The Implied Terms and the Damages of Contracts under Common Law.

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The "breach of contract" occurs when one party to the contract fails to perform one or more of his/her or its contractual obligation(s). The claimant(s) of the breach must identify the terms of contract that are not complied with. The terms may be express, implied or a mixture of both.

The express terms of a contract are ascertained by discovering what the parties actually said or wrote, but there are two main rules to consider in relation to the 'express terms':

1. The parol evidence rule in the case of *Henderson v Arthur* (1907).This rule was applicable in England but not Scotland.
2. Whether a pre-contractual statement is a contractual term or a representation.

The implied terms: a contract, containing express terms, may contain implied terms. An implied term is one which is not actually formulated by the parties, but which the law imports into the contract.

Furthermore, in any contract, in addition to the express terms, implied terms are assumed to exist, even if there is no agreement between parties either orally or in writing, the law assumes that the terms exist.

The implied terms are invisible and when they are assumed to exist they have equal force to the express terms of the contract and they are not inferior in any way and can be fully enforced.

There are three basic terms implied in contracts;

1. Some terms are implied in particular categories of contract (for example: a contract for sale of goods, a contract of hire purchase) by statute, in the act of Sale of good Act 1979.
2. Some terms are implied in contracts by virtue of rules evolved by the courts, in the case of *The Moorcock (1989).*
3. Some terms are implied on the basis of rules of customs, in the case of *Hutton v Warren (1836).*

Lord Diplock explained the effects of a breach of a contractual obligations in the case of Photo Production Ltd v Securicor Transport Ltd (1980) that :

'Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contact-breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach[1].'

The remedies for breach of contract can be any of the following:

- Damages
- Quantum meruit
- Specific performance/ specific Implementation
- Injunction / Interdiction

Depend on the estimation of what damages are to be paid by the party during the breach of contract, the damages can be divided into two parts by (i). remoteness of damages and (ii). measure of damages.

[1] David Kelly & Ann Holmes, Principles of Business Law, 1998, Page 147

The modern rules relating to remoteness are based on tests originally formulated in the case of Hadley v Baxendale (1854), where it was said that damage is not too remote if either of the following is satisfied:

- If the loss arises naturally, that is, as the probable result of the breach of contract,
- If the loss could reasonably be supported to have been in the contemplation of the parties as the probable result of the breach of contract. What was within the parties' reasonable contemplation, that is, what was foreseeable, depends upon the knowledge of the parties and the time that the contract was made.

In the event of a breach of contract, the injured party has a choice of remedies; provided that any action is brought within the Limitation period, explained in the Limitation Act 1980. Under this remedy, the claimant can seek monetary compensation for the loss suffered. When damages are claimed, the amount of such damages is calculated pursuant to the relevant breach of contract principles vide:

'The rule of common law is that where a party sustains a loss by reason of a breach of a contract, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.' In the case of Robinson v Harman (1848).

In a leading case of *Western Web Offset Printers Ltd(1996)* v Independent Media Ltd , this was a plaintiff's appeal against an award of damages for breach of contract. The issue was whether the proper measure of damages was the loss of the net gross profit. The court held, allowing the appeal and substituting the figure of £176,903.88 for the award of damages. In the circumstances the plaintiff was entitled to be compensated for loss of gross profit.

The test for mitigation is that the victim should have acted reasonably:
'…take any step which a reasonable and prudent man would ordinarily take in the course of his business...'

In the case of *British Westinghouse Electric and Manufacturing v Underground Electric Railways Company of London(1912)*, it was stated that the claimant was under a duty to mitigate his/her losses. To reduce losses, the responding party has to take all necessary cost mitigation measures. In the case of *Hadley vs. Baxendale*, it was stated that the damages for the loss of profit were too remote as a consequence of the breach and therefore not recoverable. Furthermore, the court stated that the recoverability of the damages depended upon the knowledge or the contemplation of the parties at the time of entry into the contract and in particular the knowledge of the party in breach.

In the case of *Victoria laundry (Windsor) v Newman Industries Ltd (1949)*, the court of Appeal held that the plaintiff was entitled to recover the damages for their general loss of profit but not for the loss of profit from the lucrative contracts.

The basis on which the damages are claimed will depend upon the type of loss suffered which is usually linked to the nature of the breach of contract. Some common examples are as follows:

a. Market value compensation
b. Defective performance value
c. Loss of profits. It has been held that the loss of profit was recoverable in the case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd(1949)*.
d. Remedial damages
e. Restitutionary Loss and
f. Non-Pecuniary loss

In the other hand, if the parties enter into a contractual agreement without determining the reward that is to be provided for performance, then in the event of any dispute, the court will award a reasonable sum. This assessment was called the basis of *Quantum meruit. In the case of Craven-Ellis v Canons Ltd (1936).*

1.0 Bibliography

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Leicester Board of Guardians v Trollope (1911)

The clerk of works altered the design of a floor and as a result dry rot broke out in the floors some four years after completion. It was alleged that the defect arose owing to the negligence of the architect in not seeing that the concrete was properly laid in accordance with the contract. The architect denied that it was his duty to supervise the laying of the concrete and that this was the duty of the clerk of works who had been appointed by the Guardians.

It was held that while it was the duty of the clerk of works to supervise the details of the work, the laying of a floor such as this could not be regarded as a detail and that, therefore, the architect was liable in negligence.