

CHAPTER 8: DISCHARGE OF CONTRACT AND CONTRACTUAL REMEDIES

QUESTION 1

Explain the meaning of 'Remoteness of damage' and 'Measure of damages'.

Answer:

- Damages are a common law remedy and their purpose is to compensate the innocent party. There are rules governing how far the liability of the defendant extends (remoteness of damage) as well as how much (measure of damages) he must pay.
- The test for determining remoteness of damage is in two parts and was laid down in *Hadley v Baxendale*.
- *Losses that arise naturally as a normal consequence of the breach of contract* - this is an objective test and it means losses that a reasonable person would expect to arise from the breach of contract.
- *Losses which both parties may have reasonably contemplated when the contract was made as being a probable result of its breach*. This is a subjective test and depends on the actual or implied knowledge of the parties at the time the contract was made. *Victoria Laundry v Newman Industries* (1949).
- In *Transfield Shipping Inc v Mercator Shipping Inc., The Achilleas* (2008) the court stated that in deciding whether or not a loss is recoverable it may be important to ascertain whether the defendant assumed responsibility for the loss. However in the later case of *John Grimes Partnership Ltd v Grimes* (2013) the Court of Appeal confirmed that the standard test, whether the loss was within the reasonable contemplation of the parties at the time the contract was made, should be used in the majority of cases. Consideration of 'assumption of responsibility' would only be applied in unusual cases where using the standard test would be contrary to market understanding and expectations.
- The measure (amount) of damages is not to punish the party in breach, to put the claimant (as far as money can) in the position he would have been in if the contract had been satisfactorily performed.
- The general principle is to compensate for actual financial loss but damages may be claimed for distress and disappointment in certain circumstances. *Jarvis v Swan Tours* (1973), *Farley v Skinner* (No 2) (2001).

QUESTION 2

In what circumstances may a contract be discharged because of frustration?

Answer:

- A contract will be frustrated if an event occurs, through no fault of either of the parties that makes performance of the contract impossible, illegal or radically different from what had been agreed.
- There must be no commercial purpose left in the contract, the parties must not have foreseen or should have foreseen, the event.

- Examples of frustration include, the destruction of the subject matter of the contract, *Taylor v Caldwell* (1863), personal incapacity of one of the parties, *Condor v Barron Knights* (1966), non-occurrence of event central to the purpose of a contract, *Krell v Henry* (1903), *Herne Bay Steam Boat Co v Hutton* (1903), where after the contract is made there are changes in the law, or circumstances alter, making the fulfilling of the obligations under the contract illegal, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (1943), *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* (1944).
- There is no frustration if the parties have provided for the frustrating event in the contract through a *force majeure* clause.

QUESTION 3

Sally used to be the owner of a prosperous dating agency in Brighton. Three years ago she made a contract with Speedy Ltd to advertise her agency on four of their buses for a period of one year. Soon after she had made this contract, Sally decided to terminate her dating agency and become an accountant. She asked Speedy Ltd not to go ahead with the advertisements, but Speedy refused to cancel the agreement, and for the last year has been carrying out its side of the bargain. Last week Sally received a bill from Speedy Ltd for £7,000. Advise Sally.

Answer:

- A contract is breached if one of the parties breaks one or more of the terms of the contract, or indicates in advance that he does not intend to perform the contract.
- An anticipatory breach of a contract arises where one party, prior to the actual date of performance, expressly informs the other party that they do not intend to perform some or all of their contractual obligations, or from their conduct it is clear that they do not intend to do this, *Hochster v De La Tour* (1853); *Vitol SA v Norelf* (1996).
- After the contract is completed Sally has informed Speedy Ltd that she does not wish to go ahead and therefore there is an anticipatory breach of contract.
- Once a contract is actually breached, an innocent party must take steps to mitigate his loss. But where a breach is anticipated but has not yet happened, a party has no legal obligation to accept the breach. Until a breach of contract is accepted there is no duty to mitigate loss.
- Speedy Ltd has a choice whether to sue as soon as they know Sally intends to breach the contract or they can wait until the date of performance is passed, and sue after the contract has actually been breached. *White and Carter Ltd. v McGregor* (1961).
- However the principle in *White and Carter Ltd. v McGregor* is restricted to cases where no co-operation for performance is required from the other party to the contract, and where the innocent party has a genuine reason for continuing with the contract, other than just to claim additional damages, *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* (1984). *Isabella Shipowner SA v Shagang Shipping Co Ltd* (2012) If Speedy Ltd falls within the limits of *White and Carter Ltd* Sally will be liable for the full contractual price.

QUESTION 4

Sebastian is the owner of a famous fish restaurant 'Poissons'. He has just engaged a top chef, Pierre, who has contracted to work solely for him during the next six months, and not to work in any other restaurant within a mile during that time. 'Poissons' has a large tank full of a variety of live fish from which customers choose their dinner. In breach of contract, the fish food suppliers, Shark Ltd, supply poisonous fish food on Friday morning, and by Friday evening all the fish are dead. As a result, Sebastian closes the restaurant both Friday and Saturday evening losing one hundred bookings each night. A few days later, Pierre argues with Sebastian, walks out, and goes to work in the restaurant next door. Advise Sebastian:

- a) In a claim for damages against Shark Ltd.
- b) Of any remedies he may have against Pierre.

Answer to 2a:

- Damages is monetary compensation aimed to put the parties in the position they would have been in, if the breach had not occurred. There are rules governing how far the liability of the defendant extends (remoteness) as well as how much (measure) he must pay.
- Remoteness of damages: how far the liability of the defendant extends. Test for remoteness of damages was laid down in *Hadley v Baxendale*. Party in breach is liable for: losses that arise naturally i.e. normal consequence of the breach and losses which both parties may reasonably be supposed to have contemplated when the contract was made as a probable result of its breach. *Sylvia Shipping Co Ltd v Progress Bulk Carriers* (2010). (The court in *the Achilleas case* (2008) considered of 'assumption of responsibility' but this will only be applied in unusual cases)
- The normal consequences of supplying poisonous fish food would be the illness and/or death of the fish. Even if the consequences of the breach were more serious than expected (death of fish) Shark Ltd may be liable, *H Parsons Ltd v Uttley Ingham* (1978).
- Non-usual damage can only be claimed if at the time the contract is made the particular circumstances are explicitly or impliedly brought to the other party's attention, *Victoria Laundry v Newman Industries* (1949).
- The loss of bookings may be too remote unless Shark Ltd were aware of the potential loss and assumed responsibility for it.

Answer to 2b:

- An injunction is an equitable remedy. The court orders the defendant not to do something which would be in breach of contract. It will not be granted where damages would be adequate remedy and will only granted to enforce a negative stipulation in a contract of employment. *Warner Bros v Nelson* (1937).
- Sebastian will be entitled to damages if Pierre breaches his contract but this may not be an adequate remedy if he takes all Sebastian's customers with him. He will be seeking an injunction to prevent Pierre breaching his contract and working next door. It will only be granted at the court's discretion if it is fair in all the circumstances.