



Law of Contract II

JDOC1002

Remedies – Pt 3

Deposits

- Upfront deposit payments
- Eg 10% deposit paid by purchaser upon entry into contract for sale of land
- Deposit:
 - Applied towards payment of contract price
 - Forfeited if party (payor) in breach

Deposits

- Nature of deposit:
- Distinguished from agreed damage clauses (deposits not intended as pre-estimate of loss on breach)
- Payment of deposit is to provide an “earnest”
 - Thing of value given to signify serious intent to perform contract
 - Earnest money
- Paid as guarantee for performance

Deposits and part payments

- Deposits distinguished from part payments
- Part payments:
 - Payor may recover if contract not completed (even if payor may be in breach)
- Basis for return of payment:
 - advance payment conditional on contract being performed; or
 - restitution where total failure of basis (total failure of consideration)
- Whether payment is deposit or part payment:
 - Question of construction of contract

Recovery of deposits

- Deposits recoverable by payor in some cases:
 - Where deposit constitutes a penalty
 - Equitable jurisdiction for relief against forfeiture (of deposit)
 - Where deposit invalid and regarded as part payment

Recovery of deposits

- *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573
- Facts:
 - Sale of land in Jamaica
 - 25% deposit paid (Jamaican \$3M)
 - Time of the essence; balance of purchase price tendered late
 - Vendor terminated and sought to retain deposit

Recovery of deposits

- Privy Council held:
- Deposit invalid if it constitutes a penalty:
 - Test is not whether it is a genuine pre-estimate of loss
 - Test is whether amount of deposit is reasonable as earnest money
 - Standard 10% deposits reasonable
 - Larger amounts: there must be special circumstances justifying the deposit
- Deposit was a penalty in present case and cannot be forfeited

Recovery of deposits

- *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234
- Facts:
 - Sale of land (commercial property) for \$115M
 - Contract date: 23 May 1997; completion 9 months
 - 35% deposit paid (\$40.25M)
 - Completion deferred to 2 April 1998
 - Property collapse
 - P sought to terminate (for alleged unauthorized building works)
- Issues:
 - P terminated unlawfully: P in breach
 - Is V entitled to keep deposit?

Recovery of deposits

- CFA held:
 - No
- Ribeiro PJ:
 - Test as to whether deposit is a penalty not the same as test applied for agreed damages clauses
 - Even if higher deposit intended to compensate for loss on P's breach: deposit not necessarily valid
 - Test is whether deposit is reasonable
 - Amounts higher than conventional amount will be invalid as a deposit and recoverable as a part payment unless justified by exceptional circumstances

Recovery of deposits

- ▶ Bokhary PJ:

- ▶ Where deposit unreasonable, it is recoverable either because deposit is a penalty or because it is a recoverable part payment

- ▶ Chan PJ:

- ▶ Unreasonable deposits are an invalid penalty and relief against forfeiture can be granted

Specific performance

- Equitable remedy:
 - Order compelling party to perform contract
- Granted only in particular circumstances
 - Discretionary remedy
- Basic principle:
 - Specific performance granted only if remedy of damages is inadequate

Specific performance

- *Beswick v Beswick* [1968] AC 58

- Facts:

- Peter Beswick (A) assigned business to John Beswick (B)
- B agreed to pay weekly sum of £5 to A's wife (C)
- A died and B no longer paid weekly sums to C

- Proceedings and issues:

- C, as A's legal personal representative, sought specific performance against B

Specific performance

- ▶ House of Lords held:
 - ▶ Specific performance granted
 - ▶ No loss suffered by A; damages not an adequate remedy
- ▶ Note privity of contract doctrine
 - ▶ See now Contracts (Rights of Third Parties) Ordinance (Cap 623)

Specific performance and particular types of contract

- Sale of land
 - Specific performance may usually be granted against vendor
 - Land regarded as unique; damages inadequate remedy
- Sale of goods:
 - Specific performance against seller usually not available
 - Purchaser can usually obtain identical goods in the market: damages adequate remedy
 - But damages inadequate if goods unique
- Eg *Dougan v Ley* (1946) 71 CLR 142 (sale of licensed taxi-cab; specific performance granted)

Discretionary bars to granting specific performance

- ▶ Specific performance may be declined as a matter of discretion where:
 - ▶ Contract for personal services
 - ▶ Contract requiring constant supervision of court
 - ▶ Contract which is too vague
 - ▶ Lack of mutuality
 - ▶ Severe hardship on def
 - ▶ Mistake on part of def in entering into contract (eg *Tamplin v James* (1880) 15 Ch D 215)

Contracts for personal services

- ▶ Eg employment contracts usually not specifically enforced
 - ▶ *De Francesco v Barnum* (1890) 45 Ch D 430
- ▶ Reasons:
 - ▶ Inappropriate to force parties to cooperate together
 - ▶ Form of slavery
 - ▶ Difficulties in enforcing court order
- ▶ Same principles apply to other contracts for provision of services (eg engagement of a singer for performances)

Mutuality

- Specific performance generally only granted against defendant if plaintiff is able to perform plaintiff's own obligations
 - *Price v Strange* [1978] Ch 337 at 367-368

Undue hardship

- Eg *Patel v Ali* [1984] Ch 283:
- Aug 1979: contract by def and def's husband to sell matrimonial home to pl
- Trustee in bankruptcy of husband's bankrupt estate obtained injunction preventing sale; injunction discharged July 1980
- Pl then instituted proceedings for specific performance; but only sought summary judgment in July 1983
- Meanwhile: def diagnosed with bone cancer while pregnant; leg amputated; def's husband jailed for a year
- Specific performance not ordered due to def losing home in circumstances of hardship

Other factors for declining specific performance

- *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* 1998] AC 1
- Facts:
 - Def operated Safeway supermarket as major tenant in pl's Hillsborough Shopping Centre (35 year lease entered into in 1979)
 - Lease covenant: def to keep premises open for retail trade during usual hours of business
 - 1994: Def to close a number of stores, including Hillsborough one
- Issue:
 - Can pl obtain specific performance of lease?

Other factors for declining specific performance

- House of Lords held:
 - No
- General principle: specific performance usually not granted to compel party to carry on business
- Reasons:
 - Specific performance not granted where continued supervision of court required to ensure performance (distinguish orders for carrying on activity and orders for achieving particular result)
 - Contractual obligation (and court order) not sufficiently precise
 - Possibility of plaintiff being enriched at expense of def

Other factors for declining specific performance

- Present case:
 - Specific performance not appropriate: obligation to keep premises open for retail trade not precise enough
 - Is there breach of court order if business not operated at optimal level or at reduced capacity (eg def seeks to save on costs; avoid devoting resources on loss-making business)? Too uncertain
 - Business compelled to be carried on under threat of imprisonment for contempt of court order: no way to run a business

Injunctions

- ▶ Order of court requiring party to do an act (mandatory injunction) or refraining from doing some act (prohibitory injunction)
- ▶ Eg: injunction to enforce particular contractual obligation
- ▶ Injunctions: equitable discretionary remedy

Injunctions

- ▶ Prohibitory injunctions: usually granted unless hardship to def
 - ▶ *Araci v Fallon* [2011] EWCA Civ 668, [70]
- ▶ Mandatory injunctions: test of balance of convenience applied
 - ▶ *Sharp v Harrison* [1922] 1 Ch 502
 - ▶ Relevant to look at whether damages adequate remedy:
QBE Management Services (UK) Ltd v Dymoke [2012] EWHC 80

Injunctions

- *Lumley v Wagner* (1842) De GM & G 604
- Facts:
 - Contract: pl owner of Her Majesty's Theatre engaged def as singer for 3 months
 - Clause: def not to sing elsewhere
 - Def sought to perform at Covent Garden
- Held:
 - Injunction granted to restrain performance at Covent Garden
 - But specific performance not ordered to require performance at Her Majesty's Theatre
- Note: possibilities of restraint of trade clauses not being enforced on grounds of public policy