



Law of Contract II

JDOC1002

Remedies – Pt 1

Remedy of damages

- Common law remedy of damages available for breach of contract
- Award of financial sum for loss suffered by pl
- Purpose: put the pl, in economic terms, in the position which they would have been in if the wrong had not been committed
- Contract context: put the pl, in economic terms, in the position which they would have been in if the contract had been performed
 - *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528
 - *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232
- Ordinary damages (substantial damages): compensate for loss
- Nominal damages: where no loss suffered

Measure of damages

- Basis for assessing what the loss is and what damages award should be
- Categories:
 - Expectation damages
 - Reliance damages
 - Restitution damages

Expectation damages

- Protects performance / expectation interest
- Eg: sale of goods where non-delivery by seller
- Assume:
 - Contract price: \$100
 - Purchaser has not paid
 - Market price at date of breach: \$120
- Loss: \$20 (difference in value between contract price and market price – cf Sale of Goods Ordinance (Cap 26) s 53(3))
- Damages: \$20

Expectation damages

- Methods for calculating expectation damages include:
 - “Cost of cure” basis, or cost of reinstatement; or
 - “Difference in value” basis: determine loss on basis of difference between value received by pl and value which pl ought to have received under contract

Expectation damages

- Defective performance
- Eg: sale of goods; defective goods delivered (breach of warranty of quality)
- Assume:
 - Contract price (paid): \$100
 - Value of defective goods: \$70
 - Market price if goods not defective: \$100
- Loss of \$30 (difference between value of goods and value they would have had if they had answered to the warranty – SOGO s 55(3))
- Damages: \$30

Expectation damages

- *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344
- Facts:
 - Pl contracted with def to build swimming pool for def
 - Contract: max depth of 7 feet 6 inches
 - Pool built: max depth of 6 feet
- Proceedings:
 - Pl sued for full contract price
 - Trial judge: def liable to pay full price but can obtain damages for pl's breach

Expectation damages

- Issue:
 - What damages can def recover?
 - Cost of cure basis: £21,560
 - Difference in value basis: nil
- House of Lords held:
 - Element of reasonableness taken into account in assessing loss of innocent party
 - Compare situation where cost of reinstatement less than the difference in value: reasonable to spend on repairs – former amount recoverable

Expectation damages

- House of Lords held:
 - Present case: not reasonable to claim £21,560
 - Loss: pool not in accordance with specifications (in relatively minor way)
 - Cost of reinstatement wholly disproportionate to non-monetary loss of pool-owner and does not properly represent such loss
 - Damages awarded for loss of amenity: £2500

Expectation damages

- *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518
- Facts:
 - Pl (Panatown) and Unex were companies in same corporate group
 - Unex owned land
 - Pl entered into building contract with def builders (Alfred McAlpine) to construct building on land
 - Unex and def entered into separate duty of care deed
 - Def breached building contract: serious defects
- Issue:
 - Is def liable to pl for substantial damages?
 - Did pl suffer any loss?

Expectation damages

► HL held:

- PI suffered no loss and not entitled to substantial damages (only nominal damages)
- PI not the owner of the property and any loss in value in property is not a loss suffered by pl
- No expenditure incurred or intended to be incurred by pl for repairs
- Unex had direct remedy against def for building defects under deed

Expectation damages

- Additional losses potentially recoverable as expectation damages:
- Damages for loss of profits
- Eg:
 - sale of goods contract where seller in breach and purchaser loses the profit which could have been earned on a re-sale
- Pl can claim lost benefits where pl can prove, on balance of probabilities, that expectation of receipt of benefit had a likelihood of attainment
 - *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80

Expectation damages

- Damages for loss of chance
- *Howe v Teefy* (1927) 27 SR(NSW) 301
 - Def leased racehorse to pl trainer
 - Horse not provided by def
 - Pl's loss: loss of chance to earn prizemoney in race
 - Damages awarded for loss of chance: £250
 - Damages: measurement of value of chance, and not the value of the lost prize

Reliance damages

- Reliance damages compensate for losses reasonably incurred by plaintiff in or for the purposes of performance of contract
 - Covers wasted expenditure or out-of-pocket expenses
- *McRae v Commonwealth Disposals Commission* (1952) 84 CLR 377
 - Pl entitled to reliance damages for wasted expenditure in locating non-existent oil barge
- Protection of reliance interest: pl's reliance on promise of def

Reliance damages

- Alternative view: reliance damages part of protection of performance interest: pl relies on promise of performance / expectation of performance
- Often expectation damages already covers reliance loss (because calculation of profit takes into account expenses incurred): no need to separately claim reliance damages
- But reliance damages would be specifically claimed if pl cannot prove loss of profits

Reliance damages

- ▶ Can pre-contractual expenditure be compensated?
- ▶ *Anglia Television Ltd v Reed* [1972] 1 QB 60
- ▶ Facts:
 - ▶ English TV station (pl) contracted with US actor to make film
 - ▶ Actor repudiated and film could not continue
 - ▶ Pl incurred pre-contractual expenditure (director's fees etc)

Reliance damages

- Issue:
 - Is def liable for pre-contractual expenditure?
- Held:
 - Yes
 - Pre-contractual wasted expenditure recoverable if parties contemplated or ought reasonably to have contemplated that the expenditure is likely to be wasted if the contract is not performed

Reliance damages

- *C & P Haulage v Middleton* [1983] 1 WLR 1461
- Facts:
 - Pl granted contractual licence to def to use pl's premises as office
 - Licence: def not to remove any fixtures added to premises
 - Def added fixtures and incurred expenditure
 - Pl breached contract: early termination of licence
 - Def then used own home as office
- Proceedings and issues:
 - Pl sued for certain payments owed
 - Def counter-claimed for breach of contract
 - Can def recover expenditure on fixtures?

Reliance damages

- Eng CA:
 - Def not entitled to recover expenditure
 - Licence: def not entitled to remove fixtures; if pl not in breach, no possibility of def recovering expenditure
 - Damages cannot put def in better position than if contract not breached

Restitution damages

- ▶ Restitution damages enable pl to claim for value of benefits conferred upon def in course of pl's performance of contract
- ▶ Eg: purchaser pays contract price but seller fails to deliver
 - ▶ Damages for purchaser: contract price paid
 - ▶ Recovery only if total failure of consideration
- ▶ Alternative remedy to damages for breach of contract: restitution for unjust enrichment

Non-pecuniary losses

- Eg of non-pecuniary losses recoverable: compensation for pain and suffering in connection with personal injury caused by breach of contract (where injury not too remote)
 - *Grant v Australian Knitting Mills Ltd* [1936] AC 85
- To what extent can damages be awarded for mental distress?
- General rule: damages for injured feelings or distress not recoverable
 - *Addis v Gramophone Co Ltd* [1909] AC 488

Non-pecuniary losses

- ▶ Exceptions where non-pecuniary losses recoverable:
 1. Pain and suffering and loss of amenities
 2. Where object of contract is to provide pleasure, relaxation or peace of mind
 3. Physical inconvenience
- ▶ See *Farley v Skinner* per Lord Steyn

Non-pecuniary losses

- *Farley v Skinner* [2002] 2 AC 732
- Facts:
 - Pl contracted with def surveyor to survey property intended to be purchased
 - Pl concerned about aircraft noise
 - Def's report: unlikely that property would suffer greatly from aircraft noise
 - Pl affected by aircraft noise after purchasing property
 - Def breached contract: failed to adequately investigate
 - Property value not affected by noise though

Non-pecuniary losses

- Issue:

- Can pl recover damages for distress and inconvenience?

- HL held:

- Yes
 - Exception 2 can apply if major or important object of contract is to give pleasure, relaxation or peace of mind
 - Important part of contract for pl to obtain report on aircraft noise and peace of mind that pl would not be affected if property purchased

Non-pecuniary losses

- HL held:
 - Exception 3 also applicable
 - Physical inconvenience (affecting senses) going beyond mere disappointment (Lord Scott); or where it arises from conduct amounting to nuisance (Lord Steyn)
 - Damages awarded: £10,000

Non-pecuniary losses

- Cf *Ruxley v Forsyth*
- Exception 2?
 - Where contract expressly or implied intended to confer the non-pecuniary benefit
 - Value to pool-owner of slightly greater depth
- Exception 3?
 - Consequential non-pecuniary losses