Podcast – Things to consider when determining if damages are the appropriate remedy

This podcast deals with an important topic in relation to the issue of remedies for breach of contract: the question of whether damages are the appropriate remedy to pursue in case there is a breach of contract. This is a topic which often crops up in assessment questions (either in the guise of a problem question or as an essay topic), hence it is important that you have a good understanding of this area of contract law: obviously, if you don't know what each remedy offers the claimant and what is required to use each remedy, you cannot properly advise your client as to whether damages are the correct or best remedy to pursue in a given scenario. Remember: if you are lacking the basic knowledge, you cannot make an informed choice as to the type of remedy to choose; even worse from your perspective is that it is unlikely that you will achieve a good mark. This podcast is therefore intended to help you to refresh your memory of the basic points you need to consider when determining if damages are the appropriate remedy to pursue. However, for spatial reasons, this podcast can only act as another aide-mémoire in addition to what is covered in chapter 10 of the revision guide in order to deepen your knowledge and understanding of the topic 'damages'; you will still need to fill in the details yourself. Hopefully however, the overview provided by this podcast will help you to do this much more easily.

The best starting point when determining if damages are the appropriate damages to pursue in a given scenario is the question 'what do damages do?' You might very well ask why this point should be of any concern to you; well, there are several reasons why you should be 'bothered': on a general level, it might very well be that you are asked to advise a named party on the availability of remedies for breach of contract and to recommend the best course of action in situation at hand; obviously, if you are lacking the basic knowledge of what each remedy does, you will struggle to offer complete and comprehensive advice. More specifically though, and especially when you are asked to advise a named client regarding his remedial options in relation to a breach of contract, if you don't know what 'effect' damages have when compared with other remedies you will not be able to decide if it is damages your client wants or if he wants something else (e.g. a debt action). The question of 'are damages what my client wants' almost seamlessly brings us to another important point: when thinking about what damages do, you should also consider – even if only briefly – the alternative remedies (such as e.g. specific performance) for breach of contract and their requirements; after all, it might either be that your client does NOT want to opt for damages or it might be that damages are not an adequate remedy in the given situation.

If your deliberation of these preliminary questions has led you to the conclusion that, <u>on the face of it</u>, damages would be an adequate remedy for the contractual breach which has occurred, you then need to consider a number of points which might STILL affect your client's ability to get damages. These points which, in effect, act as limitations upon the availability of damages are:

- Heads of loss

- Causation
- Remoteness
- Mitigation

As regards 'heads of loss', remember that the overriding aim behind an award of contract damages is compensatory; this prevents a claimant from being unfairly enriched, e.g. by recovering damages multiple times for the same loss. There are three heads of loss which may be claimed: expectation loss, reliance loss or restitutionary loss. If what has happened cannot be 'filed' under one of these recognised heads of loss, it cannot be claimed as damages for breach of contract.

As regards 'causation', remember that the claimant is only entitled to claim damages for those losses which were actually caused by the breach of contract: if the losses were NOT caused by the breach of contract (e.g. because they would have arisen anyway or because they were wholly attributable to another cause), they cannot be claimed from the defendant via the contractual damages remedy.

As regards 'remoteness', remember that remoteness in relation to the calculation of contract damages is concerned with the determination of the point at which a claim for damages will be rejected because the connection between the causative event – in this context: the breach of contract – and the loss caused by that event is deemed to be too tenuous, i.e. too remote. The test for remoteness derives from the case of *Hadley v Baxendale* (1854) and comprises 'two limbs' against which the claimable losses are to be tested: the first limb states that the defendant is liable for losses which may fairly and reasonably be considered as **arising naturally** (i.e. according to the usual course of things) from such a breach of contract; the second limb states that the defendant is also liable for losses which may reasonably be supposed to have been **in the contemplation of BOTH parties** *when the contract was made* as the probable result of its breach. If the loss cannot fit under **either** limb it is too remote as a matter of law and cannot be claimed in a breach of contract action.

As regards 'mitigation', remember that mitigation only applies to claims for a breach of contract (it does NOT apply to claims in debt) and essentially means that the claimant, after accepting that the contract is at an end, can only recover compensation for those losses which he could not have avoided by taking reasonable steps. What amounts to reasonable steps is a question of fact and thus depends upon the circumstances of each case, see the case of *Payzu v Saunder* [1919]. Note however that the burden of proof concerning mitigation is on the defendant: he must show that the losses claimed as damages by the claimant could have been reduced or avoided had the claimant taken **reasonable** steps to so mitigate them. In this context, it should however also be noted that though the claimant must try to mitigate his losses he need not necessarily **succeed** in any attempt he makes to mitigate his losses: the requirement is merely that he must make a **reasonable attempt** to mitigate but, if the claimant either **declines to mitigate**, or, **cannot show a reasonable**

attempt to do so, the court will then reduce his claim to take into account what it believes would have been a reasonable level of saving by mitigation.

If you can show that damages would be an adequate remedy and also that the limitations placed upon the availability of damages for breach of contract do not apply in the case at hand, then a claim for contract damages will be plausible.