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REMEDIES FOR BREACH 1 - DAMAGES

1. CAUSATION

The plaintiff must show that his loss was one which resulted from a breach of contract by the defendant (a direct causal link).

An act of the defendant in a sequence of events leading to a loss might not be held to be the cause of the loss. For example, a shipowner was not liable to a charterer when, as a result of delay, the ship ran into a typhoon, as such a catastrophe may occur anywhere: *The Monarch SS Co Case* [1949] AC 196.

If there are two causes of the state of affairs resulting in damage, and both causes have equal effect, one will be sufficient to carry a judgment for damages. See:

Smith, Hogg & Co v Black Sea Insurance [1940] AC 997.

An intervening act of a third party which itself causes the loss to the plaintiff, or aggravates the loss, caused by the defendant's breach, will not absolve the defendant from liability if the intervening act was reasonably foreseeable (the *Victoria Laundry* and *The Heron II* principles, below). Compare:

Stansbie v Troman [1948] 2 KB 48
Weld-Blundell v Stephens [1920] AC 956.

2. REMOTENESS OF DAMAGE

Not every type of damage caused to the plaintiff as a result of the breach of contract will be recoverable. If the loss flowing from the breach of contract is too remote then it cannot be recovered. Losses, to be recoverable, must have been within the reasonable contemplation of the parties. See:

Hadley v Baxendale (1849) 9 Exch 341.

Damages are recoverable under two limbs under *Hadley v Baxendale*:

(i) Damages which may fairly and reasonably be considered as arising naturally from the breach;
(ii) Damages which may reasonably be supposed to have been in the contemplation of the parties, as liable to result from the breach, at the time of the contract.

The Court of Appeal took the opportunity to review and restate the principles governing the measure of damages in:

Victoria Laundry v Newman Industries [1949] 2 KB 528.

The principles relating to remoteness of damage were further considered in the House of Lords and given greater refinement in:

The Heron II [1969] 1 AC 350.

The effect of "the two limbs" in *Hadley v Baxendale* is as follows:-

Losses which occur "in the ordinary course of things" only are recoverable under the first limb. See:

Pilkington v Wood [1953] Ch 770.

The defendant's knowledge of special circumstances under the second limb is not in itself sufficient to make him liable. There must be knowledge and acceptance by the defendant of the purpose and intention of the plaintiff. Compare:

Horne v Midland Railway (1873) LR 8 CP 131
Simpson v L & N Railway (1876) 1 QBD 274.

3. MITIGATION OF LOSS

It is the duty of every plaintiff to mitigate his loss, that is, to do his best not to increase the amount of damage done. There are three rules:

(i) The plaintiff cannot recover for loss which the plaintiff could have avoided by taking reasonable steps.
(ii) The plaintiff cannot recover for any loss he has actually avoided, even though he took more steps than were necessary in compliance with the above rule.
(iii) The plaintiff may recover loss incurred in taking reasonable steps to mitigate his loss, even though he did not succeed.

The plaintiff must minimise the loss resulting from the breach by taking all reasonable steps available to him. If he fails to do so, then he cannot recover anything in respect of that extra loss. See:

Payzu v Saunders [1919] 2 KB 581.

However, the plaintiff is not expected to take risks in order to mitigate losses caused by the defendant's breach:

Pilkington v Wood [1953] Ch 770.

If the plaintiff obtains any benefits as a result of his mitigation, these must be taken into account. See:

British Westinghouse v Underground Electric Railway of London [1912] AC 673.

Note the case of *White & Carter v McGregor* [1962] AC 413; an exception to the general rule?

4. PURPOSE OF DAMAGES

Damages are meant to compensate the injured party for any consequences of the breach of contract. The underlying principle is to put the injured party financially as near as possible, into the position he would have been in had the promise been fulfilled.

In *Addis v Gramaphone Co Ltd* [1909] AC 488, Lord Atkinson said: "I have always understood that damages for breach of contract were in the nature of compensation, not punishment."

5. HEADS OF DAMAGE & CALCULATION

There are several ways in which the plaintiff can be compensated for his loss and the plaintiff is entitled to choose whichever form of compensation he feels is most appropriate to his case.

(i) LOSS OF BARGAIN

Damages for loss of bargain are assessable to put the plaintiff, so far as money can do it, in the same situation as if the contract had been performed.

For example, in a contract for the sale of goods which are defective, the plaintiff will (under this head) be entitled to damages reflecting the differences between the price paid under the contract and the actual value of the defective goods.

(ii) RELIANCE LOSS

Damages for reliance loss are designed to put the plaintiff in the position he would have been, if the contract had never been made, by compensating him for expenses he has incurred in his abortive performance. See:

McRae v Commonwealth Disposals (1950) 84 CLR 377
Anglia Television v Reed [1972] 1 QB 60.

(iii) RESTITUTION

Where a bargain is made and the price paid, but the defendant fails to deliver the goods, then the plaintiff is entitled to recover the price paid plus interest thereon.

NOTE: Incidental losses are those which the plaintiff incurs after the breach has come to his notice. They include the administrative costs of buying a substitute, or sending back defective goods, or hiring a replacement in the meantime. Consequential losses may be loss of profits, for example, reliance loss, or further harm such as personal injury or damage to property.

The plaintiff's choice of claim may be aided by the fact that more than one of the claims is available to him. In such cases, the plaintiff can combine the claims:

Millar's Machinery Co v David Way (1935) 40 Com Cas 240.

TIME FOR ASSESSMENT OF LOSS

The general rule is that damages are to be assessed at the time of the breach. However, the court can postpone the date for assessment of damages to a more appropriate time. See:

Johnson v Agnew [1980] 1 All ER 883.

CALCULATION OF DAMAGES FOR LOSS OF BARGAIN

Where the plaintiff claims for loss of bargain and that he be put in the position as if the contract had been performed, two bases of assessment are available: cost of cure and difference in value. See:

Peevyhouse v Garland Coal Co (1962) 382 P 2d 109.

In the majority of cases where there is a discretion, the court will exercise this to use the most appropriate basis of assessment in the case. However, certain rules do exist for working out the appropriate mode of assessment:

(i) In sale of goods contracts if a defect can be cured at a reasonable cost, the cost of cure will be awarded, otherwise the difference in value is awarded.
(ii) In building contracts, cost of cure basis is usual, and the builder must put the defects right. However, if the cost of cure is greater than the whole value of the building, then only the difference in value will be awarded. This issue was considered by the House of Lords in:

Ruxley Electronics & Construction v Forsyth [1995] 3 WLR 118.

ACTUAL AND MARKET VALUES

Where damages are based on the difference in value principle, then market values may be taken into account to assess the plaintiff's loss. For example, where the defendant fails to deliver goods or render services, then the plaintiff can go into the market and obtain these goods or services at the prevailing

price. Therefore the plaintiff's damages will be the difference between the market price and the price of the goods or services in the contract. There are two rules:

(i) Under s51 SGA 1979, where a seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. But such an action will not allow the seller to recover for anything more than the difference between the market value and the contract value.

(ii) If the defendant wrongfully refuses to accept and pay for the goods, then the plaintiff can sue for the loss of profit on that transaction in certain circumstances. Compare:

Thompson v Robinson (Gunmakers) Ltd [1955] Ch 177
Charter v Sullivan [1957] 2 QB 117.

DAMAGES WHICH ARE IRRECOVERABLE

The plaintiff may be able to recover damages for injury to feelings in tort, but in contract such damages are irrecoverable. See:

Addis v Gramaphone Company [1909] AC 488.

This principle was reaffirmed by the Court of Appeal in *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308 (an unfair dismissal case).

OTHER TYPES OF DAMAGE

(i) Discomfort, vexation and disappointment
In *Jarvis v Swan Tours* [1973] 2 QB 233, the plaintiff solicitor, went on a Swan Tour and sued for damages because the hotels and buses fell short of the standards promised. It was held that the plaintiff could recover damages for the disappointment and discomfort he had been caused as a result. See also *Jackson v Horizon Holidays*.

However, there is a limit to damages for distress for breach of contract. In *Bliss*, Dillon LJ stated that such damages should be confined to cases "where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress". Recently, the Court of Appeal made it clear that they were not prepared to extend the circumstances in which damages for distress or disappointment might be granted:

Alexander v Rolls Royce Motor Cars [1995] TLR 254.

(ii) Inconvenience
In *Bailey v Bullock* [1950] 2 All ER 1167, a solicitor failed to take proceedings to recover his client's house for him and was held liable in damages for the inconvenience caused by reason of the client having to live with his wife's parents for two years.

(iii) Diminution of future prospects
In *Dunk v George Waller* [1970] 2 QB 163, an apprentice was wrongfully dismissed, but had he been allowed to complete his apprenticeship he would have got a certificate entitling him to certain jobs at certain wages. Without this certificate, his chances were lessened and he claimed damages for diminution of future prospects. He was held to be entitled to damages on this basis as the object of his apprenticeship was to enable him to get better employment.

(iv) Speculative damages
If the plaintiff's loss is the chance of doing something or benefiting from doing something, and this contingency is outside the control of the parties, then he is entitled to damages if the defendant's breach of contract denies him this

chance. For example, in *Chaplin v Hicks* [1911] 2 KB 786, the plaintiff recovered damages for loss of the chance to take part in a beauty contest.

6. LIQUIDATED DAMAGES & PENALTY CLAUSES

The parties to the contract may make a genuine assessment of the losses which are likely to result in the event of a breach, and stipulate that such sum shall be payable in the event of a breach. Such clauses are known as liquidated damages clauses and will be effective in the event of a breach, and the plaintiff will not recover more than that sum. (No action for unliquidated damages will be allowed.)

If, however, the clause is not an assessment of losses, but is intended as punishment on the contract-breaker, then the clause is a penalty clause and is void. In an action for breach of contract it is disregarded.

The parties may often be in dispute over whether the clause was a penalty or a liquidated damages clause. Various rules have been formulated to deal with such contingencies. See:

Dunlop Pneumatic Tyre Co v New Garage [1915] AC 79.

Where the contract has underestimated damages in the event of a breach, either because of inflation or through bad bargaining, damages will be limited to the amount stipulated by the contract. See:

Cellulose Acetate v Widnes Foundries [1933] AC 20.

If the clause is in fact a penalty clause, then as it is void, the plaintiff can ignore it and sue for his actual loss:

Wall v Rederiaktiebolaget Luggude [1915] 3 KB 66.