Fulfilment of obligations for a contract

Jack's purchase of " the machine" from Jim of Agricultural Supplies Ltd is one for a specific purpose. The contract with ASDA will no doubt reap substantial reward. The machine is a fundamental part of that agreement, as Jack cannot fulfill his obligations without it. The importance of the machine being able to produce vegetables that comply with the terms of the contract with ASDA was brought to the attention of Jim at the time the contract was entered into.

The question of whether Jack can recover anything beyond the price of the machine after it fails to deliver will initially depend upon the interpretation of the exclusion clause. The contract specifically excludes liability for any consequential loss whatsoever. This would include the loss of profit to be suffered by Jack as a result of ASDA summarily terminating their agreement. Such terms are however subject to theUnfair Contract Terms Act 1977, and more specifically s. 3[1], and the test of reasonableness contained within s. 11. There is a standard requirement that the term is " fair and reasonable[2]" but what amounts to this will be a question of fact in each case. Not only will it look at the extent of what the clause is attempting to exclude, but also the bargaining position of the parties. As both are essentially acting " in the course of a business" there is a suggestion that there is an equal footing and the greater the equality, the more likely that an exclusion clause will be considered reasonable[3].

What is fair to infer from the facts of this case, is that Jack is not an experienced businessman with an understanding as to the operation of a clause that would exclude liability. He may well have noticed its presence, but requires firm clarification as to what he can actually recover in the event

of a breach. It is Jim’s response that leads to the exclusion clause probably becoming unenforceable. The clause is attempting to limit the liability of Agricultural Supplies Ltd but Jim, a company Director contradicts this position and assures Jack that any consequential losses will be covered in the event of a breach. S 11(1) UCTA 1977 states that the term may be considered reasonable having regard to the circumstances known to, or in the contemplation of the parties when the contract was made. It would be harsh in this case to deny Jack the ability to rely upon Jim’s assurances. Certainly there is a strong argument that Jim’s statement will become a term of the contract, overriding the earlier exclusion clause. It was the parties’ true intention and to allow the exclusion clause to stand would not only be unreasonable, but an inaccurate reflection of that intention[4]. Assuming therefore that the exclusion clause itself does not prevent a claim in principle for losses beyond the defective machine, we can consider the issue of lost profit arising from the agreement with ASDA.

It has traditionally been the accepted practice of assessment of damages in the area of contract, that lost profit following a breach are subject to tests of causation and mitigation. While the general rule in contract law is to put the claimant in the same position as if those terms had been fulfilled[5], it is still necessary for the Court to assess such damages in monetary terms. In Jack’s situation he has an expectation interest which is defined as “ the benefit [the claimant] expected to receive from the completion of the promised performance of the other party’s obligation, but which were in the event prevented by the breach of contract committed by [the defendant][6]”. The difficulty here is that while there is a definable loss i. e. the profit from the

contract with ASDA, there is no knowing how long that contract would continue for or how much Jack would receive per annum. Where significant loss has been sustained, the Courts will look to the available evidence to assess quantum[7]. But whether this alone would suffice is debatable. The difficulty is causation; to what extent was this breach of contract the effective or dominant cause of the loss[8]?

The case of Headley v. Baxendale (1854)[9]laid down the rule regarding recovery of losses that were allegedly too remote. In modern terms it is stated to be: “ A type or kind of loss is not too remote a consequence of a breach of contract is, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question) it was within their reasonable contemplation as a not unlikely result of that breach[10]”. It would certainly appear therefore that such contemplation was well within the mind of both Jack and Jim at the time of entering into the contract. Indeed, Jack showed Jim a copy of the agreement with ASDA and his statement that Agricultural Supplies Ltd would “ see to it that Jack is compensated for any loss he incurs” certainly seems to suggest an acceptance of the types of loss i. e. future profit, which Jack would now seek to recover.

The recent judgment of the House of Lords in Transfield Shipping Inc v. Mercator Shipping Inc (*The Achilleas*) (2008)[11]has however thrown such assumptions wide open. This case concerned the hire of a ship for a certain period. The defendant failed to return the ship on time and as a result, the claimant lost a contract with a third party. While the defendant accepted that “ in the trade” compensation would have to be paid, the disputed that they were liable for the loss of profit under the second contract. The arbitrators at

first instance and the Court of Appeal[12]found for the claimant. The House of Lords however reversed that decision finding for the defendant.

The issue of “ assumption of responsibility” was at the forefront of the Lords’ considerations in this matter. While the defendant’s accepted that some losses would be sustained for which they may be liable, the Court felt that the particular kind of loss was not reasonably contemplated. As Lord Hope of Craighead stated[13];

“ a party cannot be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. It is not enough for him to know in general and on open-ended terms that there is likely to be a follow-on [contract]”

What has been established by the case is a second limb to the test in *Headley v. Baxendale* . A claimant will not necessarily recover losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered[14]. No longer can it be said that such losses were likely, probable or foreseeable alone, the particular type of loss must have been contemplated by the defendant and he nevertheless accepted the risk in the event of a breach. While this issue of a certain type of loss is not a new phenomenon[15], the combination with the test in *Headley v. Baxendale* has redressed the scope of recovery in contract cases and particularly the issue of remoteness of damage. Baroness Hale[16]has referred to this extension as “ adding a novel dimension to the way in which the question of remoteness of damage in contract is to be answered”. What

this case has done is establish a negligence type assessment for causation in contract. While the issue of remoteness, and whether the kind of loss was “ not unlikely” to occur remains a question of fact, the issue of whether it was reasonable to assume the defendant accepted responsibility for that particular type of risk is a question in law[17]. Whether this will assist Jack is not clear.

It has been suggested that the effect of *The Achilleas* uponSale of Goods Act 1979claims (as is Jack’s) may have relevance. S. 52(2) of the SGA 1979 states that;

“ The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract”.

If such loss of profit from the agreement with ASDA is to be “ not unlikely” to occur, then Jack may have to establish that Jim assumed responsibility for that particular type of loss. In *Chitty on Contracts* [18]it is submitted that the House of Lords see their decision as a separate rule when applicable to sale of goods contracts. It should be noted that the facts of *The Achilleas* related to shipping contracts and the House noted that lack of case law considering this specific issue. While not limited to this area of law, the decision as opposed to other areas i. e. sale of goods, needs to be watched with trepidation.

Ultimately there are reasonable prospects for Jack to secure damages beyond the cost of the machine. It can certainly be argued that Jim accepted the risk of the particular type when he was referred to the contract with

ASDA. The loss of profit resulting from the termination of that agreement is not the only possible pecuniary disadvantage Jack could suffer i. e. damages claimed by ASDA, returned goods through poor quality etc. This coupled with the uncertainty as to the duration and net value of the contract makes quantum an almost impossible task. It should be noted that such losses have been recovered inVictoria Laundry (Windsor) v. Newman Industries (1949) [19], and more specifically for lost profit arising out of defective equipment under a contract of sale inH Parsons (Livestock) Ltd v. Uttley Ingham & Co Ltd (1978)[20]. However the particular circumstances of Jack's contract are quite unique, and the possible extension of the remoteness rule will not appear to be a help.

BIBLIOGRAPHY

Chitty on Contracts; Thirteenth Edition 2008, Sweet & Maxwell Publishing

Peel, E.; *" Remoteness Revisited"* , L. Q. R. 2009, 125(Jan), 6-12

Poole, J.; *" Casebook on Contract Law"* , Ninth Edition 2008, Oxford University Press

McKendrick, E.; *" Contract Law: Text Cases and Materials"* Third Edition 2008, Oxford University Press

Tamblyn, N; *" Damages Under String Contracts for Sale of Goods"* , J. B. L. 2009, 1, 1-14

Rose, F.; *" Blackstone's Statutes on Contract, Tort & Restitution 2008-2009"* , Nineteenth Edition 2008, Blackstone Press

www. westlaw. co. uk– as accessed on 22nd December 2008

1

Footnotes

[1] UCTA 1977 s. 3(1) " This section applies as between contracting parties where one of them deals…on the other's written standard terms of business"; Chester Grosvenor Hotel Co Ltd v. Alfred McApline Management Ltd [1991] 56 Build LR 115

[2] UCTA 1977 s. 11(1)

[3] Watford Electronics Ltd v. Sanderson CFL Ltd [2001] All ER (D) 290 CA

[4] This section can be expanded upon to include additional cases on exclusion clauses in any text book. There is also an argument for rectification by mistake i. e. Joscelyne v. Nissen [1970] 2 QB 86 (CA)

[5] Golden Strait Corp v. Nippon Yusen Kubishika Kaisha [2007] UKHL 12

[6] Chitty on Contracts: Thirteenth Edition, Volume I, at para 26-002

[7] Tai Hing Cotton Mill Ltd v. Kamsing Knitting Factory [1979] A. C. 91, 106.

[8] *Ibid* fn 6 at para 26-032

[9] [1854] 9 Ex. 341

[10] *Ibid* fn 6 at para 26-054; see also Koufos v. C. Czarnikow Ltd (*The Heron II*) [1969] 1 A. C. 350

[11] [2008] UKHL 48

[12] [2007] Lloyd’s Rep 555

[13] *Ibid* fn 11 at para 36

[14] *Ibid* fn 6 at para 26-100A

[15] Victoria Laundry (Windsor) v. Newman Industries [1949] 2 K. B. 528

[16] *Ibid* fn 11 at para 93

[17] *Ibid* at para 22 per Lord Hoffman

[18] *Ibid* fn 6 at para 26-100G

[19] *Ibid* fn 15

[20] [1978] Q. B. 791