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RECOVERY OF LOSS

The Irish Courts Approach to Recovery of Loss, Particularly Economic Loss, for Contractors and Clients

Presented by Angelyn Rowan

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Recovery of Loss

- What is loss?
- Purpose of damages



Contract	Tort
Place injured party in same situation as if <i>contract had been performed</i>	Place injured party in same position as existed <i>prior to commission of tort</i>

Contract - Remoteness

- *Hadley v Baxendale* (1854) sets out classic statement on type of losses that will normally be recoverable for breach of contract
 - [Limb 1] – damages as may fairly and reasonably be considered arising naturally in the usual course of things
 - [Limb 2] – damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it

Tort - Foreseeability



For duty of care to arise:

1. must be sufficient 'proximity' between the parties
2. damage must have been foreseeable
3. fair, just and reasonable to impose a duty of care now replaced with analogous situation and incremental development of common law

University College Cork v Electricity Supply Board (2020) – Supreme Court decision

Approach of Courts to Economic Loss

- Foreseeable damage

“The decided cases draw a distinction between loss caused by physical damage and economic loss. This is because the existence of a duty of care not to cause foreseeable direct physical damage is in most circumstances obvious, whereas the existence of a duty of care not to cause” Keating

- Courts as gatekeepers

“All this simply serves to demonstrate that the test is an inherently flexible one whose outcome is likely to be dictated by the particular facts of the case. In the final analysis, the judiciary remain very much the gatekeepers as regards those claimants who will be let into the fold of entitlement to recover for economic loss which has been negligently inflicted and those who will not.” Cian Ferriter SC

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Fitzpatrick v Frank McGivern Limited (10 February 1977)

- Plaintiff recovered damages for cost of remedying defects
- Claimed loss of rent
- Court rejected claim for damages for loss of rent:
 - no communication to contractor of intention to rent out house
 - contractor was not therefore on notice of her intention
- Recovery of this economic loss required communication of special circumstances

DUTY TO MITIGATE



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Duty to Mitigate

- Common law rule that party that has suffered loss cannot seek to recover ***avoidable*** losses
- Based on fairness and damages not intended to be punitive
- Burden of proof on defendant to show that plaintiff could reasonably have avoided loss or was unreasonable in his/her conduct



Examples of Failure to Mitigate

1. if it is alleged that Employer has unreasonably refused to accept Contractor's offer to remedy defective work
2. where it is alleged that the remediation scheme chosen by the Employer is too elaborate
3. where Employer could have avoided any expenditure by recovering the cost of the remediation from a third party under a separate agreement



Fitzpatrick v Frank McGivern Limited (10 February 1977)

- Client refused to allow Contractor remedy the defective works
- Contractor argued that it could have undertaken remedial works at a far cheaper cost
- Court found that the client had not been unreasonable in refusing to allow the Contractor to fix the defective works given Contractor's poor performance prior to that

Sandy Island Pte Ltd v Thio Keng Thay [2020] SGCA 86

- Employer may recover damages for rectifying defects even if defects notification provision
- Right to damages for defective works and defects notification provision can co-exist
- *Though* quantum of damages recoverable likely to be reduced because cheaper and quicker for Contractor to carry out works
- No clear words in contract excluding common law right

ASSESSMENT OF LOSS



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Assessment of Loss

- What happens if losses are difficult to calculate?

“It is well established that the courts will not shirk from the assessment of damages simply because the task is difficult or uncertain”. McDermott

- *Grafton Court Ltd V. Wadson Sales Ltd. (1975)*

“I am satisfied that the true underlying principle is firstly that the court must be alert, energetic and if necessary ingenious to assess damages where it is satisfied that a significant injury has flowed from a breach of contract.”

HEADS OF CLAIM - EXAMPLES

LOSS OF PROFITS

LOSS OF CHANCE

LOSS OF MANAGEMENT TIME

LOSS OF PRODUCTIVITY/DISRUPTION

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Loss of Profits

- Once breach established Courts will apply test in *Hadley v Baxendale*
- Key is understanding parties knowledge and expectations at time of entering into contract
- If necessary Court will award a “*global sum that has regard to the prospects of the relevant plaintiff having had a financial gain and the scale of such gain, but also pays proper regard to the fact that any such gain was necessarily problematic.*” *Clarke J, Mount Kennett case*



Loss of Chance

- *Minister for Communications v Figary Watersports Developments Ltd (2010)*
 - must show that it had, on the balance of probabilities, a real and substantial chance of success, not merely a speculative one
 - must show that there were not an actions which, on the balance of probabilities, would have prevented that chance from being real and substantial
 - then Court will assess quantum of damages based on likelihood of that chance

Mount Kennett Investment Company v O'Meara & Ors (2011)



Delay was a 'loss of opportunity' case



Court considered foreseeability and remoteness



Assessed damages on the basis of this loss of opportunity



Must spell out in detail

Loss of Management Time

Costs of managerial /staff time spent dealing with consequences of breach of duty (whether in tort or contract)

Aerospace Publishing Ltd v. Thames Water Utilities Ltd (2007)

- Claimant was publisher of specialist publications relating to aviation and military history
- Sought to recover damages for cost of work done by staff in salvaging and reorganising archive after flood
- Recoverable loss = amount at least equal to cost of employing staff during that time

Loss of Productivity/Disruption

- Covid-19 - contractors seeking to claim ‘loss of productivity’
- Must be a ***clear causal link*** between the loss suffered and event for which the Employer is responsible or assumed risk for under contract terms
- Entitlement to recover this loss depends on contract terms
- Pursuant to which clause has Employer assumed the risk?



Liquidated and Ascertained Damages

- If works delayed beyond the date for practical completion, an Employer will commonly have included right to recover liquidated and ascertained damages
- Must be genuine pre-estimate of losses
- In the absence of LADs clause, the damages assessed based on the rules set out in *Hadley v Baxendale*
- *Comfort Management v OGSP Engineering (2020)*



EXCLUSION CLAUSES

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Exclusion Clauses

- Clauses excluding certain categories of losses
- Important clauses are carefully drafted, as they will be strictly interpreted

British Sugar plc v NEI Power Projects Ltd. (1998)

- In drafting exclusion clauses, it is important to be as prescriptive as possible

James Elliott Construction Limited v Irish Asphalt Limited (2014)

Persimmon Homes Ltd. v Ove Arup & Partners (2017)

Does this exclude loss of profits?

Example 1

"In respect of the [sic]...contract, NEI's liability for consequential loss is limited to the value of the contract".

Example 2 -

"Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract."

Clause 17.6 FIDIC Red Book

CAPS ON LIABILITY



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Financial Cap on Liability

- Becoming more commonplace
- Often heavily negotiated and subject to list of carve outs
- Consider interaction of insurances and agreeing to caps on liability
- Other means to limit liability, such as limitation period

Thank you

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PHILIPLEE

philiplee.ie
info@philiplee.ie



DUBLIN

7/8 Wilton Terrace
Dublin 2
Ireland

T: +353 (0)1 237 3700

BRUSSELS

EU Quarter, level 6 box 6,
Schuman Roundabout, 2-4,
1040 Brussels

T: +353 (0)1 237 3700

SAN FRANCISCO

388 Market Street, Suite
1300, San Francisco,
CA 94111

T: +1 415 839 6406

LONDON

2 Eastbourne Terrace,
London, W2 6LG
United Kingdom

T: +44 20 3934 7010