

**Law of Contract 2004 Exam**  
**Question 3**  
**High Distinction**

Nick may bring an action of damages for breach of contract against Reliable, as the latter breached the contract of repairing (by destroying T-Rex).

**Incorporation**

Nick cannot argue that the exemption clauses is not incorporated as a term because he has signed the contract.

**Interpretation**

Nick is suing Reliable for damages. Reliable may seek to rely on the exemption clause exempting liability on the part of itself and subcontractors.

There is no ambiguity in the clause in this case as to whether liability in negligence is exempted besides contractual liability, because it is specified in the clause “loss or damages caused by the negligent acts.” Therefore it covers liability in negligence. However, ambiguity does arise as to whether the clause exempts liability for loss/damage occurred ? side of the four corners of the contemplated performance of the contract. In solving this particular ambiguity the contra proferentem rule is employed ie the clause is interpreted against he party (Reliable) who prepared the contract and sought to rely on it (Darlington v Delco). As a result, it can be determined that the clause does not cover liability of the breaches occurred outside of the “four corners” of the contemplated performance of the contract.

Nick may argue that Damien’s conduct of repairing T-Rex after drinking too much for lunch is something outrageous and outside of the four corners of the reasonable contemplation of performance, therefore the liability of breach of contract in this case can not be exempted by the exemption clause (Sydney City Council v West).

If the argument above is accepted by the Court, Reliable would be liable for the loss/damages caused by Damien.

Apart from suing Reliable, Nick may also consider suing Damien for negligence. Damien may seek to rely on the exemption clause. However, doctrine of privity may prevent him from doing so as he is not a party to the contract (the clause is not a Himalaya Clause in the *Eurymedian*) Damien here may argue that Reliable is acting as trustee for him in making the contract because the clause specifically expressed an intention to cover all subcontractors (which he is one) (*Trident v McNiece*). Damien may also argue that there is an exception to privity the employees are exempted from liabilities of damages occurred in the course of their employment while carrying out the specific service of the contract which arguably is the situation here (*London Drugs v Nagal*). However, this argument would not be accepted as Damien is a sub-contractor, not an employee to Reliable.

Therefore, considering Damien's first argument in regards to trustee, the Court may not find Damien able to rely on the Clause. Even if this was the case, however Nick wouldn't want to sue Damien because he is bankrupt. Nick would rather sue Reliable.

As discussed above, it is likely for the Court to find that because the damage is caused outside of the four corners of the reasonable contemplation, Reliable is liable for the loss caused by the breach. However, in case this argument is rejected by the Court, Nick may also consider to sue for the breach of an implied term under the Trade Practices Act 1974 (Cth) (TPA). s74 of the TPA provides an implied term that services under the contract and will be rendered with due care and skill. s74 here only applies to contracts of supply goods or services from a corporation to a consumer. Reliable is a Corporation as given, Nick is a consumer because he spent \$30,000 in the contract (less than \$40,000 so it satisfies the definition of a consumer under s4B of the TPA). Therefore s74 of the TPA applies here. It is easy to establish Reliable has breached this implied term stated above due to Damien's negligent act (he was also drunk) therefore Reliable is liable for the loss and damage caused as a result of the breach of this implied term despite of the exemption clause, because the TPA (Fair Trading legislations) can not be contracted out of.

If any of Nick's arguments above are accepted by the Court, then Reliable is liable to pay for the damage for breach of the contract.

### **Damages**

The purpose of the damages here is to place Nick into the position he would have been in had the contract been performed (*Robinson v Harman*). Besides expectations, Nick is also entitled to the reliance loss, loss actually incurred (*The Commonwealth v Amman*). Nick therefore can recover the cost to build the T-Rex which is at least \$1 million as long as he can show evidence of the expenses incurred.

Nick is also entitled to the loss of profits under his contract with the Wayville show grounds as a result of Reliable's breach (rule above from *Robinson v Harman*).

With respect to Nick's contract with Wayville Showground, Nick has to argue that the contract has been frustrated due to the unforeseeable destruction of T-Rex. In order to do so, he can argue that the destruction of T-Rex has made performance of the contract impossible (*Taylor v Caldwell*). He also has to argue that the destruction of T-Rex by Reliable is totally unforeseeable because in the Yellow Page it is said to "provide the best service..." (that is why Nick chose it) therefore this frustrating event is not included by induced by Nick so that it is likely for the Court to find that the contract between Nick and Wayville Showground (WS) is frustrated.

Then the loss and benefits must be adjusted between the parties Nick and WS to the formula set out in the Frustrated Contracts Act 1988 (SA) (FCA) s7(2).

a) benefits	20,000	3000	
b) performance		3000+5000	20,000
Net loss -	5000		

It is worked out that the net loss as a result of frustration is \$5000 and \$2500 to each party. Therefore Nick, who already received \$20,000 from WS, has to pay WS \$22,500 as a result of s7(2) of FCA.

Nick lost his profits of 20,000 and an additional 2500 under the contract with WS as a result of Reliable's breach. Reliable is liable to pay this amount to Nick as damages because the loss is reasonably foreseeable to Reliable at the time of contracting with Nick as the contract between Nick and WS is obvious to Reliable (otherwise why would T-Rex be in the showgrounds) and the loss of profits under the contract between Nick and WS as a result of destruction of T-Rex (Reliable's breach) therefore arises in the ordinary course of things (*Hadley v Baxendale*). Therefore Nick is entitled to the \$22,500 paid by Reliable.

Nick may also sue for the medical expenses he incurred in the 3 months of hospital treatment because it resulted from the breach. However Reliable may argue that it was not reasonable foreseeable that Nick would incur such loss (*Hadley v Baxendale*) because it was not in the ordinary course of things that someone would suffer psychological injury as a result of the breach. However, if Nick can establish that his expenses in hospital were foreseeable by Reliable (eg by arguing the extreme importance of T-Rex and his effort to build it etc) he will recover the expenses.

Nick will also sue for his psychological injury caused by the breach. However, generally non-pecuniary loss is not compensable for breach of contract (*Baltic v Dillon*) unless the non-pecuniary benefit is promised in or as a part of the contract (*Jarvis v Swans*). However in this case, Nick may not be able to prove this because the contract was just for repairing the casing of T-Rex so Reliable will not have to pay for damages for Nick's mental injury.

Nick will sue for the loss of profits of the \$10million offered by Dino. However the principle from *Hedley v Baxendale* states that such loss has to be made known to Reliable at the time of contracting to be recoverable. However, like in *Victoria Laundry v Newman*, the loss of profit of \$10million is not known to Reliable (not even to Nick) at the time of contracting and it therefore is not recoverable.

Though Nick may argue that due to the overwhelming passion about the movie "Terro T-Rex" it was foreseeable that he would incur further loss (apart from the contract with WS) because it was foreseeable to Reliable that some other people would like to contract with him for showing T-Rex. If Nick can establish that, then he would be entitled to some of the ordinary future loss that would arise but not the \$10million (*Victoria Laundry*).

Nick will also try to get back the \$5000 paid to Reliable. He can easily argue that there is a total failure of consideration on the part of Reliable because Damien did not fix the casing and set the whole thing on fire, therefore the Court is likely to order restitution of the \$5000 paid under the contract between Nick and Reliable.