraph, you encountered the word 'mitigate', which is a foundation of the common law of damages. It says that irrespective of the surrounding circumstances, when a contract is breached, the injured party is obliged to mitigate or minimise his losses. He

cannot sit back and assume his lawyer will obtain a fine settlement by way of damages. In other words, the wrongfully dismissed employee must immediately seek a new position. The vendor of a flat in which the purchaser has 'walked away' on the completion date, is similarly obliged to immediately place his flat on the market. Loss therefore will not be recoverable for that part for which the injured party has failed to mitigate.

4.0 CONCLUSION

The general rule with regard to the time of assessment is that damages should be assessed as at the time when the cause of action arose, namely, the date of the breach. But as was stated in ***John v. Agnew (1980) AC 367 at p. 400***, this is not an absolute rule, and the court will fix any other appropriate day if the date of breach will work injustice. Situations in which the court will not apply the date of breach include (i) where the innocent party refuses to treat the breach as terminating the contract, (ii) where the plaintiff did not know until later that a breach had occurred. Indeed, in one case where there was no market for the subject-matter of the contract at the time of the breach, the court used as its date of assessment of damages, a subsequent date when it could be established that such a market had become available.

5.0 SUMMARY

By now, you should fully appreciate the difficulties inherent in clearly identifying a particular loss that a party has suffered in a contract which has been breached, and in asking did that loss result from the Defendant's conduct? Furthermore, we may encounter problems in calculating the injured party's compensation for that loss. Just how much is a spoiled holiday worth? Notwithstanding the occasional flurry of judicial generosity, the fact remains we must not lose sight of the principle that an injured party cannot recover damages for all the consequences which might arise from breach; to do otherwise would put the courts in the floodgate zone and, potentially, there would be no end to liability. Put briefly, the damages a person claims must not be too *remote. Mobil Oil(Nigeria) Ltd. v Abraham Akinfosile* (1969) NMLR 211.

6.0 TUTOR-MARKED ASSIGMENT

1. Where a party suffers from a breach of contract, it is entitled to claim for all losses that result from it. Evaluate the legal validity of this statement with reference to the rule in Hadley v. Baxendale.
2. Discuss the following broadly rescission, damages, damages arising from special circumstances.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 QUANTUM MERUIT CLAIMS

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1.0 INTRODUCTION

Quantum Meruit is where a party claims a reasonable compensation for some benefit or for work done under a contract. It is a claim of reasonable remuneration and such claim arises where one party is prevented by the other from completing performance. The aggrieved party may claim on a Quantum Meruit; thus, in ***Bernardy v. Harding (1853) 8 Ex. Ch. 822***, where one party has absolutely refused to performed or has rendered himself of incapable of performing his party of the contract, the other party can either sue for breach and claim his remedy in damages `for rescind the contract and sue on quantum meruit for the work actually done.

2.0 OBJECTIVES

At the end of the unit you should be able to understand:

- Meaning of Quantum Meruit
- Specific Performance
- Injunction
- Effect of Rate of Exchange
- Damages in Foreign Currency

3.0 MAIN CONTENT

3.1 MEANING OF QUANTUM MERUIT

Quantum Meruit means 'as much as he has earned'. A claim for a quantum meruit arises where there is an agreement for services or for supply of goods and no price or remuneration has been fixed for the goods or work done. The claim is contractual in nature and it implies the payment of a reasonable sum. In ***Warner & Warner International v. F.H.A (1993) 6 NWLR (pt. 298) 148 SC***, the court held that a claim on quantum meruit means that no specific sums can be claimed or proved. If they can, then each items stands on fails on the basis of evidence.

In ***Ekpe v. Midwestern Nigerian Development Corporation (1967) NMLR 407*** the appellant, a daily paid worker applied to be put on a permanent staff. He was given a form to fill and filled from and submitted six months after, he was neither a permanent member nor paid any salary. He brought a claim for the payment of salary for 6 months. The Court of Appeal held that where work has actually been done by one party under a void contract, the party who did the work can sue on quantum meruit to recover his remuneration for the work done provided he did the work in good faith and without the knowledge that the contract was void.

In ***International Nigerbuild Construction Co. Ltd. v. Giwa (2003) NWLR (pt. 836) 80***, the court held that where a plaintiffs can proof the rendering of services under an unenforceable contract, they contract is admissible as evidence of the value of services rendered and he may receive on a quantum meruit basis. Where work done is done or services rendered of which the defendant has had some benefit, the plaintiff can recover the value of work done on a quantum meruit basis.

Thus in ***Kpebimooh v. Board of Governors, Western Ijaw Teachers Training College (1993) NWLR (pt.298) 148 SC***, it was agreed that the contractor would be paid an increase on the contract price but no price was fixed. The court held that since the work was done for their defendants at their request without any agreement as the price, the law will imply an agreement to pay a reasonable remuneration which may be recovered on a quantum meruit. In ***Kuku v. Permaroof Contractors Ltd. (1969) NCLR 334*** the plaintiff agreed to do certain building work stated, the defendant repudiated the contract and

before the plaintiff knew, he has caused some work to be done and sued to recover for the work done.

Taylor C.J. held that where one party to a contract has repudiated a contract, or disabled himself from performing it, the other party may treat it as at an end and if he has performed his part of the contract wholly or in part, he has a right to sue on quantum meruit for what he has done. Where the price to a contract is not fixed the employed can sue on a quantum meruit to recover what he has earned, that is the reasonable amount to be paid for this service.

3.2 SPECIFIC PERFORMANCE AND INJUNCTION

Under the common law, a breach of contract obligations is compensated through the payment of damages. Specific enforcement of contractual obligation was not available at common law except under equity.

In equity too, the enforcement of contractual obligation are subject to many restrictions, based on the character of the remedy. One restriction is where the contract calls for personal performance. Other restrictions are impracticability to perform specifically or the form of relief which does not lend itself to specific performance or the form of relief may be unnecessary and undesirable.

The traditional restriction is that specific performance will not be ordered where damages are not adequate. Damages are obviously the most adequate remedy where the person injured can get a satisfactory equivalent. On the other hand, damages are not adequate where injured person cannot obtain a satisfactory substitute. In certain types of contract the courts found damages are not adequate compensation or damages are not adequate substitute. This is because of nature of the subject-matter.

The law takes the view in respect of a contract for sale of land or of a house. Other instances where specific performance can be ordered are contracts to execute a mortgage where, money is paid in advance, to pay or sell annuity, or were a loss is difficult to prove or contracts are not legally enforceable.

Specific performance is a decree, which is ordered by the court, which directs a contracting party to perform the contract which he has promised to do. It is an equitable relief and alternative remedy to damages in appropriate cases. It is an example of equity acts in personam which is granted at the discretion of the court. It is not granted as of right, but granted judiciously by the court. The court considers in all the cases, whether specific performance will create hardship for the party. Thus in ***Taylor v. H. B. Russet (1947) 12 WACA 1799***, the court refused to grant specific performance for a contract for the sale of land because at the time the land had been sold to someone else, who had in turn sold it to another person and the buyers were not aware of their earlier agreement. In refusing the application, the court observed.

a. That the title to the property had passed and it would be impossible for him to carry out the order
b. To grant specific performance would result in fostering two or more further actions.
c. The doctrine of specific, performance is an equitable relief. It will not be granted where it will cause hardship to third parties unless it is shown that the third parties were aware of the evidence of the contract.
d. That the person seeking to enforce a contract must show that all conditions precedent have been fulfilled and the party is ready and willing to perform all the terms which ought to be performed.

3.3 SPECIFIC PERFORMANCE

In the Supreme Court decision of ***Incar (Nig.) Plc. V. Bolex Ent (Nig.) (2001) 12 NWLR (pt.728) 646*** on the nature of contract enforceable by specific performance, the court restated that only a valid contract, which has given right to a legal or equitable interest is capable of being enforced by an order of specific performance. In this case the appellant desired to sell his properties in Port Harcourt, Lagos and Ibadan and invited estate agents to get buyer. Sunbo Onitirir was the one of them who received this assignment.

Onitiri got a buyer who is interested and duly acknowledge receipt of N4m cheque. Onitirir informed the appellant of its transaction and forwarded the cheque. The appellant rejected the offer of N4m, the appellant received other offers eventually sold the property to the 2nfd appellant for N4.25m and put the 2nd appellant in possession. Having failed to secure the property the respondent commenced an action against the 1st appellant joining 2nd appellant to claim:

a. A declaration that the plaintiff is the equitable owner of the premises;
b. An order of specific performance against the 1st defendant compelling him to honour the contract.

Upon the facts disclosed, it is clear that the respondent paid the sum of N4m to the firm of Sunbo Onitiri but it is also manifest that the action of the firm was in excess of the willingly allowed the purported agreement to sell the disputed property cannot bind the 1st appellant as to enable the respondent to obtain any interest, legal or equitable in the disputed property.

As the respondent is not in possession of any legal or equitable interest, he cannot be the beneficiary of the equitable over of specific person. A person claiming specific performance must have legal or equitable interest in the property. Generally speaking, specific performance will be allowed in the following circumstance;

3.3.1 Where damages are hard to quantify

This is where the value of such contract is uncertain or it is difficult to assess the damages. In a contract to sell annuities or a contract to execute a mortgage in consideration of money lent, the contract can be specifically forced. ***Swiss Bank Corp. v. Lloyd's Bank Ltd (1979) Ch. 548.***

A contract to have a loan repaid out of specific property, such a right is specifically enforceable. Such situation also, damages may be inadequate remedy because the loss is difficult to prove or the item of loss may not be legally recoverable.

3.3.2 Discretionary Nature

Specific performance is a discretionary remedy. The court is not bound to order specific performance except it is just and equitable to do so. It is an equitable remedy predicated on fixed rules and principles. The grant of specific performance is not arbitrary but one that is governed by certain rules and principles. The court will bear the following factors in mind.

a. Severe Hardship

The court will refuse to grant specific performance on the ground that it will use severe hardship to the defendant. For instance, where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the plaintiff, ***Tito v. Waddle (No. 2) 1977 Ch. 258***. The court can refuse to order specific performance on the ground of severe hardship where it results from circumstances which occurs after conclusion of the contract. Thus, in ***Patel v. Ali (1984) Ch. 283*** the court refused to order specific performance for the sale of a housed after four years delay for which neither party was responsible and during the time the circumstance had changed disastrously.

On the other hand, the severe hardship must not be due to mere peculiarly difficulties for instance the purchaser of a house will not be denied specific performance merely because the vendor finds it difficult with the sale proceeds to acquire alternative accommodation.

b. Unfairness

The court will refuse specific performance of a contract which has be obtained by unfair mean. In ***Watters v. Morgan (1861) 3 DF & 718***, the defendant agreed grant a mining lease over land which he had just bought. The defendant was induced to sign the agreement in ignorance of the value of his property. The court refused to grant specific performance. The plaintiff has taken an unfair advantage of the defendant and the court refused specific performance. The plaintiff prepared a draft agreement and hurried the defendant to sign before he could discover the value of the property.

c. Inadequate of Consideration

The general belief is that mere inadequacy of consideration is not a ground for refusing specific performance. Inadequacy of consideration can however be used to grant specific performance unless it is such as shocks conscience and amount in itself to conclusive and decisive evidence of fraud. Fraud must be coupled with some invalidating factors such mistake, unfair advantage of unequal bargaining position. In this case specific performance may be granted.

d. Conduct of plaintiff

The conduct of plaintiff is an important consideration in granting specific performance. The plaintiff must be ready to carry out his own part of the bargain. A purchaser of land could not get specific performance if he refused to perform a stipulated to which he had agreed. Specific performance was denied to a ***solus*** agreement to a patrol company on the ground that he has given discounts to other garages. ***Malius v. Freeman (1837) 2 Keen 25.***

e. Impossibility

The court will not compel a person to do what is impossible. Specific performance will not be ordered against a person who agreed to sell land which he does not possess. As a general rule, the court will refuse specific performance because it is impracticable to enforce. ***Shell Uk Ltd. v. Lostock Garages Ltd. (1976)p 1 WLR 1187.***

3.3.3 Contracts not specifically Enforceable

There are some contracts in which the court will not enforce or order specific performance. ***Okusi v. Joseph (1966) LLR 105.***

As a general rule, it has long been settled that the court will not specifically enforce contract of personal service. Specific performance will unduly interfere with personal liberty of individual as it will undesirable to compelling unwilling party to remain in personal relations. Under the **English Trade Labour Relations Act, 1974**

"It provides that no court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction." Section 16 of the Act.

As an employee cannot be compelled to do any work so also an employer cannot be forced to employ. It will be improper to force a person to a contract between two unwilling parties. However, the rule of non-enforceability of specific performance do not apply to relationship in public services such as public commission, Board of Directors or University Governing Council. Contract which are not specifically enforceable are limited to contracts for personal services of personal nature. There is no general rule against contract where one party undertakes to provide services such as contract to publish a piece of music, or contract to build.

3.3.4 Contract Requiring Constant Supervision

The court will not order specific performance in contract of continuous nature, the proper performance of which might require constant supervision. In ***Riyan v. Mutual Tontine Association (1893) Ch. 116*** the lease agreement gave the tenant the right to the services of a porter, who was to be constantly in attendance. The court refused to order specific performance because in required constant superintendence by the court, which the court has always declined. Other contracts include contract to deliver goods in installment obligations to operate railway signals, to cultivate farm in a particular manner, a voyage charter party. ***Blackett v. Bates (1865)LR 1 Ch. 177***.

It has been said that the difficulty of supervision is often exaggerated. For example, in building contracts, no practically difficulty seems to have arise in which court have specifically enforced. In bankruptcy the court may appoint a receiver to run the business or to manage the business of a bankruptcy patient in the alternative, the plaintiff could be encouraged to appoint agent to supervise the enforcement of the decree. Generally speaking, difficulty of supervisor is not in itself a bar to specific performance but only of the factors to be taken into account whether the relief will be granted or not.

3.3.5 Contract which are too Vague

Specific performance will be refused where an agreement cannot enforced at all or even compensated in damages.

Where the agreement is definite, it may still be too vague to specifically enforced. For instance, the court refused to publish an article where the parties disagreed on the wordings. Precision is essential since it is important to state exactly what the defendant want. In the sale of goodwill, specific enforcement of contract was considered impossible for the difficulty to state precisely what the vendor was to do. A contract is not vague to be specifically enforced where it is subjected to amendments.

3.3.6 Building Contracts

The general rule is that a contract to erect a building cannot be specifically enforced. The reasons are

a. Damages are not an adequate remedy;
b. The contract may be too vague, and
c. Specific performance may require more supervsinng than the court is willing to give.

In ***Woverhamption Corporation v. Emmons (1910) 1 QB 51***, the plaintiff corporation acquired land for an improvement scheme, sold part of it to the defendant who covenanted to demolished the houses on it and build new ones. The demolition was carried out and plans for the new houses were approved. The court ordered specific performance of the new contract adequately compensated the corporation if a site in the middle of the town were left vacant instead of being occupied by houses yielding rates. The court ordered specific performance because the work was precisely defined and damages will not adequately compensate the plaintiff.

3.3.7 Contract Enforceable in Part

When the court cannot grant specific performance of the contract as a whole, it will not interfere to compel specific performance of a part of a contract. Thus in ***Riyan v. Mutual Tontine Association (1893) Ch. 116***, the court refused to compel specific performance of an undertaking to have a porter constantly in attendance. However, where part of the contracts are severable, specific performance can be separately ordered. The court may order specific performance with compensation where monetary adjustment can be made in respect of the unperformance part.

3.3.8 Terminable contract

The court will refuse an order if the party against whom specific performance is sought is entitled to terminate the contract, since the order will render it nugatory by exercising its power to terminate.

3.3.9 Promise Without Consideration

Specific performance will not be ordered on a gratuitous promise on the principle that equity will not aid a volunteer.

The principle is the same where it is binding in law because it is under seal or supported by nominal consideration. The principle that equity will not aid a volunteer does not apply where an option to buy land is granted under seal but without consideration such an option amounts to an offer-coupled with a legally binding promise not to revoke. The resulting contract of sale can be enforced.

3.4 INJUNCTION

An injunction is an equitable remedy and applicable under discretionary ground. It is not subject to the same restrictions that apply to a claim for specific performance. An injunction is appropriate where the contract is negative in nature or where the contract contains a negative stipulation. An injunction is an order by which one party to an agreement is required to do or refrain from doing a particular thing. An injunction is restrictive/preventive or mandatory/compulsive.

However, such an order is subject to a balance of convenience 'Test and may be refused if the prejudice suffered heavily outweighs the advantage that will be demised from such restoration. ***Kennaway v. Thompson (1981) QB 88***. An injunction will not be granted where it will compel or indirectly the defendant to do an act which he could not have been ordered to do by specific performance. For instance, in a contract of service, an employee cannot be restrained from committing a breach of his positive obligation to work for this would amount to enforcing a contract of service. Contract commonly enforced by an injunction are contracts in restraint of trade.

An injunction may put so much economic pressure on the employee as to force him to perform the positive part of the contract. Thus in ***Warner Bros Pictures Inc. v. Nelson(1937) 1 KB 209***, a film actress signed undertaking with the plaintiffs, her employees, not to act for any other organizations. She was restrained by an injunction from breaking her undertaking.

Similarly, in ***African Songs Ltd. v. Sunday Adeniyi Suit No: LD/1300/174 delivered on Jan. 14, 1974 (unreported)***, a musician who undertook to perform and record solely for the plaintiff company was restrained from recording for himself or for any other company for the remaining period of the contract. The plaintiff also sought an injunction to restrain the distribution of gramophone records and an order that they should be withdraw from the public. Dosumu J. held that since the records had already been distributed all over the country, nothing could be done about it. In a contract of employment, an injunction to

restrain the breach by an employee of a stipulation will only be issued if the contract contains an express negative promise. The remedy may contradict statutory provisions to make an employee perform his position obligation to work. Where the defendants obligations is not to render personal services, even though it may not be specifically enforceable an injunction can be issued. For instance, to restrain a shipowner from using a ship under charter inconsistently with the charter party, to restrain breaches of exclusive dealing agreement. An injunction has been issued to restrain a seller of uncut timber from interfering with the right of the buyer to cut down the timber.

It is not specific performance, but an injunction merely to prevent the vendor from breaking the contract. However, if a contract is made for the sale of unascertained generic goods such as coal or iron, an injunction not to break the contract or not to withhold delivery will not normally be granted since it embraces a positive obligation.

A negative stipulation which is too wide may be severed and enforced in part. Severance is not governed by the rules relating to severance of promises in illegal contract. Thus, in ***Warner Bros Pictures Inc. v. Nelson(1937) 1 KB 209***, the actress undertook two things, not to act for third parties and not to engage in any other occupation. Without plaintiffs written consent the plaintiff sought an injunction to restrained her from acting and the court granted it. The court stated that the stipulation that she could not engage in any other occupation could not be granted as such undertaking would force her to choose between idleness and performance of her obligation to work. If the negative stipulation is invalid or illegal the question severance will be determine by the principles governing illegal contract. In ***African Songs Ltd. v. Sunday Adeniyi Suit No: LD/1300/174 delivered on Jan. 14, 1974 (unreported)***, Dosunmu J. granted an injunction restraining the defendant from making any records or tapes for himself or any other organization.

The court held that the granting of an interim injunction would not drive the defendant to perform for the plaintiff or make him remain idle. In all the circumstance of the case, the injunction to be granted must be such as will be limited in scope and time and as will be reasonable for the protection of the plaintiffs business as records dealer. The court restrained the defendant from recording gramophones or tape music for commercial purpose for one year which was the period left for the agreement to run.

3.5 EFFECT OF RATE OF EXCHANGE

In contractual obligations, a contract may be expressed in foreign currency. Since the forum in which such payment is to be made is regulated by the municipal law of the country whose unit account is in question, what would be a legal tender must depend upon the law in force at the time when the contract was made. In England, the general rule is that where a contractual obligation requires the payment of money, it may be either in foreign currency or sterling and so the debt can be discharged in either way. The same principle is applicable in Nigeria, an obligation can be discharged in foreign or in naira and the currency has depreciated compared to as the same the debts was contracted, the creditor will suffer heavy losses. The claim may become worthless. It has long been accepted in English law the court order the payment of damages in English currency

whether the judgment stemmed from the breach of a contract whose proper law is English or any foreign currency. However, the amount due can be converted at proper exchange rate the above rule was abandoned in ***Milan Gas v. George Frank (Textiles) Ltd. (1976) AC 443*** where the House of Lords gave judgment expressed in Swiss franc for the payment of damages. With the pronouncement in the House of Lords, it is now possible to state the law as to judgment with some degree of certainly that the court may give judgment in foreign currency or its sterling equivalent. The rules applies to contractual actions whether the proper laws of the contract is in foreign law or English law and this extends to breach of contract whether the claim is liquidated or unliquidated damages.

The rules laid down is a rule of procedure so, a judgment in a foreign currency can be satisfied by payment of the sum due in that currency or sterling converted as at the date of the judgment. The rule of English law for determination of the appropriate currency is that unliquidated damages must be calculated in the currency which most truly expresses the plaintiffs loss and this may not necessarily be the currency in which he has directly incurred expenditure. Where it involves a liquidated sum, in a foreign currency, if the money of account and payment are different, the loss may be measured in the currency of the money of account.

3.6 DAMAGES IN FOREIGN CURRENCY

Under the law, damages recoverable for breach of contract is prima facie calculable in Nigeria currency, thus is, in naira. However, where damages are claimed which is calculable in foreign currency, the amount shall be converted into the Nigerian currency. In ***C.C.B. (Nig.) Ltd. v. Onwuchekwa (1998) 8 NWLR (pt. 562) 375 CA*** the damages recoverable would have been firstly, the naira equivalent of the money to be remitted to the overseas suppliers to cover the cost of the commodity as well as incidental expenses. In the instance case, a foreign currency was in the contemplation of the parties at the time of the contract damages will be recoverable in the foreign currency. The measure of special damages recoverable would be the value of the pound sterling at the time of the breach.

4.0 CONCLUSION

Where one person has expressly requested another to render him a service without specifying any remuneration, but the circumstance of the requested imply that the service is to be paid for, there is implied promise to pay ***quantum meruit***, i.e., so much as the party doing the services deserves. The term itself literally means “as much as he has earned”. Further, if a person by the terms of a contract is to do a certain piece of work for a lump sum, and he does only part of the work, or something different, he cannot claim under the contract, but he may be able to claim on a ***quatum meruit***, as e.g., if completion has been prevented by the act of the other person to the contract.

5.0 SUMMARY

By now you should be able to know the meaning of Quantum-Meruit. When the claim and arises under a contract. Note that a breach of contract obligation is compensated through the payment of damages, when parties can sue for damages the types of damages. The circumstances under wish the court can award such damages and the factors the court will consider before granting such damages.

6.0 TUTOR-MARKED ASSIGNMENT

1. Compare and contrast the following cases:
   a. ***Swiss Bank Corp. v. Lloyd's Bank Ltd (1979) Ch. 548.***
   b. ***Tito v. Waddle (No. 2) 1977 Ch. 258***
   c. ***Watters v. Morgan (1861) 3 DF & 718***
   d. ***Malius v. Freeman (1837) 2 Keen 25***
   e. ***Shell Uk Ltd. v. Lostock Garages Ltd. (1976)p 1 WLR 1187.***
2. There are some contracts in which the court will not enforce or of order specific performance. Discuss citing relevant cases

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UNIT 4 QUASI-CONTRACT

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1.0 INTRODUCTION

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

In Craven-Ellis v Canons Limited, (1936), the principle is enlarged even more as there was never a binding contract to start with. By technicality, the directors who signed the Plaintiff's employment contract lacked legal capacity to the extent that they had not obtained the requisite qualification shares; hence the contract was invalid. Meanwhile, the Plaintiff had performed services for which he had not been paid. The court ordered payment to him on the basis of quantum meruit, or quasi-

contract, as indeed, at common law, there was no contract but he had performed services.

2.0 OBJECTIVES

At the end of this unit you should be able to understand:

- The Meaning of Quasi-Contract
- When money is paid under mistake of fact
- When money is paid under ineffective contract
- When money from a third party
- Claims against wrongdoer
- Money paid to the de fendants use
- Compromise

3.0 MAIN CONTENT

3.1 MEANING OF QUASI-CONTRACT

Quasi-contract has some of the elements of a contract but does not satisfy the criteria of consent or the requirement of consensus ad idem. The relationship is usually referred to as quasi or contractive contract.

Historically, it was based on an implied promise to pay and principally based on an unjust enrichment. It may originate from statutory provisions. In a certain circumstances, a minor, who has obtained benefits at the expense of an adult may be liable at common law in quasi-contract. It is expressly preserved also under section 3(2) of the **English Minors Contract Act 1987**. It is sufficient to mention transaction under quasi-contract.

3.2 MONEY PAID UNDER A MISTAKE OF FACT

It is the general rule that where money is paid to another person under a mistake, that is, there is specific facts which makes it look as if the receiver is lawfully justified to receive the money and the fact is not known to the payer. An action will lie to recover the money. Thus, in ***Chief Osian v. Flour Mills of Nigeria (1968) NCLR 3*** Kazeem J held that a person who pays money to another under a mistake of fact is entitled to recover it as money had and received if (a) the mistake is bona fide (b) it gives notice of the mistake to the payee and (c) he demands its repayment.

In ***Standard Bank of Nigeria Ltd. v. Attorney-General of the Federation (19710 1 NCLR 18,*** the court said that where money paid to a banker or to his customers account or paid to as agent for his principal, and under a mistake of fact, it can be recovered from the banker or other agent while it remains in this hands, but not when he has, before notice of the mistake, paid it over to his customer or principal or alternatively materially alter his position. The mistake must be of fact and not of law. It must not be occasioned by neglect or misconduct.

3.3 MONEY PAID UNDER THE INEFFECTIVE CONTRACT

Where there is a total failure of consideration, where a seller has no title, but sold goods to the buyer and he has enjoyed the use of goods, the buyer is entitled to recover from the seller money had and received as money paid on a consideration that has totally failed. In the instance, the seller must not be operating under an intention that he has an implied power to sell. Partial failure of consideration to analyse the nature of the contract to determine whether there is total failure of consideration. Total failure of consideration may occur where one party has received some benefit or incur some detriment. There is a failure of consideration where one of the parties fails to receive the benefit.

Thus, in ***Mobil Oil (Nigeria) Ltd. v. Coker (1877) 1 NCL 108***. The court held that there is a failure of consideration where the plaintiff pays money under a lease which the defendant is unable to grant.

Failure of consideration involves in money paid in an illegal contract or contract that cannot be enforced under the Statute of Frauds. So also, where a vendor refuses to perform his part under a contract for the sale of land there is total failure of consideration, the purchaser can recover as money had and received any money he has paid under the contract.

3.4 MONEY FROM A THIRD PARTY

This is where the defendant received money from a third party on behalf of the plaintiff. Where a person holds funds for a third party, he may be asked to pay it to the plaintiff. He will be liable if he fails to do so. An agent who receives money on behalf of the principal, he is liable for the amount so received.

In principle, where a person receives money which belongs to another person, he is regarded in law as having received it to the use of the other person. The imposes on him an obligation to make payment to the person entitled for money had and received to his use.

3.5 CLAIMS AGAINST WRONGDOER

Where money is obtained through fraud, the defendant is liable to an action for money had and received. The money may be recovered with interest. Where a person has a right to bring an action for money had and received, he may elect between a claim for money had and received or alternatively, or a claim in conversion. The two actions are independent from and in many cases lies where one action would fail. Thus, where a person is given a negotiable instrument with instruction to obtain cash, and he misapplies the proceeds, the plaintiff may bring an action for money had and received or alternative a claim for conversion. In ***Olaore v. Vaswani (1968) NCLR 269,*** the court laid down the rules of election and circumstance in which plaintiff may elect. If it is against a bank, the proper form of action is for money had and received and not conversion.

3.6 MONEY PAID TO THE DEFENDANT USE

Where a plaintiff has been compelled by law to pay money which the defendant was liable to pay, the defendant is indebted to the plaintiff in the amount of payment.

The law requires that the action for money paid is maintainable only cases in which there has been a payment of money by the plaintiff to third party at the request of the defendant and with an undertaking express or implied to repay it. The action is founded on common law, statute, agreement or estoppels. Payment is at the request of the defendant, and not voluntary.

3.7 COMPROMISE

In a pre-existing contract, an agreement may be made between parties as a way of setting a dispute; This may be done in a matter, whether the dispute is already in court or out court. This, in essence is a compromise. A compromise is an agreement arrived at either in court or out of court for settling a dispute upon what appears to the parties to be equitable terms having regard to the uncertainly they are in regarding the facts or law the law and the facts together.

The essence of compromise based on mutual concession which will normally terminate the controversy. The real essence is to avoid the necessity of determining liability. Where there is an effective compromise, the claimant would forgo part of his claim while the person against whom claim has been made would have been prepared to meet part of the claim. Where there is a breach and both parties are sticking to their guns and none accept liability. The dispute can be settled without admission of liability, thus, in ***Central Bank of Nigeria v. Beckiti Construction Ltd. (198) 6 NWLR (pt. 553) 238, in April 1992***, a contract for the construction of prefabricated office block at Abuja was awarded for DFL 12, 638, 905 the respondent claimed he had incurred considerable expenses in the performance of the contract. In June 1992, the appellant alleged that the respondent unilaterally arbitrarily and legally terminated the contract and he claimed N28, 009, 647, 81 being expenses incurred and anticipated profit lost. The respondent accepted payment of N1, 373, 752.01 as total payment. The appellant did not accept the offer and commenced action.

A compromise derives its force from the arrangement of the parties. The respondent applied to trial court for leave to enter final judgment against the appellant for the sum of N1,373,752.01 being the amount owed to the respondent for expenses incurred in the performance of the contract. The High Court gave final judgment against the appellant foe the sum. The appellant was dissatisfied and appellant to the Court of Appeal. The court held that where the issue of liability has not been admitted and is still to be determined at the trial, it is erroneous for the court to proceed to award part of the damages claimed. “The court frowns at giving judgment in piece-meal. It is better to give one judgment to cover all the issues in controversy. Where there is a valid compromise arrangement, the rights and obligations of the parties are shifted from the original rights and obligations sought to be enforced to the new contractual relationship created by the R

4.0 CONCLUSION

We have defined contract as an agreement between two or more persons imbued with the element of enforceability. However, there are several instances in which, although there are no agreements or even semblances of agreements between the parties, the law for reasons of justice and fairness, holds that a contractual relationship should be inferred between the parties, in order to prevail on a party who has obtained some benefit at the expense of another to make a corresponding compensation to the other party. The purpose of such an arrangement is to ensure that none of the parties suffers any loss or detriment. The term 'quasi-contract' is used to describe those circumstances in which there are no agreements between the parties, but the law in its wisdom will enforce the rights and obligations of the parties. In ***Aiyedade D.C. v. Adelakun (1958) WRNLR 52***, Taylor, J., stated that to prevent a person from obtaining money from, or advantage over, another in an unconscionable circumstance.

5.0 SUMMARY

Under this unit we have been able to learn about what Quasi-Contract is. Quasi-contract has some of the elements of a contract but does not satisfy the criteria of consent. We have also learnt about transactions under Quasi-Contract namely; Money paid under a mistake of fact, Money paid under the ineffective contract, Money from a third party, Claims against wrongdoer, money paid to the defendants use and compromise.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define the term Quasi-Contract
2. Distinguished the following
    a. Money paid under a mistake of fact
    b. Money paid under ineffective contract
    c. Money from a third party
    d. Claims paid to the different use
    e. Compromise

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