

Practice questions for Chapter 12 – Remedies for breach of contract

Problem question

Ricky, a builder, has sought your advice regarding the following issues:

- Ricky entered into a contract to purchase a new cement mixer from Building Machinery Ltd. A term of the contract states that 'it is a condition that the cement mixer be delivered by the 10th December.' Unfortunately, due to an administrative error, the cement mixer was not delivered to Ricky until the 13th December. Ricky is refusing to pay for the cement mixer and has returned it to Building Machinery Ltd (in fact, he returned the cement mixer because he found it cheaper elsewhere). Building Machinery Ltd is threatening to sue Ricky for breach of contract.
- Ricky entered into a contract with Steve, under which Ricky would build a swimming pool in Steve's garden. The contract specified that the pool should be two metres deep at the deep end, but the pool is built with a maximum depth of 1.8 metres (the shallower depth in no way affects the value of the pool). Steve is demanding that Ricky pay for the cost of rebuilding the pool, so that it is the appropriate depth.
- Karl owns a restaurant and wants to expand its seating capacity. He therefore entered into a contract with Ricky to build an extension onto the restaurant. The work should have been completed by the end of October, but Ricky did not finish the extension until eight weeks later and Karl is suing Ricky for breach of contract. Karl is claiming for the profit lost as a result of not having the extra seating capacity, and the amount claimed is higher than normal given that Karl wanted the extension ready for the busy Christmas period. Karl also had to turn down a lucrative wedding booking because his restaurant lacked the seating capacity to accommodate all the members of the wedding party. Karl is also suing for the loss of profits he would have made as a result of this wedding party.

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- It is common for problem questions involving remedies for breach of contract (discussed in ch 10) to actually require you to discuss whether a breach has occurred and whether the right to terminate the contract exists (discussed in ch 9). Be aware of the ways in which different contract law topics can interact.
- As the standard of contractual performance is strict, it follows that, in delivering the cement mixer three days late, Building Machinery Ltd is in breach of contract. The issue to discuss here is whether or not Ricky has the right to terminate the contract and/or claim damages. This will depend upon the type of term breached.
- The contract itself has labelled the term in question as a condition. The general rule is that where the parties have specifically classified a term in the contract, the court will usually follow this classification.¹ However, the parties' classification is not conclusive and the courts will ignore the parties' classification where it feels appropriate to do so. The case of *L Schuler AG v Wickman Machine Tool Sales Ltd*² should be briefly discussed.

¹ *Lombard North Central plc v Butterworth* [1987] QB 527 (CA).

² [1974] AC 235 (HL).

- In *L Schuler AG*, there were clearly good reasons why the court was unwilling to follow the parties' classification. On the face of it, such reasons are absent from our case. There appears to be no reason why the courts should not follow the parties' classification. Indeed it may be the case that Ricky specified delivery by the 10th for a good reason – you are not told this, but it is a reasonable speculation.
- This is backed up by statute. Whether late delivery of goods will entitle the buyer to terminate will depend on whether time was of the essence of the contract. The Sale of Goods Act 1979 (discussed in the online chapter entitled 'The sale of goods'), s 10(2) provides that whether stipulations regarding time (except stipulations regarding time of payment) are of the essence of the contract depends on the terms of the contract itself. As the contract itself classifies the term as a condition, it is highly likely that time is of the essence and so Ricky will have the right to terminate the contract as a condition has been breached.
- The fact that he has decided to terminate because he can obtain a replacement cement mixer elsewhere for less will not be relevant here. Obviously, this motive could be compared with some of the cases concerning innominate terms. In *Reardon-Smith Line Ltd v Yngvar Hansen Tangen*,³ the claimant sought to escape the contract because he could obtain a better price, but in that case, the term breached was clearly not a condition.

Ricky entered into a contract with Steve, under which Ricky would build a swimming pool in Steve's garden. The contract specified that the pool should be two metres deep at the deep end, but the pool is built with a maximum depth of 1.8 metres (the shallower depth in no way affects the value of the pool). Steve is demanding that Ricky pay for the cost of altering the pool, so that it is the appropriate depth.

- There is little doubt that Ricky, in failing to build the pool to the specified depth, is in breach of contract. Generally, contractual damages for breach of contract will aim to put the claimant in the position he would have been had the breach not occurred,⁴ and this is usually assessed by determining the difference in value between the expected performance and the actual performance.
- However, in many cases, the claimant may enter into a contract not expecting to make a financial gain, so any breach that occurs may not affect the claimant financially. Persons often enter into contracts for non-financial reasons. Accordingly, in some cases, the 'difference in value' approach will fail to adequately compensate the claimant for the loss sustained due to the breach. This is the case as regards the building of the pool. The shallower depth has not affected the value of the pool, but it may affect Steve's enjoyment.
- In such cases, the court may be prepared to award damages based on the cost of obtaining substitute or remedial performance (this is known as the 'cost of cure'). The leading case in this area is *Ruxley Electronics and Construction Ltd v Forsyth*.⁵ As the facts of *Ruxley* closely mirror the facts of our case, feel free to briefly state the facts of the case.
- However, it is the *ratio* of *Ruxley* that is important, namely that the courts will only permit recovery of the cost of cure where it is reasonable to do so. In *Ruxley*, remedying the breach would have required the pool to be ripped out and a new pool installed. In our case, we are not told whether to alter the pool to the correct depth would require such drastic action, so feel free to hypothesise. If such action is required, it is likely that the courts will not allow recovery of cost of cure. However, if the pool can be altered to the specified depth without unreasonable expense, then the courts will be much more likely to award cost of cure.

³ [1976] 1 WLR 989 (HL).

⁴ *Robinson v Harman* (1848) 1 Ex 855.

⁵ [1996] AC 344 (HL).

Karl owns a restaurant and wants to expand its seating capacity. He therefore entered into a contract with Ricky to build an extension onto the restaurant. The work should have been completed by the end of October, but Ricky did not finish the extension until eight weeks later and Karl is suing Ricky for breach of contract. Karl is claiming for the profit lost as a result of not having the extra seating capacity, and the amount claimed is higher than normal given that Karl wanted the extension ready for the busy Christmas period. Karl also had to turn down a lucrative wedding booking because his restaurant lacked the seating capacity to accommodate all the members of the wedding party. Karl is also suing for the profit he would have made as a result of this wedding party.

- There is little doubt that, in failing to complete the extension on time, Ricky is in breach of contract. As noted, contractual damages for breach of contract will aim to put the claimant in the position he would have been had the breach not occurred,⁶ and this would appear to indicate that Karl could recover damages for all profits lost as a result of the extension not being completed on time.
- However, this is not necessarily the case and the law imposes limits on the claimant's ability to recover damages for certain losses. Of relevance here is the law relating to remoteness of damage. Certain losses will be regarded as too remote and therefore irrecoverable.
- The test for determining whether or not a loss is too remote was established in the case of *Hadley v Baxendale*.⁷ Point out the two limbs of the test set out by Alderson B. These two limbs can be seen in operation in the leading case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*,⁸ and as this case has similar facts to the facts of our case, feel free to briefly state the facts.
- There is little doubt that, applying the test established in *Hadley*, Karl will be able to claim for the profit lost as a result of the extension not being completed on time, and the custom lost (although you may wish to argue that quantifying this loss would be difficult and the courts might be reluctant to award damages for such loss due to its speculative nature). This loss would be regarded as a 'normal' loss that would fall under the first limb of the test in *Hadley*.
- The loss of profit sustained by Karl due to having to turn down the wedding booking is more problematic. There is no doubt that this is a 'special' loss under the second limb of the test in *Hadley* and therefore, Karl can only recover for this loss if it was in the reasonable contemplation of both parties. In other words, Karl can only recover for this loss if Ricky knew of the wedding booking. You are not told whether Ricky knew or not, so state both possible outcomes.

Problem question

Johnny Cab, a world-famous comedian, has agreed to perform at The Happy Club in Cardiff from the 1st February until the 1st March. A term of the contract provides that 'Johnny Cab will not perform at any other venue for the duration of the contract.' Mike, the owner of The Happy Club, discovers that Johnny is due to perform at the Millennium Centre in Cardiff on the 15th February and that Johnny agreed to perform there after he entered into the contract to perform at The Happy Club. Mike contacts Johnny to inform him that, if he performs at the Millennium Centre, he will be acting in breach of contract. Johnny tells Mike that he intends to go ahead with his performance at the Millennium Centre and that, if Mike tries to prevent him from performing there, then Johnny will refuse to perform at The Happy Club. Mike is keen for Johnny to perform there as tickets for his performances have already sold out and having a comedian of Johnny's fame will bring prestige and publicity to the venue.

Advise Mike. Would your answer differ if the term of the contract instead stated 'Johnny Cab will only perform at The Happy Club for the duration of the contract?'

⁶ *Robinson v Harman* (1848) 1 Ex 855.

⁷ (1854) 9 Exch 341.

⁸ [1949] 2 KB 528 (CA).

Introduction

- This is a question about contractual remedies. In this question, there is little doubt that, if Johnny does perform at the Millennium Centre, he will be acting in breach of contract. In many problem questions involving contractual remedies, it will be highly likely that a breach of contract has occurred because if no breach exists, there will usually be no need to discuss remedies. However, do not neglect the need to establish that a breach has taken place.
- It is likely that Mike will want to seek your advice regarding (i) can Johnny be prevented from performing at the Millennium Centre, and (ii) can Johnny be compelled to continue performing at The Happy Club for the duration of the contract.
- You may also want to point out that the normal remedies for breach of contract (that is, termination and/or damages) may not be appropriate in this case as they will be unlikely to compensate Mike for the loss sustained. It is likely that Mike does not want damages, but wants the added revenue and prestige that will come from having a famous comedian like Johnny perform at his venue.

Can Mike prevent Johnny from performing at the Millennium Centre?

- In order to prevent Johnny from performing at the Millennium Centre, Mike will need to obtain an injunction preventing Johnny from performing there. As the term imposes upon Johnny a negative obligation (that is, an obligation not to do something), the injunction sought will be a prohibitory injunction.
- As an injunction is an equitable remedy, it is not available as of right and will only be granted at the discretion of the court. In particular, the courts will not grant an injunction where it would amount to an indirect order for specific performance.
- This issue has arisen most notably in relation to cases such as the one concerning Johnny and Mike, namely contracts of employment and contracts for service. The case of *Lumley v Wagner*⁹ shows that, historically, the courts would not grant an injunction if the effect of it would be to compel the defendant to work for the claimant, but would grant an injunction to prevent the defendant from working for anyone else.
- On this basis, it would appear that the court would grant an injunction as the term does not compel Johnny to work at The Happy Club, but it does prevent him from working anywhere else.
- However, more modern cases (notably *Page One Records Ltd v Britton*)¹⁰ have indicated that the distinction drawn in *Lumley v Wagner* is not a justifiable one and the court should ask whether or not an injunction would, as a practical matter, compel the defendant to work for the claimant. It will be remembered that, in *Page One Records*, the defendants needed a manager and so, if an injunction were to be granted preventing anyone else from acting as their manager, it would have compelled them to continue to employ the first claimant as their manager.
- It could be argued that, given the relatively short duration of the contract and the fact that Johnny probably is not financially dependant on the contract with The Happy Club, he is not in the same position as the defendants in *Page One Records*. Accordingly, it would appear that, were the court to enforce the term by granting an injunction, it would not force Johnny to perform at The Happy Club. All it would do was to prevent him from performing at the Millennium Centre.
- It should be noted that if the term stated that 'Johnny Cab will only perform at The Happy Club for the duration of the contract,' then enforcing such a term via an injunction would constitute an indirect order of specific performance. In such a case, the court would not therefore grant an injunction.

⁹ (1852) 1 De GM & G 604.

¹⁰ [1968] 1 WLR 157 (Ch).

Can Mike compel Johnny to continue performing at The Happy Club?

- In order to compel Johnny to continue performing at The Happy Club, Mike will need to obtain an order for specific performance. Like an injunction, an order for specific performance is an equitable remedy and so is dependant upon the discretion of the court.
- The courts have long indicated that they will not compel the performance of a contract of personal service on the ground that compelling a person to work for another is an unjustifiable restriction on personal liberty.¹¹ Statute reinforces this with the Trade Union and Labour Relations (Consolidation) Act 1992, s 236 providing that no court shall compel a person to work via an injunction or an order for specific performance. Accordingly, the court will not compel Johnny to perform at The Happy Club.

Damages and restitution

- Based on the above, it would appear that Mike can prevent Johnny from performing at the Millennium Centre, but he cannot compel Johnny to continue performing at The Happy Club. Accordingly, should he wish, Mike can commence proceedings to obtain an injunction to prevent Johnny from performing at the Millennium Centre, and should Johnny not perform further at The Happy Club, Mike can sue Johnny for breach of contract and obtain damages.
- Contractual damages are assessed so as to put the claimant, so far as money is able to do so, in the position he would have been in had the breach not occurred (that is, had the contract been performed as planned).¹² As all the tickets for Johnny's performances have already been sold, it should be relatively straightforward to calculate how much money The Happy Club would have made had Johnny performed the full contract duration. Although such damages would not include certain losses (loss of publicity or prestige).
- An alternative approach would be to advise Mike to wait until the contract period has over and then, assuming that Johnny performs at the Millennium Centre and also performs at The Happy Club throughout the contract duration, and then bring proceedings against Johnny for breach of contract (that is, the breach resulting from Johnny performing at the Millennium Centre). This way, Mike would gain the benefit of Johnny's performances and can also obtain damages for Johnny's breach.
- However, it could be argued that Mike has lost nothing by Johnny performing at the Millennium Centre. Had the Millennium Centre performance resulted in The Happy Club selling fewer tickets, then substantial damages may be awarded. However, The Happy Club has sold all the tickets for Johnny's performances, so it could be argued that no loss has been sustained.
- It could be argued by Mike that, in performing at the Millennium Centre and breaching the contract, Johnny has been unjustly enriched. Mike could therefore argue that he should recover the profit that Johnny made performing at the Millennium Centre, but the House of Lords in *Attorney General v Blake*¹³ stated that such recovery will only be permitted in exceptional circumstances, and the facts of our case do not appear to be exceptional.
- The law in this area is far from settled, but the current view appears to favour awarding damages based on the hypothetical sum that the claimant might have received had he bargained with the defendant for release from the term that was breached.¹⁴ Accordingly, Mike may be able to obtain damages based on the hypothetical amount he would have gained had Johnny negotiated to be released from the term that he breached.

¹¹ *Johnson v Shrewsbury and Birmingham Rly* (1853) 3 DM & G 358.

¹² *Robinson v Harman* (1848) 1 Ex 855.

¹³ [2001] 1 AC 268 (HL).

¹⁴ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch); *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323.

Frustration

- Better students may notice that, if Johnny does refuse to perform at The Happy Club, then The Happy Club would appear to be in breach of contract towards those customers who had purchased tickets to see Johnny perform. However, it is highly likely that, in such a case, the contracts between the customers and The Happy Club would be frustrated, meaning that no breach occurs and the customers would be entitled to a refund.
- The Happy Club would be compensated for this loss by seeking damages from Johnny for breach of contract.