

FORESEEN AND UNFORESEEN DAMAGES

(By Paul Mallia, B.A.)

IT is a rule of law that obligations lawfully entered into by the parties must be performed with good faith (art. 699). It sometimes happens, unfortunately, that such obligations are not performed. The first effect of such non-performance is “enforcement”; but the Court cannot always enforce an obligation; it is a well-known maxim of law that *nemo precise cogi potest esse ad factum*. In many cases all that can possibly be done by the Court is to give money compensation, i.e. to order a payment which shall put the plaintiff in the same financial position as if the duty had been fulfilled or the wrong not committed. And here we come to the second effect of the non-performance of obligation, namely liability for damages on the part of the debtor.

If such non-performance, however, is due to irresistible force or a fortuitous event, the debtor cannot be made liable for damages for *res debita creditori*. Unless the debtor is in delay since *mora perpetuat obligationem* and has the effect of transferring the risk and peril of the thing from the creditor to the debtor. Failing such “casus”, “the person, who has contracted an obligation is bound, if he does not fulfill it, to make good the damages”(art.831).

Art.842 lays down : “The debtor is liable only to such damages as were, or might have been, foreseen at the time of the obligation, unless the non-performance of the obligation proceeds from fraud on his part.”

Art.843 lays down that “in cases where the non-performance of an obligation proceeds from fraud on the part of the debtor, damages relative to the loss sustained by the creditor and to the profit of which he has been deprived, are not to exceed that which is the immediate and direct consequence of the non-performance of the obligation.

Art. 842 distinguishes between foreseen and unforeseen damages, and lays down that a debtor who negligently does not fulfill his obligation is liable for those damages which were or might have been foreseen at the time he entered into the obligation. Now the question is asked whether such foresight refers in the case and origin of the damage or to the quantity of the damage actually suffered. Until lately it was held that such foresight referred to the cause and origin of the damage; once the cause of the damage was, or could have been foreseen at the time of the obligation, the debtor was responsible in case of negligent non-performance to the whole amount of the damage resulting from such non-performance. Thus a Railway Company was held responsible for the loss of parcels lost through the negligence of its employees notwithstanding that the actual amount of the damage could not possibly have been foreseen . however, in 1924, the French Courts decided that the foresight referred to the extent and actual amount of the damage suffered and not to its cause and origin. This seems rather illogical since such decisions tend to equalize the responsibility of a debtor who acted negligently with that of a debtor whose non-performance proceeds from fraud, for by art.843 the fraudulent debtor is responsible for the actual amount of the damage suffered by the creditor provided such amount of damages does not exceed that which is the immediate and direct consequence of the non-performance of the obligation, which damage can always be foreseen, even if such damage is not or cannot be foreseen at the time he enters into the obligation.

It is only logical that some sort of difference should exist and that the responsibility for damages in case of fraud should be stricter than the responsibility in case of negligence, since in case of *dolus*, the liability for the damages does not simply arise from the non-performance of the obligation, but it also raised *ex delicto*.

To sum up we may therefore say that in case of negligence the debtor is liable to the damage whose *cause* he foresaw or could have foreseen at the time of entering into the obligation, while in case of *dolus* he is liable to the whole damage which is the immediate and direct consequence of the non-performance of the obligation irrespective of whether such damage was or could have been foreseen at the time of concluding the obligation.

The question is now asked what is meant by the word “foreseen”? Foreseen damage is that damage which any other person (i.e. other than the creditor) would have suffered in the circumstances : *damnum communiter incursum, lucrum communiter cessans, id est atque uni vel alteri ejusdem conditionis contingens*; it is, in one word, common or intrinsic damage; such extraordinary damage cannot in any way be responsible foreseen. This distinction between common and particular damages is debatable for, as Demoulin says, all damage is particular to the particular person who suffers it. Pothier, on the other hand, holds that in sale, for example, the contracting parties are not liable to every kind of damage possible, but only to those damages which are closely connected with the thing itself i.e. the intrinsic or common damages.

An example will illustrate this better: A sells B an immovable for £1,000. B carries out necessary and useful repairs; establishes a business; and is able to acquire good will from the inhabitants of the town in which the immovable is situated. Independently, however, of such business, the value of the house has increased considerably owing to the opening of new street just in front of it. After 2 years or so, it is found out that A was not the real owner, and since *nemo plus iuris ad alium transferre*, B suffers eviction. What damages is the seller in this case bound to make good?

According to the distinction we referred to above, the seller is bound only for the intrinsic damages i.e. those damages which are closely connected with the immovable sold. Thus A is to reimburse B for the necessary and useful repairs carried out, for the rents paid, for the costs of contract, and also for the accidental increase of value of the house due to the opening of the new street; but he is not bound to make good the loss of the has nothing to do with the immovable itself but is peculiar to the not intrinsically connected with the immovable itself. Here however lies the difficulty : all damages suffered are either closely or remotely connected with the thing itself. The only help that is offered us in this case is to distinguish between common and good will acquired by b in his business, since such food will is peculiar damages. The good will acquired by B in his business particular use made of the house by B. it is needless to say, however, that A would also be liable for the loss of such good will if the establishment of the business was a clause in the contract of sale.

Damages are part of the system of remedies which the Law sanctions for safeguarding the performance of obligations lawfully entered into by the parties thereto—they are in fact its most complicated part. It is no doubt true that in most cases they are not applied. – People are getting more and more conscious of their duty to obey the Law and to execute faithfully all

obligations entered into freely by themselves and we may hope that the system of damages will in the future fall in the background. The existence of such remedies, however, is essential to the working of the social system as men are now constituted. We may hope, indeed, that we are progressing towards a time when the element of compulsion in Law will not be indispensable. But we have not yet reached it; until that time is reached the system of damages will continue to play its important role in Civil as well as in Commercial Law.