English Law of Contract: Remedies

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Overview

1. Discharge
2. Damages
3. Remedies in equity
1. Discharge

- Certain breaches of contract (i.e. breach of condition or breach of innominate term carrying serious consequences) entitle the innocent party to bring the contract to an end (dealt with in earlier lecture).
2. Damages

- Any breach of contract gives innocent party right to damages from party in breach.
- Substantial damages are monetary compensation for loss suffered as consequence of other party’s breach.
- To obtain substantial damages from other party, the innocent party must show that they have suffered loss as result of breach (issue of “causation”), that the loss was a likely consequence of the breach (issue of “remoteness”) and the amount of loss (issue of “measure”). There must be a causative link between the loss and the breach (issue of “causation”).
- Party in breach may argue that innocent party failed to mitigate loss.
2. Damages: Remoteness (1)

• The innocent party is only entitled to damages for loss which is not too remote a consequence of the breach.
• The point of departure is the rule in *Hadley v. Baxendale* (1854).
  – Damage or loss must *either* arise naturally from breach (i.e. according to usual course of things) *or* the damage/loss must be such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach.
2. Damages: Remoteness (2)

- Subsequent interpretations of this rule:
  - See *Victoria Laundry (Windsor) Ltd. v. Neuman Industries Ltd.* (1949) (CA per Asquith LJ). Only “reasonably foreseeable loss” may be recovered. Whether or not the loss was such depends on the knowledge possessed by the party in breach. This knowledge may be either:
    a) Imputed – i.e. what every person is assumed to know with respect to “natural” and “ordinary course of things”; or
    b) Actual knowledge – deriving from special knowledge of facts from which one would infer probability of exceptional loss.
  - HL approved *Victoria Laundry* in *The Heron II* (1969) but disapproved of the use of the phrase “reasonably foreseeable” as this ≠ test of remoteness in tort. HL held that the latter test of remoteness ≠ test of remoteness in contract. In contract, test of remoteness = whether loss is “within the reasonable contemplation of the parties”, at the time they made the contract, “as liable to result”.

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2. Damages: Remoteness (3)

- This distinction was challenged by Denning in *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.* (1978) but remains valid.
- If defendant ought reasonably to have contemplated the *kind* of damage that would result from the breach, they cannot claim that they could not have contemplated the *extent* of that damage, see e.g. *Parsons v. Uttley Ingham; Wroth v. Tyler* (1974).
- The principle in question can be difficult to apply.
2. Damages: Remoteness (4)

• When is knowledge imputed?
  – Contrast *The Heron II* (knowledge of market fluctuations imputed when the breaching party = professional shippers) with *Balfour Beauty v. Scottish Power* (1994) (knowledge of “continuous pour” construction method not imputed).

• NB: *Transfield Shipping Inc. v. Mercator Shipping Inc.* (2008)
  – HL (or at least 2 judges) introduce new (or refined) test for remoteness based on “assumption of responsibility”, i.e. the extent to which a party is liable for foreseeable loss depends on whether or not the loss is of the type or kind for which the party has assumed responsibility.
2. Damages: Measure of damages (1)

- **Loss of bargain – expectation loss**
  - Normal aim of the court is to put the innocent party in the position they would have been in had the contract been properly performed, see *Robinson v. Harman* (1848).
  - Two usual methods of assessing this loss are either (a) difference in value; or (b) cost of cure. The court will ordinarily try to apply the more appropriate of these methods. However, in some cases, neither method is appropriate. See e.g. *Ruxley Electronics and Construction Ltd. v. Forsyth* (1995).
  - Substantial damages will not be withheld simply because they are difficult to assess – *Chaplin v. Hicks* (1911); cf. *McRae v. Commonwealth Disposals Commission* (1950).
2. Damages: Measure of damages (2)

- Alternative method of assessing damages – reliance loss
  - The normal measure is loss of expectation. Reliance loss may be sought where loss of expectation is difficult to prove.
  - Aim of reliance loss is to put innocent party into position he would have been in had the contract never been made. See *Anglia TV v. Reed* (1972); *McRae v. Commonwealth Disposals Commission* (1950).
  - NB: If innocent party had made a “bad bargain” they cannot repair this bargain by claiming reliance loss. See *C & P Haulage v. Middelton* (1983).
  - It is up to the party in breach to show that innocent party would not have recovered their expenses even if the contract had not been broken. See *CCC Films (London) Ltd. v. Impact Quadrant Films Ltd.* (1985).
2. Damages: Measure of damages (3)

- **Other types of consequential loss**
  
  i. Disappointment/mental distress/injured feelings – damages for these (when flowing from breach of contract) are not generally awarded: *Addis v. Gramophone Co. Ltd.* (1909). However, damages for such may be awarded if contract itself was supposed to provide peace of mind or freedom from distress, e.g. holiday contracts: see i.a. *Jarvis v. Swan Tours Ltd.* (1973); *Bliss v. South East Thames Regional Health Authority* (1985); *Yearworth v. North Bristol NHS Trust* (2009); cf. *Hayes v. James & Charles Dodd* (1990).

2. Damages: Measure of damages (4)

- Other types of consequential loss (cont.)
  iii. Loss of reputation and loss due to difficulty in finding new employment – damages usually not recoverable: see *Addis v. Gramophone Co. Ltd.* But it may be possible to recover for loss of chance to enhance future reputation, e.g. situation of actors: *Clayton & Jack Waller Ltd. v. Oliver* (1930); cf. *Aerial Advertising Co. v. Batchelors Peas Ltd (Manchester)* (1938) (damages given for loss of existing reputation). Damages may be obtained for loss of reputation (“stigma compensation”) in exceptional circumstances where loss is not too remote – e.g. when employer breaches implied term that they would not operate a dishonest and corrupt business: *Malik v. BCCI* (1997).

iv. Exemplary/punitive damages not available.
2. Damages: Measure of damages (5)

- **Mitigation**
  - Innocent party must take reasonable steps to mitigate their loss: *British Westinghouse Electric v. Underground Electric Co. of London* (1912).
  - Defendant has burden of proving that plaintiff failed to mitigate: *Pilkington v. Wood* (1953).
  - There is no duty to mitigate prior to actual breach but there may be duty not to aggravate loss: see e.g. *White and Carter v. McGregor* (1962); cf. *Clea Shipping Corporation v. Bulk Oil International Ltd.* (1984).
  - There is no duty to mitigate in an action by a creditor to recover the price of goods delivered.
2. Damages: Measure of damages (6)

- **Liquidated damages**
  - Parties may provide in contract itself that a specified sum shall be payable in event of breach. If such sum = genuine pre-estimate of loss, it is recoverable even if it does not end up representing the actual loss. This will not be so if such sum = threat or “penalty” held by one party over the other party to try to force latter to hold their side of bargain.
  
  - How to tell difference between liquidated damages clause and penalty? Construction of clause must be “decided upon the terms and inherent circumstances of each particular contract, judged at the time of making the contract”: *Dunlop v. New Garage Motor Co. Ltd.* (1915).

  - Language used by parties not conclusive.
2. Damages: Measure of damages (7)

- Liquidated damages (cont.)
  - Guidelines by HL in *Dunlop* (above):
    - Sum = penalty if (i) sum specified > greatest possible loss; (ii) a larger sum is payable after non-payment of a smaller sum; (iii) a single lump sum is payable on occurrence of one or more several events, some of which may cause serious and some minor damage.
  - Clause can be liquidated damages clause even if it is well-nigh impossible to precisely predetermine loss caused by breach.
3. Remedies in equity (1)

- **Rescission of contract**
  - Contract induced by misrepresentation may be rescinded. Rescission also available in cases of duress and undue influence.

- **Specific performance**
  - This is a decree issued by court ordering defendant to execute their contractual duty.
  - If party fails to comply with decree, they risk liability for contempt of court (involving fines and sometimes imprisonment) or seizure of their property until compliance.
  - Traditionally, specific performance only granted when damages are *inadequate* remedy. Typical case when thing promised is unique or irreplaceable – e.g. particular painting, piece of land.
3. Remedies in equity (2)

• Specific performance (cont.)
  – Remedy is also available to enforce **contractual obligation to pay sum of money**: see, e.g. **Beswick v. Beswick** (1968).
  – Specific performance not usually ordered in **personal contracts services**.
  – Specific performance not usually ordered in contracts lacking “mutuality”.
  – Specific performance may not be awarded where performance would require constant supervision by the court: see e.g. **Ryan v. Mutual Tontine Association** (1893); **Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.** (1997).
  – As equitable remedy, specific performance will not be granted if it causes hardship or if plaintiff has not acted equitably: see e.g. **Patel v. Ali** (1984).
3. Remedies in equity (3)

- **Injunction**
  - This is a decree by court ordering a person to do or not to do a certain act.
  - Injunction usually not granted if its effect is to compel a party to a contract to do something which could not have been made subject to order of specific performance: see, e.g. *Page One Records Ltd. v. Britton* (1968).