

ANSWERS - SELF TEST – REMEDIES FOR BREACH OF CONTRACT

1. What is it that damages for breach of contract aim to do? (1)

To compensate the innocent party for the loss he has suffered as a result of the D's breach of contract. (1) Therefore damages are assessed in accordance with that loss. Contractual damages are not punitive.

2. What are the different ways in which an innocent party's expectation loss might be measured? (2)

Expectation loss damages aim to compensate for loss of the bargain and to put the innocent party into the position he would have been in had the contract, as promised, been performed. This can be achieved by either awarding difference in value, i.e. the difference between what he expected to get (promised value) and what the innocent party actually received (1) OR by awarding the cost to achieve the performance as promised (cost of cure or reinstatement) (1).

3. What is the significance of the decision of the House of Lords in *Ruxley Electronics & Construction Ltd v Forsyth*? (4)

The House of Lords decision reaffirmed the principles governing the award of cost of reinstatement damages where the difference in value measure is lower (1).

(i) Cost of reinstatement damages will only be awarded where it is reasonable to carry out the reinstatement or repair i.e. they will not be awarded where the cost would be wholly disproportionate to the benefit to be obtained (1).

(ii) In addition, whether it is reasonable to insist on cost of reinstatement will in part depend on whether there was an intention to reinstate (i.e. to actually carry out the repair or reinstatement)(1). [Thus rejected Court of Appeal's approach which had rejected the requirement to show an intention to rebuild and had insisted that reasonableness was only relevant to the question of mitigating the loss, i.e. was there any other cheaper way in which the personal preference could be satisfied?]

However, if cost of reinstatement is not available on the facts (because unreasonable), it may still be possible to recover damages for loss of pleasurable amenity (as compensating the claimant for loss of his subjective preference)(1).

4. What do you understand by the expression "consumer surplus"? (1)

The "consumer surplus" is the subjective value that an individual consumer places on performance or particular property, which is over and above the objective market value of that performance or property. (1)

5. Give 2 examples of situations where the "consumer surplus" is recognised when awarding damages for breach of contract. (2)

(a) The award of cost of reinstatement rather than difference in value. For example, if I contract for the building of a wall for reasons of privacy and as a result of breach the wall is not built, I subjectively want cost of reinstatement damages since difference in value damages (between value of land with and without the wall) would not put me in as good a position as if the contract had been performed. (1)

(b) Damages for distress and disappointment caused by a breach of a holiday contract or where the breach relates to a failure to perform (or correctly perform) a specifically requested service (see Farley v Skinner (No.2)) (1).

6. What is the significance of the decision in *McRae v Commonwealth Disposals Commission* in the context of remedies for breach of contract? (2)

If expectation loss is too speculative to recover for, then an innocent party will necessarily be forced to claim his reliance loss damages (1). On the facts the combined effect of recovering the price paid (in restitution for total failure of consideration) and the wasted cost of the salvage expedition (reliance loss) put the plaintiff into the position that he would have been in had he never entered into the contract of purchase. (1)

7. What is the most important limitation on the right of an innocent party to claim reliance loss damages? (2)

A claimant cannot claim damages for reliance loss if this would amount to compensating him for having made a bad bargain (1). This is because damages for breach of contract can only compensate for loss flowing from the breach, not loss from having made that contract on those terms in the first place (1). An injured party who made a bad bargain will have to claim expectation loss (even if this is minimal). Authority = C & P Haulage v Middleton.

8. What is the remoteness rule in contract? (4) Give case authority. (1)

Not every loss that has been caused by the breach of contract can be recovered for. Some losses are said to be too remote a consequence of the breach.

The basic test to determine remoteness is to ask whether the loss was within the reasonable contemplation of both parties at the time they made the contract as the probable result of its breach. (2)

If the loss in question is normal loss resulting from such a breach (i.e. it arises naturally according to the usual course of things from the breach), then knowledge of that is imputed to the parties (and it will be within their reasonable contemplation)(1).

If the loss is abnormal loss, it can only be said to be within their contemplation as the probable result of breach if they both had actual knowledge of the circumstances making such a loss a probable consequence of this breach. (1)

Authority = Alderson B in Hadley v Baxendale (1).

9. Explain what is meant by "mitigation of damages". (3)

Mitigation means that there is a "duty" placed on the injured party to minimise his own loss once the breach has occurred. (1) He is expected to take all reasonable steps to minimise his loss but need not take steps which would be unreasonable. (1)

If he fails to mitigate a loss, he cannot recover for it or he cannot recover to the extent that he failed to mitigate (1).

10. When, if ever, are damages for distress and disappointment available for breach of contract? (4)

They are not generally available in contract (Addis v Gramophone)(1). However, such damages can be recovered where

(a) a major or important purpose of the contract (Farley v Skinner No. 2, Hamilton-Jones v David & Snape) was to provide pleasure and peace of mind (e.g. holiday contracts) (1) or (b) where a major or important purpose of the contract was to relieve a source of distress (Heywood v Wellers) (1). Alternatively, such damages may be recovered for distress consequent on physical inconvenience (Farley v Skinner No. 2) (1).

11. In what circumstances will the damages awarded to an injured party for breach of contract be apportioned to take account of that party's contributory negligence? (4)

Where liability arises on the facts for both contractual negligence (breach of qualified contractual obligation to take reasonable care or exercise reasonable skill) **and** there is negligence liability in tort. (Vesta v Butcher)(3). If this were not the position, it would be possible to avoid the 1945 Act and apportionment thereunder by framing an action against the guilty party in contract only.

Damages cannot be apportioned where the guilty party's breach is a breach of a strict contractual obligation in the contract (Barclays Bank v Fairclough Building)(1).

12. If an agreed damages clause is a liquidated damages clause but the actual loss is lower than that amount, can the innocent party recover

(a) Only his actual loss; OR

(b) The higher liquidated damages amount? (2)

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13. If an agreed damages clause is a liquidated damages clause but the actual loss is higher than that amount, can the innocent party recover

(a) His higher actual loss; OR

(b) The lower liquidated damages amount? (2)

(b) The lower liquidated damages amount. This is the effect of Cellulose Acetate Silk v Widnes Foundry (2). Always recover a liquidated damages figure irrespective of actual loss.

14. What is the effect if the agreed damages clause is in fact a penalty? (3)

The general consequence that follows is that the clause is invalid (and hence unenforceable) (1). Damages should therefore be awarded on unliquidated principles to compensate the innocent party for his actual loss (1). If the actual loss is lower than the penalty, only the actual loss is recoverable. If the actual loss is higher than the penalty, the position is unclear since it is felt to be ironic that the innocent party should be able to claim his higher actual loss whereas if the clause had been a liquidated damages clause, he would have been limited to the liquidated damages amount. However, the decision in Wall suggests that higher actual loss is recoverable in these circumstances. (1)

15. The penalty rule is often said to be arbitrary in its application. Give two examples to illustrate this. (2)

(a) The penalty rule only applies where the sum specified as agreed damages is payable on breach. It does not therefore apply if the sum is payable on a non-breach event, even if that sum is penal in nature and extravagant in amount. (1) See Lord Denning's comment in Bridge v Campbell Discount.

(b) The penalty rule does not apply to deposits that are of a customary amount (Workers Trust v Dojap Investments), even though the deposit does not reflect the loss sustained by breach and is intended to compel performance (1).

16. When would a claim for an agreed sum be appropriate? (2)

Where the innocent party has performed his contractual obligations (e.g. delivery of goods or performed a service) (1) and the other has not paid, in breach of contract. The action will be for the liquidated amount of the price – a debt claim. (1)

17. Give two examples of instances when a restitutionary remedy would be appropriate. (4)

(a) Recovery of money paid where there has been a **total** failure of consideration (i.e. no performance at all by the recipient of that money). See e.g. McRae v Commonwealth Disposals Commission. (2)

(b) Recovery on quantum meruit (reasonable value of a benefit) where a benefit has been conferred by the innocent party on the guilty party (and there is no contractual provision for remuneration) which, if it were retained, would unjustly enrich the guilty party (2). BSC v Cleveland Bridge & Engineering.

Points scored [maximum of 45] =