# CONTRACT – Remedies (lectures 18 & 19)

## MEASURES

### LIQUIDATED DAMAGES (fixed sum): planning for breach – certainty (liquidated), privacy, cost effective, amicable (commercial relationship preserved). The party subject to LDC may argue that it is in fact a penalty clause, which are struck out of the contract.

The Test for a Penalty Clause – Dunlop Pneumatic Tyre v New Garage

- Terminology inconclusive
- Penalty clause is ‘in terrorem’
- Based on construction of particular contract, judged at time of contracting

Valid LDC = genuine pre-estimate of loss set at the time of contracting.

Penalty clause if:

1. Stipulated sum is extravagantly greater than the greatest possible loss conceivable on breach.
2. Breach is non-payment of money and stipulated sum is greater.
3. A single lump sum is payable on any of several possible breaches were some are serious but others trivial.
4. Even though loss impossible to precisely quantify, a stipulated sum will be a genuine pre-estimate.

If PC do UTCC regs 1999 apply? It will if consumer contract, not if two businesses.

### NATURE OF COMPENSATION

#### Expectation (placed in the same situation as if the contract had been performed) – Robinson v Harman

- *3 alternative measures:
  1. Difference in value
  2. Cost of cure (defective performance has taken place)
  3. Loss of amenity (can only claim this if the contract is for enjoyment) – Rusley Electronics v Forsyth

Application of Rusley is seen in Farley v Skinner (No2), cf where the cts looked at the intention of the parties claiming amenity – Birse Construction ltd v Eastern Telegraph Co Ltd, McGlinn v Walsham Contractors

- Reliance (puts c in position as it had not contracted) – Anglia Television v Reed

C has unthought choice between reliance and expectation loss – CC films v Quadrant films. The burden of proof is on party paying to prove otherwise.

- Except where trying to escape a bad bargain – c & p hauflin v midleton

If expectation damages too speculative – McRae v Commonwealth Disposals

- Pre-contractual expenses available – Anglia TV v Reed

### Restitution

- Order for restitution (puts D wrongly recovered the money)

C has unfettered choice between reliance and expectation loss – CC films v Quadrant films. The burden of proof is on party paying to prove otherwise.

### LIMITING FACTORS

#### CAUSATION

- Must be a causal link between breach and loss. Galoo Ltd v Bright Grahame Murray states that it must be an effective cause. Is there a novus actus interveniens? (Lambert v Lewis) OR is it likely to happen? (Monarch Steamship Co v AB Karlschamms)

#### REMOTENESS – Hadley v Baxendale

DAMAGES must be either:

1. Arising naturally in the usual course of things - imputed knowledge (normal losses).
2. Reasonably in the contemplation of the parties (ie in special circumstances) – actual knowledge (abnormal losses).

Confirmed in Jackson v Royal - must discuss repercussions of breach at time of contracting.

Application of the test: Victoria Laundry v Newman Industries; Heron II (the loss was not unlikely due to the d’s action/breach); Balfour Beauty v Scottish Power (the specific type of loss was unrecoverable as not foreseeable by d); The Achilles

### MITIGATION

- Technically no obligation to mitigate, but losses resulting from failure to mitigate is not recoverable.

What is required for mitigation?

- Reasonable steps whereby Westinghouse v Underground Electric c was not expected party not expected to embark on litigation – Pilkington v Wood

- May have to accept breach if cost effective – Payzu v Shandlers

- Mitigating party’s conduct not weighed in ‘nice scales’ – Bank of Portugal v Waterlow & Sons.

#### CONTRIBUTORY NEGLIGENCE

- 64 Law Reform (Contri Neg) Act 45

- Contrib neg generally not available but it may be where there is: breach of contractual duty to take care AND the breach is a tort – Vesta v Baxter. Also Barclay’s Bank plc v Faireough

#### EQUITABLE REMEDIES

- Specific performance is an order of a court which requires a party to perform a specific act – cooperative insurance society ltd v Argyll stores (holdings) ltd

- Injunction (requires a party to do or refrain from doing specific acts) – Evening Standard v Henderson

- Rescission (bringing parties back to position in which they were before entering into the contract, if possible)

- Rectification (ct corders change in a written doc to reflect what it ought to have said in the first place).

## UNLIQUIDATED DAMAGES (unknown amount).

- Damages assessed by the court
- Compensation NOT punishment – The Golden Victory

## OTHER AWARDS:

- Generally there is no damages for mental distress – Addis v Gramophone Company Ltd; Johnson v Unisys Ltd

- Contract for pleasure/relaxation/peace of mind – Jarvis v Swans Tours (whole purpose); Farley v Skinner (major object)

- Loss of reputation (Malik v BCCI) and loss of chance (Chaplin v Hicks) both fall within expectation loss

- Quantum meruit – Sumpter v Hedges

## RELIANCE (ct corders change in a written doc to reflect what it ought to have said in the first place).