Law of Contract II JDOC1002

Remedies – Pt 2

Date of assessment

- Damages normally assessed at the time of breach
  - *Johnson v Agnew* [1980] AC 367
- Anticipatory breaches:
  - Damages normally assessed at time when performance should have been made
  - *Millet v Van Heck & Co* [1920] 3 KB 535 at 542-3

Causation

- Loss must be caused by the breach of contract
  - *C & P Haulage v Middleton* [1983] 1 WLR 1461
- Where multiple causes, look at whether breach was an effective cause
  - *County Ltd v Girozentrale Securities* [1996] 3 All ER 834
- Common sense approach to causation: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 522; *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360 at 1374–1375
- "But for" test may be applied: *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516

Remoteness of loss

- Damages will not include losses which are too remote
- Liability for damages is based on (objective) intentions of parties at time of contracting
- Damages recoverable only where there is (objectively) an assumption of responsibility by the def for the type of loss concerned
  - *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)* [2009] 1 AC 61
  - *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232

Remoteness of loss

- Rule in *Hadley v Baxendale* (1854) 9 Exch 341: sets out rule as to the losses which may be recoverable
- Two limbs of rule:
  - (1) General damage: loss fairly and reasonably considered to arise naturally from breach (arising in usual course of things)
  - (2) Special damage: loss reasonably supposed to be in contemplation of parties, at time of contracting, as probable result of breach

Remoteness of loss

- *Hadley v Baxendale*:
- Facts:
  - Contract for carriage of pl miller's crankshafts to be transported for repairs
  - Delivery of shaft delayed by def carrier
  - Mill shut for 5 days: pl suffered loss of profits
- Held:
  - Loss of profits not recoverable: loss too remote (not within either limb)

Remoteness of loss

- Liability for losses based on what may be reasonably contemplated by parties:
  - What is reasonably contemplated arises from either imputed or actual knowledge of def regarding pl's circumstances
- First limb of rule in *Hadley v Baxendale*: imputed knowledge of def (regardless of actual knowledge)
- Second limb of rule in *Hadley v Baxendale*: actual knowledge of def
- Imputed or actual knowledge provides basis for assumption of responsibility for the likely loss

Remoteness of loss

- *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528
- Facts:
  - Boiler delivered by def sellers to pl launderers 5 months late (breach of contract)
  - Loss of business
- Held:
  - Loss of business for normal profits recoverable under first limb of *Hadley v Baxendale*
  - But pl could not recover losses arising from highly lucrative dyeing contracts with Ministry for Supply
  - Actual knowledge of contracts required in order to apply second limb

Remoteness of loss

- *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350
- Facts:
  - Carriage of sugar by sea; late arrival (breach of contract by carriers)
  - Loss suffered by charterer on sale of sugar arising from drop in market price
- Held:
  - Loss was within 1st limb of *Hadley v Baxendale*
  - Actual knowledge of proposed sale by charterer not required

Remoteness of loss

- *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791
- Facts:
  - Def sold and installed bulk feed storage hopper for pl to feed pl's pigs
  - Hopper not reasonably fit for purpose (breach of contract)
  - Pigs ill from eating mouldy nuts
  - Pigs contracted E Coli (254 pigs dying)

Remoteness of loss

- Held:
  - Parties could not have contemplated that pigs would contract E Coli
  - But within reasonable contemplation that pigs would suffer injury or death if hopper unfit for storing pig feed
  - Where type of loss is foreseeable, then def is liable for whole extent of loss (even if more serious than contemplated)
  - Def liable for loss of pigs

Remoteness of loss

- *Transfield Shipping Inc v Mercator Shipping Inc (The Archilleas)* [2009] 1 AC 61
- Facts:
  - Charterparty contract
  - Appellant charterer 9 days late in re-delivery of ship to respondent ship-owner
- Issues:
  - What loss is recoverable?
  - One possible basis: difference between market rate for hire and charter rate for 9 days (total of $158,301.17)
  - Ship-owner argued on different basis: loss of actual profits in contract with subsequent hirer of ship (for 191 day hire) because of reduction of rate ($8000) caused by delay (total claimed: $1,364,584.37)

Remoteness of loss

- UKSC:
- Lord Hoffmann:
  - Is loss a kind or type for which contract-breaker ought fairly to be taken to have accepted responsibility?
  - Presumed intentions based on what people entering into contract in the particular market would reasonably be considered to have undertaken

Remoteness of loss

- Lord Hope:
  - Reasonable foreseeability of loss not sufficient for loss to be recoverable; party must (objectively) have undertaken responsibility for loss
  - Rule in *Hadley v Baxendale* is based on presumed intentions of parties on what def would undertake to be responsible for in the event of the def's breach
  - Justification for def's liability on this basis: def is aware (or taken to be aware) of circumstances of likely loss and can quantify potential liability and assess whether to bear risk in contracting

Remoteness of loss

- Lord Hoffmann and Lord Hope:
  - Party cannot be expected to assume responsibility for something that they cannot quantify
  - Ship-owner losing profits on subsequent charter foreseeable but impossible for appellant to quantify what that loss might be (no knowledge of terms of hire – eg period of hire etc)
  - Appellant cannot reasonably be expected to have assumed responsibility for such loss

Remoteness of loss

- Lord Hoffmann and Lord Hope:
  - Parties can (largely) quantify loss of profits based on market fluctuations in price of hire – loss of profits arising in the ordinary course of things
  - It can be presumed that appellant has assumed responsibility for loss arising from difference between market rate and charter rate where late re-delivery
  - General understanding of shipping industry taken into account in determining what liabilities were being undertaken

Remoteness of loss

- Lord Rodger and Baroness Hale:
  - Same conclusion reached but without adoption of assumption of responsibility concept
  - Lord Rodger: difference between market rate and charter rate recoverable under 1st limb of *Hadley v Baxendale*; special losses arising from subsequent hire only recoverable under 2nd limb but no knowledge on part of appellant to allow 2nd limb to be applied
- Lord Walker agreed with Lord Hoffmann, Lord Hope and Lord Rodger

Remoteness of loss

- If applying 1st limb in *Hadley v Baxendale*:
  - Loss of profits in a subsequent charter likely / foreseeable; so why not allow recovery of whole extent of loss under 1st limb?
- Adopt Lord Hoffmann's analysis:
  - Use assumption of responsibility concept to determine whether loss should be assessed under 1st or 2nd limb
  - The loss of profits in the subsequent charter sustained by respondent is different in kind to the type of lost profit arising in the ordinary course of things because appellant could not reasonably be expected to have assumed responsibility for the former
  - Therefore the loss of profits in the subsequent charter can only be recovered under 2nd limb

Remoteness of loss

- Suggested approach (*Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] 2 Lloyd's Rep 81 per Hamblem J):
  - Assumption of responsibility concept provides basis for rule in *Hadley v Baxendale*
  - Starting point: apply rule in *Hadley v Baxendale*
  - Where necessary, then specifically consider whether def can reasonably be expected to have assumed responsibility for loss in question

Remoteness of loss

- *Richly Bright International Ltd v De Monsa Investments Ltd* (2015) 18 HKCFAR 232
- Facts:
  - Sale of commercial premises
  - Head agreement: Win Profit selling to World Orient
  - 1st sub-sale: World Orient selling to 823 Investment
  - 2nd sub-sale: 823 Investment selling to Richly Bright ($133,266,600)
  - 3rd sub-sale: Richly Bright selling to De Monsa ($135,864,000)
  - De Monsa failed to complete (and confirmers also failed to complete their sub-sales upstream)

Remoteness of loss

- Issue:
  - What damages can Richly Bright recover from De Monsa?
- CFA:
  - *Hadley v Baxendale* applied (1st limb), with adoption of concept of assumption of responsibility
- Ordinary sale of land (without confirmer sales): breach by purchaser (non-completion)
  - Eg purchase price $10M but market price at completion date $9M
  - Vendor can recover $1M damages

Remoteness of loss

- Sub-sales (confirmer sales): breach by sub-purchaser (non-completion):
- If confirmer (sub-vendor) still acquired property:
  - Sub-vendor can recover damages in manner similar to ordinary sales
- If confirmer (sub-vendor) does not acquire property:
  - Sub-vendor can recover anticipated loss of profit on confirmer sale

Remoteness of loss

- Present case:
  - Richly Bright's loss of profit: $2,597,400
  - But Richly Bright already retained forfeited 10% deposit of $13,586,400 from De Monsa
  - No additional damages can be claimed on top of deposit
  - Richly Bright not entitled to recover against De Monsa for Richly Bright's own loss of deposit and other liabilities of Richly Bright in settlement of claims against them made by 823 Investment: De Monsa could not have assumed responsibility for such upstream losses which would have been unquantifiable and unpredictable

Mitigation

- Duty of pl to mitigate losses
  - Where pl unreasonably fails to mitigate loss, pl not entitled to recover loss that would not be suffered if there was mitigation
  - Eg where pl acts unreasonably in not attempting to minimize loss suffered

Mitigation

- Eg:
  - Wrongful dismissal of employee (breach of contract)
  - Loss of income
  - But employee unreasonably declines alternative employment immediately available elsewhere (on same or better terms)
  - Failure to mitigate: loss of income not recoverable if same (or more) income could be earnt had employee taken up alternative employment
  - See *Brace v Calder* [1895] 2 QB 253 on similar facts

Recovery of sums fixed by the contract

- Action for liquidated sum:
  - Cause of action in debt for sum owing
  - Not an action for damages for breach of contract
- Action in debt – elements to be established:
  - Sum fixed by contract
  - Sum is now due for payment by the def

Agreed damages clauses

- Agreed damages or liquidated damages clauses:
  - Term of contract specifying amount payable by one party as liquidated damages if that party in breach of contract
- Where clause applies, then:
  - Pl can sue for liquidated sum and need not prove loss
  - Def liable for liquidated sum regardless of whether actual loss is greater or less than liquidated sum
  - See *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234 at [77]–[79]

Agreed damages clauses

- Agreed damages clause not enforceable on public policy grounds though if amount to be paid constitutes a penalty
- *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79
- Facts:
  - Pl manufactured motor tyres
  - Contractual obligations on def purchasers included: not to re-sell below list prices
  - Agreed damages clause: payment of £5 for each tyre or tyre cover or tube sold or offered in breach of contract
  - Def sold below list prices to a co-operative society

Agreed damages clauses

- Issue:
  - Was agreed damages clause a penalty?
- Lower courts:
  - Trial judge: clause not a penalty; sum of £250 awarded to pl
  - CA: clause was a penalty; no loss proved by pl; nominal damages awarded only (£2)
- What is the purpose of resale price maintenance agreements?
  - What are the potential losses for pl if there is breach?

Agreed damages clauses

- House of Lords held:
- Express designation by parties not conclusive on whether clause is genuine agreed damages clause or whether it is a penalty
- Test: whether the agreed sum is a genuine pre-estimate of loss in the event of breach by other party
  - Penalty if amount is extravagant or unconscionable in comparison with greatest loss that could conceivably be proved
- But clause can be upheld as setting fair compensation agreed by parties where precise pre-estimation of losses impossible
- Clause upheld in present case: not a penalty

Agreed damages clauses

- *Cavendish Square Holding BV v Makdeshi* [2016] AC 1172
  - Two cases heard together
  - Second case: car park – first 2 hours free; overstay: £85 payable
- UKSC held:
- Test on whether clause is penal in nature reformulated:
  - Provision is penal if it is a secondary obligation imposing detriment on contract-breaker out of all proportion to any legitimate interest of innocent party in enforcement of primary obligation
  - Innocent party potentially has legitimate interest extending beyond recovery of compensation for loss

Agreed damages clauses

- Car park case:
  - £85 not a penalty even though not a genuine pre-estimate of loss
- *Cavendish* states law in HK:
  - *Law Ting Pong Secondary School v Chen Wai Wah* [2021] 3 HKLRD 185 (CA)

Agreed damages clauses

- *Law Ting Pong Secondary School v Chen Wai Wah* [2021] 3 HKLRD 185 (CA)
- Facts:
  - Employment contract for teacher (def): July 2017
  - Teaching duties commence 1 Sep 2017 (for one year to 31 Aug 2018)
  - Contractual right to terminate: upon 3 months' notice or paying 3 months' salary in lieu of notice
  - Aug 2017: def indicated would not report for duty in Sep; did not give 3 months' notice and refused to make payment in lieu
- Issue:
  - Was contractual provision for payment in lieu a penalty?

Agreed damages clauses

- Held:
  - *Cavendish* principles applied
  - A penalty must involve a secondary obligation arising from a breach of contract
  - Provision on payment in lieu involves a primary obligation of performance (pursuant to contractually stipulated method for termination)
  - Even if the provision involves a secondary obligation, the employer school has a legitimate interest in deterring teachers from leaving without giving sufficient notice (school needs to have sufficient time to find replacement)
  - Provision was not a penalty