

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 8 - Remedies for Breach of Contract
Chapter 26 - Damages
Section 1. - The Nature of Damages for Breach of Contract
(a) - General

Introduction

26-001

Subject to a number of controls,¹ the parties to a contract may themselves specify in their contract the remedy available to the innocent party following the other's breach.² In the absence of any such "tailor-made" clause on the remedy, the law on damages fills the gap with "default" provisions on the assessment of money compensation which apply to all types of contract.³ Until *Att-Gen v Blake*,⁴ the traditional view was that damages for a breach of contract committed by the defendant are a compensation to the claimant for the damage, loss or injury he has suffered through⁵ that breach,⁶ and this remains the normal rule.⁷ The claimant is, as far as money can do it and subject to the limitations referred to in the next paragraph, to be placed in the same position as if the contract had been performed.⁸ This implies a "net loss" approach in which any gains made by the claimant as the result of the breach (e.g. savings made because he is relieved from performing his side of a contract which has been terminated for breach⁹; savings in taxation; benefits obtained from partial performance; or the salvage value of something left in his hands) must be set off against his losses arising from the breach (after he has taken reasonable steps to minimise those losses).¹⁰ Where the claimant is to be compensated for loss of an income stream, a capital sum will be awarded with an appropriate discount for accelerated receipt.¹¹ In assessing damages for breach of contract, the court can take account of only the defendant's¹² strict, legal obligations: it cannot take account of:

"the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do."¹³

Thus, if the contract-breaker had a choice of alternative methods of performance, damages will be assessed on the basis of his minimum legal obligation, viz on the alternative which would have been least onerous, or most beneficial to him.¹⁴ If the claimant cannot establish an actual loss, he is entitled only to nominal damages.¹⁵ Even where the claimant can prove his loss, damages are hardly ever a full recompense, since "it must be remembered that the rules as to damages can in the nature of things only be approximately just".¹⁶

General limitations on recovery

26-002

The law on damages places various conditions and restrictions on the principle that the claimant is generally entitled to recover all he has lost as a result of the breach. Traditionally the principal general limitations on recovery have been (1) the "mitigation" rule, that a claimant cannot recover for losses

which he could have avoided by taking reasonable steps¹⁷; and (2) the “remoteness” rule, that the claimant will recover for losses only if they arose “in the usual course of things” or were losses that were contemplated by the parties at the time the contract was made.¹⁸ Following the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)*¹⁹ it now seems that there is a third limitation of general application: (3) a claimant will not recover even losses that were not unlikely to occur in the usual course of things if the defendant could not reasonably be regarded as assuming responsibility for losses of the particular kind suffered.²⁰ Whether this is an aspect of the remoteness rule or is a separate limitation is not wholly clear but the two topics are considered together.²¹

Particular restrictions²²

26-003

There are also a few restrictions on recovery of particular kinds of loss. Two of these have now been removed. The rule in *Bain v Fothergill*,²³ which limited the liability of the vendor of land who was unable to complete the contract because of a defect in his title, was abolished by the Law of Property (Miscellaneous Provisions) Act 1989.²⁴ The rule that if a breach consists in the late payment of money, interest is not recoverable unless the contract expressly or impliedly provides for it, nor damages for loss of interest,²⁵ has been reviewed in the House of Lords; damages for loss of interest should be recoverable whenever the loss has been pleaded or proved.²⁶ However, a number of other restrictions remain. First, recovery of damages for distress, disappointment or loss of amenity caused by a breach of contract still seems to be limited to cases in which the object of the contract was to prevent distress or to provide enjoyment or the promised amenity.²⁷ Secondly, a valuer who negligently overvalues a property is (in the absence of fraud) liable only for the difference between the overvaluation and what would have been the proper valuation at the time of the loan; he is not liable for further loss called by the property falling in value even if the borrower for whom the valuation was prepared would not have accepted it as security at all had he been given a correct valuation.²⁸ (It is possible that both the second and third restrictions are examples of the defendant not being liable for a loss for which it was unreasonable to think he was assuming responsibility.²⁹) And thirdly, a party who in an action against the defendant has incurred legal costs for which it has not been awarded costs when those could have been awarded may not be able to recover them.³⁰

Contract excluding or varying right to damages

26-004

At common law, the right of a contracting party to claim damages for a breach of the contract may be excluded or limited by the express terms of the contract, provided that the language employed to do so is plain.³¹ But the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015 impose some statutory restrictions on attempts to exclude or limit liability for breach of contract.³² The parties may also agree that a particular sum shall be payable in the event of breach,³³ or agree on other forms of contractual provision designed to operate in the event of a breach.³⁴ The courts will enforce these subject to the law as to penalties³⁵ and to the general principles of the law of contract, such as illegality.³⁶

Damages in lieu of specific performance or injunction

26-005

The court is empowered by what is still often referred to as Lord Cairns’ Act³⁷ to award damages in addition to, or in substitution for an order for specific performance or an injunction: the assessment of damages under this power is examined in the next chapter.³⁸ There was at one time some support for the view that damages under Lord Cairns’ Act might be assessed differently to damages at common law: they might be assessed at a different date³⁹ and the damages might include a share of the profit the defendant had made by breaking the contract.⁴⁰ However, in *Johnson v Agnew*⁴¹ the House of Lords said that there should be no difference in the assessment of damages under the Act

and damages at common law. It is now clear that on occasion damages at common law may include a share of the profit made by the defendant.⁴²

Concurrent liability

26-006

If the claimant is able to sue in tort (i.e. there is concurrent liability,⁴³ which has been considerably widened by *Henderson v Merrett*⁴⁴) he will be able to take advantage of the more favourable rules on damages in tort, e.g. on remoteness of damage.⁴⁵ But concurrent liability in tort may benefit the defendant, e.g. in regard to contributory negligence.⁴⁶

Abatement of price

26-006A

⚠ The victim of a breach of contract who has not yet paid the other party may be entitled to rely on the fact that what he has received is worth less than it would have been, had the contract been performed, as a ground for abatement of the price. In *Multiplex Constructions (UK) Ltd v Cleveland*

*Bridge UK Ltd*⁴⁷ ⚠ Jackson J. reviewed a number of authorities⁴⁸ ⚠ and said⁴⁹ ⚠:

“Although there is not a complete harmony of approach to be discerned from this line of cases, I derive seven legal principles from the authorities cited:

(i)

In a contract for the provision of labour and materials, where performance has been defective, the employer is entitled at common law to maintain a defence of abatement.

(ii)

The measure of abatement is the amount by which the product of the contractor's endeavours has been diminished in value as a result of that defective performance.

(iii)

The method of assessing diminution in value will depend upon the facts and circumstances of each case.

(iv)

In some cases, diminution in value may be determined by comparing the current market value of that which has been constructed with the market value which it ought to have had. In other cases, diminution in value may be determined by reference to the cost of remedial works. In the latter situation, however, the cost of remedial works does not become the measure of abatement. It is merely a factor which may be used either in isolation or in conjunction with other factors for determining diminution in value.

(v)



The measure of abatement can never exceed the sum which would otherwise be due to the contractor as payment.

(vi)

Abatement is not available as a defence to a claim for payment in respect of professional services.

(vii)

Claims for delay, disruption or damage caused to anything other than that which the contractor has constructed cannot feature in a defence of abatement.”

The fact that the innocent party has paid the price in full does not prevent a later claim for damages ⁵⁰ ; nor does an abatement of the price to reflect the diminution in value of the performance preclude a later claim for other kinds of loss. ⁵¹  Similarly, s.53 of the Sale of Goods Act 1979 provides that

“(1)


Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—




(a)




set up against the seller the breach of warranty in diminution or extinction of the price

...

(4)










The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.” ⁵² 

Under the Consumer Rights Act 2015 a consumer who has received goods, digital content or services that do not conform to the contract may have the right to a “price reduction”. ⁵³  There are, however, certain cases in which there is no right to abatement of the price, in addition to contracts for professional services (as noted by Jackson J.). Claims in respect of cargo cannot be deducted from freight, ⁵⁴  and an employer has no right to make deductions from an employee’s salary on account of bad work unless there is provision to that effect in the contract. ⁵⁵ 

1. e.g. the law on penalties below, paras 26-178 et seq.; and statutory controls such as the Unfair Contract Terms Act 1977 (see above, Ch.15), the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015 (see below, Vol.II, Ch.38) and the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (see below, Vol.II, paras 39-005 et seq.).
2.  For an example see *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] EWCA Civ 1043. There is a presumption that the parties do not intend to give up rights or claims which the general law gives them, and clear express words must be used in order to rebut this presumption: *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689, 717–718 (Lord Diplock); but as the *Scottish Power* case shows, it is a matter of interpretation.
3. Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), pp.88–94.
4. [2001] 1 A.C. 268 (see below, paras 26-046—26-057).
5. For the necessary causal link between the breach and the loss, see below, para.26-058.
6. *Robinson v Harman* (1848) 1 Ex. 850, 855; *Lock v Furze* (1866) L.R. 1 C.P. 441, 450–451, 453; *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, 39; *Wertheim v Chicoutimi Pulp Co* [1911] A.C. 301, 307; *British Westinghouse Electric Co Ltd v Underground Electric Rys* [1912] A.C. 673, 689; *Watts & Co Ltd v Mitsui & Co Ltd* [1917] A.C. 227, 241; *Banco de Portugal v Waterlow & Sons Ltd* [1932] A.C. 452, 474; *Monarch S.S. Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196, 220–221; *C. Czarnikow Ltd v Koufos* [1969] 1 A.C. 350, 414; *Johnson v Agnew* [1980] A.C. 367, 400.
7. For exceptions see below, paras 26-043—26-057.
8. For recent applications of this principle, see *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 A.C. 353 at [9], [29], and [57] and *Bunge SA v Nidera BV* [2015] UKSC 43 at [76] (see below, para.26-074). If the victim of an anticipatory breach claims damages for non-performance, he must show that he would have been able to perform his obligations under the contract, otherwise he would be placed into a better position than if the party guilty of the repudiation had performed: *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep. 653. See above, para.24-024.
9.  Thus a football club that has terminated a contract for improvements to its pitch before paying the price cannot recover the full price of employing a third party to carry out the work instead: *Gartell & Son v Yeovil Town Football & Athletic Club Ltd* [2016] EWCA Civ 62, [2016] B.L.R. 206.
10. The language of “balancing” or “setting off” gains and losses is used by the House of Lords in the *British Westinghouse* case [1912] A.C. 673, 691, and in *Westwood v Secretary of State for Employment* [1985] A.C. 20, 44.
11.  *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep. 360 at [73]; *Mitsui Osk Lines Ltd v Salgaocar Mining Industries Private Ltd* [2015] EWHC 565 (Comm), [2015] 2 Lloyd's Rep. 518 at [56]–[58].
12. It will on occasion take into account losses incurred by the claimant even though he was not legally obliged to incur them, e.g. payments made voluntarily to a third person injured as the result of the defendant's breach of contract. See below, para.26-033.
13. *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278, 294 (distinguished in a case of “unfair dismissal”: *York Trailer Ltd v Sparkes* [1973] IRC 518; cf. *Janciuk v Winerite Ltd* [1998] I.R.L.R. 63, and in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402,

which involved a discretionary bonus clause).

- [14.](#) See below, para.26-075.
- [15.](#) See below, para.26-009.
- [16.](#) *Rodocanachi v Milburn* (1886) 18 Q.B.D. 67, 78. See further below, para.26-015. But see Street at Ch.6, and cf. the use of actuarial calculations approved by the House of Lords in *Wells v Wells* [1999] 1 A.C. 345.
- [17.](#) See below, paras 26-079 et seq.
- [18.](#) See below, paras 26-107 et seq.
- [19.](#) [2008] UKHL 48, [2009] 1 A.C. 61.
- [20.](#) See below, para.26-126.
- [21.](#) See below, paras 26-126—26-134.
- [22.](#) See below, paras 26-139—26-150.
- [23.](#) (1874) L.R. 7 H.L. 158.
- [24.](#) s.3. See below, para.26-165.
- [25.](#) See below, paras 26-227 et seq.
- [26.](#) *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 A.C. 561; below, para.26-230.
- [27.](#) See below, paras 26-140—26-149.
- [28.](#) See below, para.26-168.
- [29.](#) See below, paras 26-126—26-134.
- [30.](#) See below, para.26-150.
- [31.](#) On such exclusion or exemption clauses, see above, Ch.15.
- [32.](#) See above, paras 15-066 et seq., and below, Vol.II, paras 38-192 et seq.
- [33.](#) See paras 26-178 et seq.
- [34.](#) For illustrations, see below, paras 26-201 and 26-203.
- [35.](#) See below, paras 26-178 et seq.
- [36.](#) See Ch.16.
- [37.](#) Chancery Amendment Act 1858 s.2; see now Senior Courts Act 1981 s.50.
- [38.](#) Below, paras 27-083 et seq.
- [39.](#) See *Wroth v Tyler* [1974] Ch. 30: see below, para.27-085.
- [40.](#) See *Wrotham Park Estate Co v Parkside Homes* [1974] 1 W.L.R. 798, discussed below, paras 26-049—26-054.

- [41.](#) [1980] A.C. 367, 400.
- [42.](#) See below, paras 26-046 et seq.
- [43.](#) See above, paras 1-154 et seq.
- [44.](#) [1995] 2 A.C. 145.
- [45.](#) Below, paras 26-107 et seq.
- [46.](#) Below, para.26-077.
- [47.](#)  [2006] EWHC 1341 (TCC).
- [48.](#)  *Mondel v Steel* [1841] 8 M. & W. 858; *Davis v Hedges* [1871] L.R. 6 Q.B. 687; *H. Dakin & Co v Lee* [1916] 1 K.B. 566; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689; *Hutchinson v Harris* [1978] 10 B.L.R. 19; *Acsim (Southern) v Danish Contracting and Development Co* [1989] 47 B.L.R. 55; *Duquemin Ltd v Raymond Slater* [1993] 65 B.L.R. 124; *Foster Wheeler Wood Group Engineering v Chevron UK Ltd* Unreported February 29, 1996; *Mellows Archital Ltd v Bell Projects Ltd* [1997] 87 B.L.R. 26.
- [49.](#)  [2006] EWHC 1341 (TCC) at [652].
- [50.](#)  *Davis v Hedges* [1871] L.R. 6 QB 687.
- [51.](#)  *Mondel v Steel* [1841] 8 M. & W. 858.
- [52.](#)  See Vol.II, para.44-411.
- [53.](#)  See Consumer Rights Act 2015 ss.19(4)(b) and 24 (goods), ss.42(2)(b) and 44 (digital content) and ss.54(3)(b) and 56 (services); Vol.II, para.38-483.
- [54.](#)  *Aries Tanker Corp v Total Transport Ltd (The Aries)* [1977] 1 W.L.R. 185 HL.
- [55.](#)  *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch. 310 CA.

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(b) - Liquidated and Unliquidated Damages

Liquidated and unliquidated damages

26-007

The term liquidated damages is applied where the damages have been agreed and fixed by the parties in a way which complies with the criteria developed by the courts for their validity,⁵⁶ or fixed by statute as in the case of damages against parties to a dishonoured bill of exchange.⁵⁷ Unliquidated damages is the term applied where the damages are at large and are to be assessed by the court; the rules as to remoteness of damage⁵⁸ are the main criteria for such damages. Often the parties to a contract fix a sum as liquidated damages in the event of one specific breach, and leave the claimant to sue for unliquidated damages in the ordinary way if other types of breach occur.⁵⁹ Again, where there is provision for liquidated damages the claimant may, in appropriate cases, nevertheless elect to ask instead for an injunction to restrain a breach.⁶⁰

^{56.} The rules on “penalty clauses”: see below, paras 26-178 et seq.

^{57.} Bills of Exchange Act 1882 s.57 (see Vol.II, para.34-117); *Re Rickett* [1949] 1 All E.R. 737.

^{58.} Below, paras 26-107 et seq.

^{59.} e.g. *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 K.B. 352. See below, para.26-179.

^{60.} But the claimant cannot have both an injunction and liquidated damages in respect of a single breach: *Sainter v Ferguson* (1849) 1 Mac. & G. 286; *Carnes v Nesbitt* (1862) 7 H. & N. 778; *General Accident Insurance Co v Noel* [1902] 1 K.B. 377. cf. the position if there are different breaches: *Imperial Tobacco Co v Parslay* [1936] 2 All E.R. 515; *Elsley v J. G. Collins Insurance Agencies Ltd* (1978) 83 D.L.R. (3d) 1 Sup.Ct. of Canada (injunction granted to restrain future breaches of employee’s covenant not to compete, together with damages in respect of past breaches). See also *Upton v Henderson* (1912) 28 T.L.R. 398. The fact that the agreement provides for liquidated damages to be payable for some breaches does not mean that damages are an adequate remedy for every breach: *Araci v Fallon* [2011] EWCA Civ 668 at [52].

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(c) - Claims for an Agreed Sum

Distinction between claims for payment of an agreed sum and claims for damages

26-008

There is an important distinction between a claim for payment of a debt and a claim for damages for breach of contract. A debt is a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition ⁶¹; damages may be claimed from a party who has broken his contractual obligation in some way other than failure to pay such a debt. (It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at the due date. ⁶²) The relevance of this distinction is that rules on damages do not apply to a claim for a debt, e.g. the claimant who claims payment of a debt need not prove anything more than his performance ⁶³ or the occurrence of the event or condition ⁶⁴ on which the sum becomes payable; there is no need for him to prove any actual loss suffered by him ⁶⁵ as a result ⁶⁶ of the defendant's failure to pay; the whole concept of the remoteness of damage ⁶⁷ is therefore irrelevant; the law on penalties does not apply to the agreed sum ⁶⁸; the claimant's duty to mitigate his loss does not generally apply ⁶⁹; and the claimant will usually be able to seek summary judgment. ⁷⁰ The distinction may also be relevant where a contract provides for payment to be made by instalments; thus, under a hire-purchase agreement, a claim for arrears of instalments already due is a claim in debt quite distinct from a claim for damages for breach of the contract as a whole. ⁷¹ Under a contract for payment by instalments, no claim in respect of instalments due in the future may be brought as a claim for a debt, ⁷² but if the party due to pay the instalments has committed a breach of his obligations which entitles the other party to terminate the contract, then, subject to the general rules on damages, an award of damages may be made in respect of the prospective loss of the future instalments, allowance being made for a discount on account of the earlier payment of a lump sum to be received under the judgment instead of the instalments spread over the future period. ⁷³

^{61.} e.g. *Alder v Moore* [1961] 2 Q.B. 57; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129 HL (guarantee: see Vol.II, Ch.45); *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, 449 (suing in debt to recover an unpaid deposit); *Jervis v Harris* [1996] Ch. 195. Vol.II, Ch.42 (contracts of insurance).

^{62.} See below, para.26-175. Interest may also be payable on a debt: below, paras 26-227 et seq.

^{63.} On the question when an action lies for the price under a contract for the sale of goods, see Vol.II, paras 44-395 et seq.

^{64.} See n.49, above.

^{65.} cf. para.26-015.

- [66.](#) On causation, see below, paras 26-058 et seq.
- [67.](#) See below, paras 26-107 et seq.
- [68.](#) See below, para.26-178.
- [69.](#) *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413; but note the qualification that if the price is not yet payable because claimant has not yet performed, and he has no legitimate interest in performing, he may not be able earn the price by doing so: see below, paras 26-092 and 26-105.
- [70.](#) CPR Pt 24. A debt can be factored, viz sold to a financial institution.
- [71.](#) *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117, 123, 129. (See Vol.II, para.39-346.)
- [72.](#) Unless the contract provides for payment to be accelerated in the circumstances which have occurred: see below, para.26-199.
- [73.](#) *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 Q.B. 190; *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All E.R. 883 HL. On the question of the discount, see also *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117 (approved by HL in *Christopher Moran Holdings Ltd v Bairstow* [2000] 2 A.C. 172, 180, 184, 188) and below, para.26-218, between nn.1135 and 1136. On damages for prospective loss in general, see below, paras 26-011—26-013.

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(d) - Nominal, General and Special Damages

Nominal damages

26-009

Wherever the defendant is liable for a breach of contract, the claimant is in general entitled to nominal damages although no actual damage is proved ⁷⁴; the violation of a right at common law will usually entitle the claimant to nominal damages without proof of special damage. ⁷⁵ Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the claimant, but it may also arise when the claimant, although he has suffered loss, fails to prove any loss flowing from the breach of contract, ⁷⁶ or fails to prove the actual amount of his loss. ⁷⁷ A regular use of nominal damages, however, is to establish the infringement of the claimant's legal right, and sometimes the award of nominal damages is "a mere peg on which to hang costs". ⁷⁸

General and special damages

26-010

Damages that are to compensate a claimant who has suffered a loss as the result of a breach of contract may be "general" or "special". The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right or duty ⁷⁹; damage must be proved but the claimant cannot quantify exactly any particular items in it. ⁸⁰ The main meaning ⁸¹ of special damages is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings. Special damage must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded, ⁸² since the purpose of pleading special damage is to prevent surprise at the trial by giving the defendant prior notice of any item in the claim for which a definite amount can be given in evidence, e.g. in a claim for wrongful dismissal, loss of salary during the period of notice required by the contract. ⁸³ A claimant who bases his claim on precise calculations must give the defendant access to the facts on which they are based ⁸⁴; thus it was held that where loss of profits was not a necessary consequence of the alleged breach of contract the claim for such loss should be specifically pleaded, in order to give the defendant fair warning of the claim. ⁸⁵

^{74.} *Marzetti v Williams* (1830) 1 B. & Ad. 415; *The Mediana* [1900] A.C. 113, 116; *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361.

^{75.} *Ashby v White* (1704) 2 Ld. Raym. 938; *Constantine v Imperial Hotels Ltd* [1944] K.B. 693. On nominal damages when a bank wrongly dishonours a customer's cheque, see Vol.II, para.34-323.

- [76.](#) *Columbus & Co Ltd v Clowes* [1903] 1 K.B. 244; *Weld-Blundell v Stephens* [1920] A.C. 956; *Taylor & Sons Ltd v Bank of Athens* (1922) 91 L.J.K.B. 776; *James v Hutton and J. Cook & Sons Ltd* [1950] 1 K.B. 9; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 Q.B. 113. See below, paras 26-058 et seq.
- [77.](#) *Erie County Natural Gas and Fuel Co Ltd v Carroll* [1911] A.C. 105; cf. *Government of Ceylon v Chandris* [1965] 3 All E.R. 48; cf. *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 106 (see below, para.26-015, text at n.85); cf. also *Dean v Ainley* [1987] 1 W.L.R. 1729.
- [78.](#) *Beaumont v Greathead* (1846) 2 C.B. 494, 499. But costs are in the discretion of the court, and sometimes a claimant who recovers nominal damages will not receive costs: *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All E.R. 873, 874.
- [79.](#) Pollock, *Contracts*, 13th edn, p.536; cf. the cases on dishonouring a cheque, Vol.II, para.34-323.
- [80.](#) *Aerial Advertising Co v Batchelor's Peas Ltd* [1938] 2 All E.R. 788; and cf. *Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 K.B. 740. In *B.C. Sawmills v Nettleship* (1868) L.R. 3 C.P. 499 it was presumed that delay in delivery had caused some loss and interest on the value of the goods was awarded by way of general damages. General damages may also be awarded when a claimant's goods have been put out of action by a tortfeasor but the claimant had a replacement available: for a recent example, see *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2013] EWCA Civ 887, where the damages were assessed on the basis of the capital tied up in the goods, wasted expenditure and depreciation, see at [28]. In tort cases in which a property has been damaged through the defendant's negligence, the true measure of the claimant's loss is the diminution in the value of the property, and this should be pleaded as general damage; the cost of repairs is no more than evidence of the diminution in value: *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 1 W.L.R. 60 at [28]. When a court awards less than the full cost of reinstating property that has been damaged, because full reinstatement would be unreasonable, the court may award "general damages" for loss of amenity to compensate for "an apparent deficit in compensation": *Arroyo v Equion Energia Ltd* [2013] EWHC 3150 (TCC) at [60]–[62]; but such general damages cannot be awarded in place of either diminution in the value of the property or the cost of reinstatement when these have not been claimed (at [63]), and nor can "Wrotham Park" or "negotiation" damages (on which see para.26-051): [2013] EWHC 3150 (TCC) at [67]. An example of general damages being used to compensate for an apparent deficit in compensation would seem to be the award of damages for loss of amenity in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344.
- [81.](#) For other meanings, see Street at pp.18-22. One meaning which has been used is the reference to damages under the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341 (below, paras 26-109 et seq.): see *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104, 125–127.
- [82.](#) *Hayward v Pullinger and Partners Ltd* [1950] 1 All E.R. 581; *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All E.R. 873. See also *The Susquehanna* [1926] A.C. 655, 661; *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] 1 W.L.R. 1199 (this decision was accepted by the appellants in the House of Lords: [1967] 1 W.L.R. 384).
- [83.](#) *Hayward v Pullinger and Partners Ltd* [1950] 1 All E.R. 581. See Vol.II, para.40-201.
- [84.](#) *Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 1 W.L.R. 570.
- [85.](#) *Perestrello e Companhia Limitada v United Paint Co Ltd* [1969] 1 W.L.R. 570.

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(e) - Prospective Loss and Continuing Breaches

Prospective loss ⁸⁶

26-011

The general rule, in contract as well as in tort, is that damages for all prospective loss flowing from a single cause of action must be recovered once and for all in one action ⁸⁷: the claimant cannot recover damages for one part of his loss in one action, and then recover further damages for another part of his loss in a subsequent action. ⁸⁸ Hence the claimant should claim at the same time damages for all his loss resulting or likely to result from the defendant's breach of contract, whether the loss is past or is reasonably anticipated in the future. Damages for prospective loss should take into account the contingencies of life and other uncertainties affecting the future. ⁸⁹ The court may, however, defer the assessment of damages for future losses which are very uncertain. ⁹⁰

Separate breaches

26-012

There may be separate breaches of different promises in the same contract, giving rise to separate causes of action, as where there are successive breaches of an instalment contract ⁹¹; in such a case, damages may be awarded for the separate breaches in separate actions.

Continuing breaches of contract

26-013

There is, however, a difference between repeated breaches of recurring obligations and a breach of contract which is a continuing one (giving rise to a continuing cause of action). ⁹² With a continuing wrong, a fresh cause of action arises after recovery of damages in an earlier action, and the claimant may bring a second action to recover damages for loss arising after the earlier action. A former rule of court prescribed:

“Where damages are to be assessed ... in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.” ⁹³

An instance of a continuing breach of contract has been given by the Court of Appeal ⁹⁴:

“For example, a contract of service for a specified term might contain a stipulation that the

employee should not during the period of his service carry on or be concerned in any other business of the same kind as the employer's business. If the employee, in breach of such a stipulation, did proceed to carry out some other business of the kind in question, the breach would, we think, clearly be a continuing one, in that the employee would die in diem be continuously in breach of the stipulation so long as the prohibited business was carried on."

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- [86.](#) On damages for sums of money payable in the future, see above, para.26-008.
- [87.](#) *Rowntree & Sons Ltd v Allen & Sons (Poplar) Ltd* (1936) 41 Com. Cas. 90. See s.35 of the County Courts Act 1984; cf. the same rule in tort: *Darley Main Colliery Co v Mitchell* (1886) 11 App. Cas. 127, 132. See also *Pegler v Ry Executive* [1948] A.C. 332.
- [88.](#) *Furness Withy & Co v Hall* (1909) 25 T.L.R. 233. See also *Conquer v Boot* [1928] 2 K.B. 336 (distinguished in *Purser and Co (Hillingdon) Ltd v Jackson* [1977] Q.B. 166 (successive arbitrations over different building defects)); *H.E. Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 Q.B. 242. Prospective loss falls within the rule: *Clarke v Yorke* (1882) 47 L.T. 381.
- [89.](#) e.g. *Johnston v G.W. Ry* [1904] 2 K.B. 250, 259–260. On discounting for contingencies in hypothetical situations, see below, paras 26-069 et seq. Where a contingency which will affect the loss has in fact occurred by the time of trial, this should be taken into account: see below, para.26-074.
- [90.](#) *Deeny v Gooda Walker Ltd (No.3)* [1995] 4 All E.R. 289 (the plaintiff's future liabilities to policyholders could not be predicted with reasonable confidence; there was also the risk that, having received a substantial sum for future losses, the plaintiff might allow the damages to be dissipated before the policyholders' claims were made); cf. *Total Liban SA v Vitol Energy SA* [2001] Q.B. 643.
- [91.](#) *H.E. Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 Q.B. 242, 252; *National Coal Board v Galley* [1958] 1 W.L.R. 16, 26.
- [92.](#) *National Coal Board v Galley* [1958] 1 W.L.R. 16 (failure to work Saturday shifts at a colliery amounted to repeated breaches of a recurring obligation).
- [93.](#) RSC Ord.37 r.6. See *Hole v Chard Union* [1894] 1 Ch. 293; cf. the award of damages in lieu of an injunction: below, paras 27-083 et seq.
- [94.](#) *National Coal Board v Galley* [1958] 1 W.L.R. 16, 26.

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(f) - Date for Assessment

Date for assessment

26-014

The normal rule is that damages should be assessed as of the time of breach. However, the rule is applied with a good deal of flexibility, in particular when the claimant has deferred reacting to the breach for a good reason. The rule is thus closely linked to the question of mitigation and will be considered in that context. ⁹⁵

⁹⁵. See below, paras 26-087—26-092.

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(g) - Difficulty in the Assessment of Damages

Difficulty of assessment

26-015

⚠ The fact that damages are difficult to assess does not disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. ⁹⁶ Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. ⁹⁷ The fact that the amount of that loss cannot be precisely ascertained does not deprive the claimant of a remedy. ⁹⁸ ⚠ The loss of profits suffered by a claimant as the result of the defendant's breach of contract frequently depends on many speculative factors, but the courts will always attempt to assess the amount of the loss. ⁹⁹ As was said in a recent fraud case:

“Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.” ¹⁰⁰ ⚠

If the exact loss cannot be determined, the court may have to use the nearest available measure. So if there is no market for the goods which the buyer has wrongly refused to accept, or no clear evidence of the market value, the price at which they were resold may be taken as the best evidence of their value. ¹⁰¹ When there is no direct evidence that of the value of services that should have been provided, damages may be calculated on the assumption that the services were worth a proportionate part of the contract price. ¹⁰² When the profit-earning capacity of a business sold was less than had been warranted by the seller and there was no evidence of either the business's actual value or the value it would have had if the warranty had been met, damages were assessed by working out the ratio between the price the buyer was willing to pay and the warranted earning capacity, and then applying that to the shortfall in earning capacity. ¹⁰³ ⚠

Loss of chance

26-016

In some cases the amount of the claimant's loss cannot be precisely ascertained because it is not

known what would have happened had the defendant not broken the contract, as, for example, where whether the claimant would have made a profit or gained some advantage depends on a contingency, does not deprive the claimant of a remedy. Where, if the defendant had fully performed his undertaking, there was only a chance that the claimant would acquire a benefit or make a profit, the court will discount the damages to reflect the likelihood that the benefit or profit would have been received.¹⁰⁴ Loss of chance will be explored more fully when we discuss causation.¹⁰⁵


Different methods of assessment

26-017


We will see also that the court may have to determine the most appropriate way to measure the loss. For example, where construction or rebuilding work has not been carried out fully or correctly, the court may have to choose between measuring the claimant's loss by the cost of completing the work or by the difference in value of the resulting structure¹⁰⁶; where a breach of contract has affected the claimant's business, the court may have to choose between measuring the loss by the reduction in profits or by the effect on the value of the business.¹⁰⁷

^{96.} *Chaplin v Hicks* [1911] 2 K.B. 786 (below, para.26-071); *Simpson v L.N.W. Ry* (1876) 1 Q.B.D. 274.

^{97.} *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91, 106.


^{98.}  The preceding sentences were quoted with apparent approval in *Wemyss v Karim* [2016] EWCA Civ 27 at [43].

^{99.} See below, paras 26-135—26-138.

^{100.}  *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486, [2011] Q.B. 477 at [22], Toulson L.J. See also *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch. 529 at [95]–[96]. Where the claimant's proof has been made more difficult by the defendant's wrong, the principle in *Armory v Delamirie* (1722) 1 Stra. 505 "raises an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt. The practical effect of that is to give the claimant a fair wind in establishing the value of what he has lost": Jonathan Parker L.J. in *Browning v Brachers* [2005] EWCA Civ 753 at [210]; see also *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 1708 (Ch) at [70]; *Double G Communications Ltd v News Group International Ltd* [2011] EWHC 961 (QB) at [5]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 at [189]; *Gul Bottlers (PVT) Ltd v Nichols Plc* [2014] EWHC 2173 (Comm) at [86]. The principle applies where the defendant has suppressed or failed to produce evidence to which it has access, not when the evidence is simply incomplete or involves a measure of conjecture, see *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) at [244]; *University of Wales v London College of Business Ltd* [2016] EWHC 888 (QB) at [10].

^{101.} See below, para.44-379. Likewise, evidence of the actual earnings made by a ship may be used as evidence of the current rates in the charter market: *Glory Wealth Shipping Pte Ltd v North China Shipping Ltd (The North Prince)* [2010] EWHC 1692 (Comm), [2011] 1 All E.R. (Comm) 641, [16]–[19].

^{102.} See below, para.26-041 n.218.

^{103.}  *Wemyss v Karim* [2016] EWCA Civ 27 at [49].

^{104.} See below, paras 26-071—26-073.

[105.](#) See below, para.26-058.

[106.](#) See below, paras 26-034 et seq.

[107.](#) See below, para.26-172.

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(h) - Appeals against the Assessment of Damages

Power of appellate court to reassess damages

26-018

When the Court of Appeal hears an appeal ¹⁰⁸ against the assessment of damages made by a judge sitting alone, without a jury, it applies similar principles to those followed previously in considering appeals against the award of damages by the verdict of a jury. ¹⁰⁹ The court will interfere only if it is convinced that the trial judge acted upon some wrong principle of law, ¹¹⁰ or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court of Appeal, an entirely erroneous estimate of the damages to which the claimant is entitled. ¹¹¹ Great attention is paid to the opinion of the trial judge and the appellate court should be slow to reverse the judgment of the judge who saw and heard the witnesses. ¹¹² In special situations, the appellate court may take account of circumstances affecting the assessment of damages which arise after the first instance trial, ¹¹³ e.g. if the fresh evidence showed that the “basic or fundamental assumption” underlying the judge’s assessment had been “falsified by later events”. ¹¹⁴

^{108.} The appeal used to be by way of rehearing: CPR Sch.1: RSC Ord.59 r.3(1) which enabled the court to substitute its own view of the assessment of damages: *Flint v Lovell* [1935] 1 K.B. 354, 360; *Davies v Powell Duffryn Associated Collieries Ltd* [1942] A.C. 601, 616–617. Appeals are now normally limited reviews, CPR r.52.11, but CPR r.52.10 gives the Appeal Court all the powers of the lower court and power to alter its orders. The Court of Appeal is more willing to interfere with a judge’s award than with a jury’s award of damages: [1942] A.C. 601, 616; and if it reverses a decision for the defendant on the issue of liability, it will assess the damages itself: *Reaney v Co-operative Wholesale Society* [1932] W.N. 78; cf. the position in the Privy Council: *Ratnasingam v Kow Ah Dek* [1983] 1 W.L.R. 1235.

^{109.} The verdict of a jury awarding damages can be set aside only if the Court of Appeal upon consideration of all the circumstances comes to the conclusion that the damages awarded were so small or so large that 12 sensible jurors could not reasonably have awarded them: *Mills v Stanway Coaches Ltd* [1940] 2 K.B. 334, 340; *Phillips v London & S.W. Ry* (1879) 4 Q.B.D. 406; (1879) 5 Q.B.D. 78; or if the court is satisfied that the jury took into consideration matters which they ought not to have considered or had disregarded matters which they ought to have considered: *Smith v Schilling* [1928] 1 K.B. 429, 440. See also *Praed v Graham* (1889) 24 Q.B.D. 53; *Johnston v G.W. Ry* [1904] 2 K.B. 250; *Bocock v Enfield Rolling Mills Ltd* [1954] 1 W.L.R. 1303; *Nance v British Columbia Electric Ry* [1951] A.C. 601, 613; *Scott v Musial* [1959] 2 Q.B. 429; *Cavanagh v Ulster Weaving Co Ltd* [1960] A.C. 145; *Ward v James* [1966] 1 Q.B. 273.

^{110.} e.g. *Benham v Gambling* [1941] A.C. 157; *Naylor v Yorkshire Electricity Board* [1968] A.C. 529; *Dingle v Associated Newspapers* [1964] A.C. 371; *Lai Wee Lian v Singapore Bus Service* (1978) Ltd [1984] A.C. 729 (all cases on torts).

111. *Flint v Lovell* [1935] 1 K.B. 354, 360 (approved in *Owen v Sykes* [1936] 1 K.B. 192). See also *Davies v Powell Duffryn Associated Collieries Ltd* [1942] A.C. 601, 616–617, 623–624; *Nance v British Columbia Electric Ry* [1951] A.C. 601, 613; *Warren v King* [1964] 1 W.L.R. 1, 9; *Morey v Woodfield (No.2)* [1964] 1 W.L.R. 16. cf. *Hinz v Berry* [1970] 2 Q.B. 40; *Bone v Seale* [1975] 1 W.L.R. 797 (nuisance case). For an appeal from a county court judge, see *Shave v J. W. Lees (Brewers) Ltd* [1954] 1 W.L.R. 1300.
112. *Powell v Streatham Manor Nursing Home* [1935] A.C. 243. See also *Smith v Schilling* [1928] 1 K.B. 429, 432–433 (similar remarks concerning the opinion of the trial judge who took the verdict of the jury).
113. *Edwards v Society of Graphical and Allied Trades* [1971] Ch. 354, 377, 384 (a contract case, following the tort case of *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 W.L.R. 1023); see also *Mulholland v Mitchell* [1971] A.C. 666.
114. *Hunt v Severs* [1993] Q.B. 815, 838 (a tort case: the House of Lords did not deal with this point: [1994] 2 A.C. 350).

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(a) - Expectation, Reliance and Restitution

“Expectation” “reliance” and “restitution” interests

26-019

It has been pointed out ¹¹⁵ that the victim of a breach of contract has a number of interests which may be protected by an award of damages. First, he may have paid money or conferred some other benefit on the other party, and he will have an interest in recovering the money or the value of the benefit conferred. This has been termed the “restitution interest” and there is a very strong moral argument for protecting it, as it represents both a loss to the claimant and a corresponding gain to the defendant. Secondly, the victim may have incurred expense or loss in reliance on the promised performance ¹¹⁶ and which is wasted by the defendant’s breach. ¹¹⁷ This is termed the “reliance interest” of the claimant; and it merits protection because it represents the extent to which the victim is left worse off than before the contract was made. ¹¹⁸ Thirdly, the victim has an “expectation interest”, i.e. the gains or benefits ¹¹⁹ which he 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 latter. ¹²⁰ It was pointed out that the expectation interest has perhaps the weakest claim to protection, since it represents something that the victim did not have before the contract was made. ¹²¹ Nonetheless, damages for breach of contract will in principle compensate the victim for loss of expectation, as well as protecting his restitution and reliance interests. For example, if the buyer of a machine receives and pays the price but then justifiably rejects it because it is not in accordance with the contract, he may recover the value that the machine would have had if it had been in accordance with the contract, thus in effect recovering the price paid; wasted expenditure such as installation expenses, thus obtaining compensation for reliance loss; and (subject to the rules on remoteness, mitigation, etc ¹²²) the net profit that he would have been able to make by using the machine. ¹²³

26-020

This essentially theoretical analysis is a useful tool of analysis and it has found its way into the English case-law. However, it must be applied with some caution. First, the analysis is not exhaustive: damages may be awarded for kinds of loss which do not fit readily into any of the three categories. ¹²⁴ Secondly, the interests may overlap, in the sense that the broader interests will often include the narrower. Thus if the claimant has paid the price but has received nothing in return, recovery of the price may be viewed as the restitution interest, or as a form of wasted expenditure (and so part of the reliance interest), or as an element of being put into the position he would have been in had the contract been performed (the expectation interest). Thirdly, it must be emphasised that contract damages are normally assessed on the “expectation” measure and do not protect the restitution interest or the reliance interest as such. The last point is explained in the next paragraph.

Primacy of the expectation interest

26-021

Damages for breach of contract are designed to put the claimant into the position he would have been in had the contract been performed, and will not necessarily compensate the claimant's restitution or reliance interest in full. For example, if a buyer of goods has paid the price and has received nothing in return, but the price was higher than the goods would have been worth even if they had complied with the contract, the damages will reflect that fact and will not fully protect the claimant's restitution interest.¹¹⁵ The claimant may be able to recover the full amount of the price paid by means of a claim in restitution, but there are restrictions on such claims, notably that there must have been a total failure of consideration.¹¹⁶ Similarly, the claimant is permitted to claim wasted expenditure in reliance on the contract as an item of damage in addition to or in place of claiming for loss of profits, but he will not recover damages for expenditure which he would not have recouped even if the contract had been performed.¹¹⁷ These results follow from the principle that the award should not put the claimant into a better position than if the contract had been performed.¹¹⁸ In other words, the "expectation measure" is the primary measure for damages for breach of contract. The circumstances in which reliance loss may be recovered, and the limit imposed by the expectation measure, are discussed more fully in the paragraphs that follow.

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- ¹¹⁵. Fuller and Perdue (1937) 46 Yale L.J. 52, 373 (on this article, see Friedmann (1995) 111 L.Q.R. 628); Street at pp.240-247. Another analysis recognises the "performance interest"; see below, para.26-042.
- ¹¹⁶. Costs incurred by the claimant in attempting to mitigate (see below, para.26-102) are incurred as a result of the defendant's breach and are therefore outside this definition: see below, para.26-032.
- ¹¹⁷. See, e.g. below, paras 26-022—26-031; Vol.II, para.44-387. See also Owen (1984) 4 O.J.L.S. 393. The reliance interest includes the award of damages in some situations to restore the claimant to the position he would have been in if he had not entered a particular transaction: see below, para.26-031.
- ¹¹⁸. The price paid is also a form of wasted expenditure and thus the reliance interest includes the restitution interest but covers more. Recovery of the price is therefore sometimes discussed as an aspect of recovery of expenditure in reliance on the contract: see below, para.26-026.
- ¹¹⁹. "Benefit" may include a personal or subjective, even idiosyncratic, benefit.
- ¹²⁰. See, e.g. below, paras 26-133—26-138.
- ¹²¹. Fuller and Perdue (1937) 46 Yale L.J. 52, 56.
- ¹²². See para.26-002.
- ¹²³. cf. *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com. Cas. 204. It is not yet wholly clear that English law permits the claimant to recover both his expected profit on the contract and the consequential expense he has incurred in reliance on the defendant's promise; but it is submitted that the claimant may recover reliance loss and the net profit: see below, para.26-029.
- ¹²⁴. See below, paras 26-032—26-033.
- ¹²⁵. cf. *Dawood Ltd v Heath Ltd* [1961] 2 Lloyd's Rep. 512, 518 and below, paras 26-026 and 29-062 et seq. See also *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [433], Hamblen J. ("Unlike in a claim for restitution, the contract price forms no part of the relief or remedy to which the claimant is entitled. In so far as it is relevant its relevance is evidential in the sense that in an appropriate case an inference may be drawn from the contract price as to the value of the services to which the claimant was entitled and for whose value he is entitled to be compensated".)

- [126.](#) See below, para.26-026. It seems that it suffices if there has been a total failure in respect of a part of the contract if the price is divisible or can readily be apportioned, as in *Dawood Ltd v Heath Ltd* [1961] 2 Lloyd's Rep. 512: below, para.29-065.
- [127.](#) See below, para.26-024.
- [128.](#) The principle that the claimant should not be placed into a better position than if no breach had occurred was used recently to justify the decision that if the victim of an anticipatory breach claims damages for non-performance, he must show that he would have been able to perform his obligations under the contract: *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* [2013] EWHC 3153 (Comm), [2013] 2 Lloyd's Rep. 653. See above, para.24-024.

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(b) - Expenditure Wasted as a Result of the Breach ¹²⁹

Expenditure wasted as a result of the defendant's breach

26-022

In an action for damages for breach of contract, the claimant is permitted to claim damages for expenditure which he incurred in reliance on his expectation that the defendant would perform his undertaking, if the breach results in that expenditure being wasted, at least in part. The claim may be either in addition to or in place of a claim for damages for loss of expectation. The claim will succeed unless it fails because of one of the normal limitations on recovery such as the rules on remoteness or mitigation, ¹³⁰ or because the defendant shows that the claimant would not have recouped the expenditure even if the contract had not been broken. ¹³¹ One type of reliance expenditure is that directly related to the claimant's own preparations for his performance, as where he has incurred the cost of labour and materials which will be wasted as a result of the breach. ¹³² A second type is expenditure which was not incurred in or towards the performance of his own obligations but from which he expected to benefit as part of the activity in which he was engaged, and which he would have recouped had the contract been performed.

Expenditure in performing or in preparing to perform

26-023

This expenditure is part of the cost of the claimant's performance and if the defendant had fulfilled his side, the claimant would have received the benefit of the expenditure when he received the defendant's performance (e.g. payment of the price). When the claimant terminates the contract on the ground of the breach, he may claim damages to cover his expenditure towards his own performance, but only to the extent that it has been wasted as a result of the breach. ¹³³

The ceiling on recovery in an unprofitable contract

26-024

If the claimant fully performed his side of the contract, he would not be entitled to recover from the defendant more than the value of the latter's performance, viz the gross return (such as the price) to which the claimant was entitled under the contract. If the claimant is relegated to a claim to damages because he had only partly performed his side by the time the contract was terminated, then, unless the cost of performing what he had originally undertaken were increased by breaches by the defendant, ¹³⁴ the amount of the gross return to which he would be entitled upon full performance will be a ceiling on the recovery of damages for the expenditure incurred in his partial performance. ¹³⁵ By suing for damages for his costs in performing in reliance on the contract, the claimant cannot recover more than he would have been entitled to if the defendant had not broken the contract. ¹³⁶ The precise arithmetical method of implementing this principle has not yet been decided ¹³⁷ but it is submitted that

the claimant should be entitled to claim his performance expenditure actually incurred to the limit imposed by the gross return (or price) due for full performance.¹³⁸ The onus of proof is on the defendant to show (on the balance of probabilities) that the claimant would have made a loss on full performance of both sides of the contract and so would not have recouped all of his own costs in performing his side.¹³⁹ In the absence of such proof, the court will assume in the claimant's favour that he would have recouped all the costs incurred in his performance, and so will be willing to award damages to reimburse the claimant.¹⁴⁰ Usually the claimant will seek damages for this reliance expenditure rather than for his loss of expectations (his gross return, less future expenses avoided after the breach) only where he lacks adequate proof of his loss of expectations (e.g. profits),¹⁴¹ or where he feared that it would have been a losing or unprofitable contract so that he would not be able to prove any net loss of expected profit.¹⁴² The courts insist that the claimant has an unfettered choice as to which measure of damages to claim,¹⁴³ but any claim for reliance loss is subject to the principle stated in this paragraph.

Cost of performing increased by defendant's breach

26-025

The principle that the gross return to which a party would be entitled upon full performance will be a ceiling on the recovery of damages for the expenditure incurred in his partial performance, set out in the previous paragraph, will not apply if a breach by the defendant—for example, if the defendant has failed to provide access or facilities as promised—has increased the costs of the partial performance.¹⁴⁴

Recovery of price paid as form of wasted expenditure

26-026

It has already been pointed out that if the victim of a breach of contract has paid the price and subsequently has terminated the contract, one of his interests is in recovering what he has paid. This may be viewed as the "restitution interest" or as part of the reliance interest, as it is a form of wasted expenditure. He may recover the money paid by way of restitution only if there has been a total failure of consideration, either in respect of the contract as a whole or in respect of a part of it to which the price paid may be apportioned.¹⁴⁵ Can the claimant opt to reclaim the price paid by way of a claim for damages for wasted expenditure? In cases in which there has been a total failure of consideration, courts have allowed claimants to recover the price paid as an element of damages for reliance loss: thus in *McRae v Commonwealth Disposals Commission*,¹⁴⁶ in which the defendants sold a non-existent wreck of an oil-tanker, the High Court of Australia rejected the buyer's claim for loss of profits as speculative but allowed recovery of the price (\$285) as well as other wasted expenditure.¹⁴⁷ There seems no reason why the claim should not have been simply for the price paid. However, the claimant will not be permitted to recover the full price paid by way of damages if it is shown that the value of the performance would have been less than the price, as that would put the claimant into a better position than if the contract had been performed.¹⁴⁸ Where there has not been a total failure of consideration, it has been said that the party cannot claim the price paid as a form of damages for wasted expenditure, since to allow that would undermine the total failure of consideration requirement.¹⁴⁹ If the payor has received partial performance, its value must be taken into account in calculating the amount of expenditure wasted.¹⁵⁰ Three points should be noted. First, in principle the difference between the value of what the claimant received and what he actually received is different to a proportion of the price paid¹⁵¹; but in practice it may be difficult to value the partial performance and the price paid may be used as evidence of its value.¹⁵² Secondly, though there has not been a total failure of consideration, it will not always be the case that the payor will have received a benefit that should be taken into account in assessing the damages for wasted expenditure. This is because it has been held that in contracts for work and materials, partial performance by the payee (such as a ship builder drawing up plans and starting construction¹⁵³) may mean that there has been no total failure of consideration even though nothing is ever delivered to the payor. In such a case it is submitted that the price paid may in effect be recovered by way of damages for wasted expenditure. Thirdly, again, the claimant must not be put into a better position than if the contract had been performed. Thus, whether or not a deduction has to be made on account of a benefit that the payor has received by part performance, if the total benefit that the payor would have received under the

contract if it had been performed would have been worth less than the price payable, any damages awarded for wasted expenditure must be reduced accordingly. ¹⁵⁴

Reliance expenditure not directed at performance

26-027

Before the breach the claimant may incur expenditure in reliance on the expected performance of the contract by the defendant where the expenditure was not incurred in or towards the performance of his own obligations; this is expenditure from which he expected to benefit, as part of the activity in which he was engaged, after he had received the benefit of the defendant's performance, but which the breach now renders futile. Subject to mitigation, ¹⁵⁵ the claimant is entitled to damages to reimburse him for this expenditure, provided it was within the reasonable contemplation of the parties that it was not unlikely that the claimant would incur it in reliance on the contract, and that it would be wasted if the defendant committed the breach in question. (No test of reasonableness in incurring the expenditure has been imposed on the claimant, but if the expenditure was incurred unreasonably, it would not satisfy the remoteness test.) So where the buyer of goods had them repaired before he had to give them up to a third party (because it later emerged that the seller had no title to them), he recovered the cost of the repairs which was wasted from his point of view. ¹⁵⁶ Other illustrations of the recovery of wasted expenditure are the cost of painting a machine before it was found to be defective ¹⁵⁷; the cost of transporting goods to a sub-buyer before they were examined and rejected ¹⁵⁸; and the cost of equipping a salvage expedition to a tanker which the buyer had been promised was on the "Jourmand Reef", when in fact neither the tanker nor the reef existed. ¹⁵⁹

Ceiling on recovery if claimant's activity would have been unprofitable

26-028

As with the case of performance expenditure discussed above, ¹⁶⁰ the defendant may show ¹⁶¹ that the claimant entered into a contract as part of a commercial or profit-making activity and that he would have made an overall loss on that activity. The defendant must show that, from the gross return which the claimant expected to receive from exploiting or using the subject matter of his contract with the defendant, ¹⁶² he would not have recouped all of the expenditure incurred in reliance on the contract. Where the defendant can prove that, even if he had completely performed that contract, the claimant's gross return from his exploitation would not have covered that expenditure, the claimant's claim for wasted expenditure can succeed only to the extent that it would have been recouped. ¹⁶³ (The same question as discussed above arises over the method of implementing this principle. ¹⁶⁴)

Claims for both profit and reliance loss

26-029

Both expectation and (subject to the claimant's expectation ¹⁶⁵) reliance interests are thus protected by the law on damages. May the claimant recover both, so long as he is not compensated twice for the same loss and is not put into a better position than if the contract had been performed? In principle, the claimant should be entitled to claim damages both for his wasted expenditure incurred up to the date of his terminating the contract and also for the net loss of profit ¹⁶⁶ which he would have made but for the breach. There can be no valid objection to this, provided the calculations show that there is no overlapping in the claimant's recovery, viz his net loss of profits is calculated by deducting from his expected gross return both the cost of his performance and reliance expenditure to the date of termination ¹⁶⁷ and the cost of the further expenditure which he would have incurred after that date if he had completed his performance. ¹⁶⁸ In one case, the Court of Appeal has ruled that the claimant must choose between claiming for his wasted reliance expenditure and claiming for his loss of expected profits, holding that he is not entitled to recover both. ¹⁶⁹ This position is correct if it is interpreted to mean that the claimant should not recover both his gross return or profits expected under the contract (or from the activity in question) ¹⁷⁰ and also the (now wasted) expenditure incurred in reliance on the contract which he had intended to meet from that gross return. But it is submitted

that the ruling against a “split” claim cannot be justified if the claimant can show that there is no overlapping between the two claims. ¹⁷¹

Expenditure incurred before making the contract

26-030

The claimant may incur expense before entering the contract, but in the expectation that if such a contract is made, the expenditure will be needed to enable him to perform the contract (or to undertake the activity of which the expected contract will form part), and that he will be able to recoup the expenditure from the benefit of the defendant's performance of that contract (e.g. the price) or from the profits he expects to make from the activity in question. If, at the time of contracting, it was within the reasonable contemplation of the parties that the claimant would be able to recoup this expenditure in this way, but that it will not be recouped if the contract is broken in the way in which it was, he may recover damages for any wasted ¹⁷² part of the expenditure arising from the breach. ¹⁷³ For instance, the overhead costs (premises, staff, etc.) will often be incurred by the claimant before he makes a particular contract: the defendant, when entering into the contract, can easily contemplate that the claimant will expect to recoup from it a contribution towards overheads. ¹⁷⁴

Damages assessed on a “no transaction” basis

26-031

⚠ In a limited number of situations, where the claimant claims that he would not have entered into a particular transaction but for the defendant's negligent advice (or failure to advise), his damages have been assessed at the amount needed to restore him to the position he would have been in if he had never entered the transaction. ¹⁷⁵ So in *Hayes v Dodd* ¹⁷⁶ a solicitor negligently advised the plaintiff that he had a right of way to give access to the leasehold property he proposed to acquire as a site for his business. There was no legally enforceable vehicular right of way and the business failed through the lack of adequate access. Damages were assessed on the “no transaction” basis viz all the wasted expenditure incurred by the plaintiff (the initial cost of the lease and goodwill, rent, rates, insurance, bank interest and other expenses wasted until the time he reasonably gave up the business) less the amounts recovered by the plaintiff through selling the lease and his plant (the mitigation rules applied). In *South Australia Asset Management Corp v York Montague Ltd* ¹⁷⁷ ⚠ the question was whether a valuer who is employed by a potential secured lender and who negligently over-values the property offered as security is liable not only for the difference between the negligent valuation of the property and its actual value at the time but for the whole loss suffered by the claimant if the property market falls so that the security becomes even less adequate. The Court of Appeal ¹⁷⁸ ⚠ distinguished between “no transaction” cases, in which the transaction would not have proceeded but for the defendant's negligence, and “successful transaction” cases in which it would have proceeded but possibly on different terms or for a different amount: once it was proved that the lender would not have made the particular loan but for the valuer's negligence, the valuer was liable for the entire loss flowing from the transaction so far as it was foreseeable. The House of Lords ¹⁷⁹ ⚠ disagreed, holding that that the distinction between “no transaction” and “successful transaction” cases should be abandoned. Lord Hoffmann, with whose reasons the other Members of the Judicial Committee agreed, said that the starting point must be the scope of the defendant's duty and the kind of loss for which the claimant is entitled to compensation. ¹⁸⁰ ⚠ The principle

“... is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the



parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them. The principle thus stated distinguishes between a duty to *provide information* for the purpose of enabling someone else to decide upon a course of action and a duty to *advise* someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.”¹⁸¹






⚠ This has become known as the SAAMCo principle.¹⁸² ⚠ In *Hughes-Holland v BPE Solicitors*¹⁸³ the Supreme Court confirmed where the defendant’s duty was to advise on the transaction as a whole, the claimant is in principle entitled to recover its full loss from entering the transaction; whereas where the duty was only to provide information on which the claimant was to base its decision, even if the information was critical to the claimant’s decision, the defendant may be liable for the financial consequences of its being wrong but not for the financial consequences of the claimant entering into the transaction so far as these are greater. Lord Sumption, with whose judgment the President and other Justices agreed, said:

“In cases falling within Lord Hoffmann’s ‘advice’ category, it is left to the adviser to consider what matters should be taken into account in deciding whether to enter into the transaction. His duty is to consider all relevant matters and not only specific factors in the decision. If one of those matters is negligently ignored or misjudged, and this proves to be critical to the decision, the client will in principle be entitled to recover all loss flowing from the transaction which he should have protected his client against. The House of Lords might have said of the ‘advice’ cases that the client was entitled to the losses flowing from the transaction if they were not just attributable to risks within the scope of the adviser’s duty but to risks which had been negligently assessed by the adviser.

By comparison, in the ‘information’ category, a professional adviser contributes a limited part of the material on which his client will rely in deciding whether to enter into a prospective transaction, but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client (or possibly his other advisers). In such a case, as Lord Hoffmann explained in *[Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)]*¹⁸⁴ ⚠, the defendant’s legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction, he is liable only for the financial consequences of its being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else’s decision.”¹⁸⁵ ⚠

⚠ So the first basis applied where a broker negligently advised the claimant to enter a transaction; he was held liable for all the losses suffered by the claimant from that entry.¹⁸⁶ ⚠ In contrast, if the defendant’s duty was only to give information on a particular aspect of the proposed transaction or, as has occurred in a number of conveyancing cases, to report to a lender on title or similar matters, the claimant should not recover the whole of the loss suffered through entering the transaction that turned

out to be bad for other reasons. ¹⁸⁷  Thus if the defendant's duty was to advise the client on whether to enter another transaction or arrangement, because of the defendant's breach of contract the claimant entered that other transaction when it would not otherwise have done so, and the transaction turned out badly for other reasons, the claimant may be able to recover its wasted expenditure in full. ¹⁸⁸  However, the claimant's loss must still have been within the contemplation

of the parties ¹⁸⁹ ; and again ¹⁹⁰  the claimant is not put into a better position than he would have been in if the contract had been performed properly. Thus a claimant will not recover if the project would not have been viable and the claimant would have lost its investment even without the defendant's breach. ¹⁹¹  It is clearly established that when the defendant fraudulently induced the claimant to enter into a transaction, even if it is not an "advice" case, damages may also be assessed on the "no transaction" basis. ¹⁹²  In fraud cases, neither the normal remoteness test nor the principle that the claimant must not be put into a better position than if the contract had been performed applies. ¹⁹³ 

^{129.} See Owen (1984) 4 O.J.L.S. 393.

^{130.} See above, para.26-002.

^{131.} See below, para.26-026.

^{132.} The test of reasonableness in incurring the expenditure would not seem to be relevant (cf. the rule in mitigation for post-breach expenditure: below, para.26-032). But the expenditure must have been intended by the claimant to be part of his performance and must satisfy the remoteness rules, so unreasonably high costs may not be recoverable.

^{133.} If the claimant can salvage any items of value from his preparations for performance, the rules of mitigation require him to deduct from his claim the amount he obtained from selling the salvageable items to a third party (or the amount he ought reasonably to have obtained from doing so).

^{134.} On this see next paragraph.

^{135.} *PJ Spillings (Builders) Ltd v Bonus Flooring Ltd* [2008] EWHC 1516 (QB) (citing this paragraph in the 30th edition); see also *C. & P. Haulage v Middleton* [1983] 1 W.L.R. 1461; and *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, although they were concerned not with the profitability of the individual contract which the defendant broke, but of the activity of which that contract was an essential part. On this see below, para.29-028.

^{136.} *C. & P. Haulage v Middleton* [1983] 1 W.L.R. 1461; *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16; *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm) ("the fundamental principle stated by Baron Parke in *Robinson v Harman* ... requires the court to make a comparison between the claimant's position and what it would have been had the contract been performed" (at [65])). The case is helpfully noted in (2011) 127 L.Q.R. 23 (McLauchlan).

^{137.} Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at pp.124–127.

^{138.} This view is found (obiter) in the *C.C.C. Films case* [1985] Q.B. 16, 35. Harris, Campbell and Halson at pp.124-127, prefer this method to scaling down the claimant's damages by reference to the total of his costs incurred to date and the potential costs which (but for the breach) he would thereafter have incurred.

^{139.} *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16.

- [140.](#) [1985] Q.B. 16, 39-40. But in *Parker v SJ Berwin* [2008] EWHC 3017 (QB) it was held that the underlying principle is one of fairness and the burden would not be put on the defendant when the claimants had failed to explain how they would obtain finance (at [77]).
- [141.](#) *Molling & Co v Dean & Son Ltd* (1902) 18 T.L.R. 216; *Anglia Television v Reed* [1972] 1 Q.B. 60.
- [142.](#) This statement is probably restricted to a contract where the claimant intended to make a profit from his performance of the contract (viz it was not a consumer contract where the claimant intended to use the subject matter of the contract).
- [143.](#) *Anglia Television v Reed* [1972] 1 Q.B. 60; *C.C.C. Films (London) Ltd v Impact Quadrant Films* [1985] Q.B. 16, 31-32; *Khan v Malik* [2011] EWHC 1319 (Ch) at [129]. On the possibility of a “split” claim, see below, para.26-029.
- [144.](#) See Campbell (2015) 78 MLR 296, 314-318, explain the facts and decision in the US case of *Boomer v Muir* (1933) 24 P.2d 570 (a case on quantum meruit: see below, para.29-074)
- [145.](#) See above, para.26-021 and below, paras 29-057—29-067.
- [146.](#) (1951) 84 C.L.R. 377. Another example is provided by *Harling v Eddy* [1951] 2 K.B. 739.
- [147.](#) The other expenditure (the cost of an abortive salvage expedition) was not directed at performance: cf. para.26-027 below.
- [148.](#) See above, para.26-024.
- [149.](#) *Khan v Malik* [2011] EWHC 1319 (Ch) at [130]. In *Howard-Jones v Tate* [2011] EWCA Civ 1330, [2012] 1 P. & C.R. 11 it appears that a claim seeking reimbursement of the purchaser’s payment and expenses, made after he had terminated the contract because of the vendor’s non-performance of a post-completion obligation to install water and power, was denied on the basis that there had not been a total failure of consideration; but, with respect, it is hard to see why recovery by way of damages should be refused so long as (a) any benefits received by the purchaser before termination are taken into account; and (b) the purchaser was not put into a better position than he would have been in if the contract had been performed. The measure of damages awarded (the cost of making good the vendor’s obligations to install water and power) seems appropriate only on the assumption that, despite having the right to terminate the contract, the purchaser had not done so.
- [150.](#) [2011] EWHC 1319 (Ch) at [132].
- [151.](#) See also the discussion of cases of failure to provide services, below, para.26-041.
- [152.](#) *Peninsular & Orient SN Co v Youell* [1997] 2 Lloyd’s Rep. 136, 141.
- [153.](#) e.g. *Stocznia Gdanska SA v Latvian Shipping Co, Latreefers Inc* [1998] 1 W.L.R. 574. See below, paras 29-057—29-058.
- [154.](#) For a worked example, see below, para.29-063. See also *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [433], Hamblen J. (“Unlike in a claim for restitution, the contract price forms no part of the relief or remedy to which the claimant is entitled. In so far as it is relevant its relevance is evidential in the sense that in an appropriate case an inference may be drawn from the contract price as to the value of the services to which the claimant was entitled and for whose value he is entitled to be compensated.”)
- [155.](#) See below, para.26-079. The claimant’s damages will be calculated on the basis that he took reasonable steps to realise the salvage value of anything left on his hands after the breach.
- [156.](#) *Mason v Burningham* [1949] 2 K.B. 545. See also *Steam Herring Fleet Ltd v V.S. Richards & Co Ltd* (1901) 17 T.L.R. 731 (expenses in preparing for a voyage; delay in delivering ship). See

also *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 K.B. 99, 105.

157. *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292. See also *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 T.L.R. 317 (beer wasted when ingredient found to be contaminated).
158. *Molling & Co v Dean & Son Ltd* (1901) 18 T.L.R. 217.
159. *McRae v Commonwealth Disposals Commission* (1950) 84 C.L.R. 377 (see above, para.6-031). The High Court of Australia dismissed a claim for loss of profit as speculative.
160. Above, para.26-024. (The discussion in that paragraph applies to the present paragraph, subject to the proviso that the latter is not limited to the profitability of the contract in question, but applies to the profitability of the activity in question.)
161. The onus of proof is on the defendant: *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16 (above, para.26-024).
162. The relevant gross return is that expected from the claimant's whole undertaking, of which the contract with the defendant forms an essential part: *C. & P. Haulage v Middleton* [1983] 1 W.L.R. 1461. This point is implicitly recognised in *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292.
163. The *C.C.C. Films* case [1985] Q.B. 16; *C. & P. Haulage v Middleton* [1983] 1 W.L.R. 1461. The equivalent of para.26-028 in the 30th edition of Chitty was relied on by Gloster J. in *Grange v Quinn* [2013] EWCA Civ 24 at [103]. In that case a tenant who had been wrongly evicted from business premises after a short period sought to recover the premium she had paid by way of an action for damages; her claim was rejected by the trial judge on the ground that even if she had not been evicted, her business was so unprofitable that she would not have been able to recoup even the premium. Gloster J. and Arden L.J. agreed that the premium could be recovered by way of damages except to the extent that the landlord could show that the tenant would not have been able to recoup it from gross income derived from using the premises, but they differed over whether the landlord had discharged or could discharge the burden of showing that the tenant would not have recouped the premium. Jackson L.J. agreed with Gloster J. that the tenant should be allowed to recover the premium, but on the simple ground that a tenant who has been wrongfully evicted at an early stage should have a claim to recover the premium. Jackson L.J. relied on the decision of the CA in *Sampson v Floyd* [1989] 33 E.G. 41, which had stated this. However, as Arden L.J. (at [21]) and Gloster J. (at [97]) pointed out, in *Sampson v Floyd* the court had not heard argument on the question of profitability of the venture, which did not arise. It is submitted that in the case where the claimant's overall activity would not have earned enough to recoup the premium, the entire premium can only be recovered by way of restitution, and there must have been a total failure of consideration: see para.26-026.
164. See above, para.26-024 n.123.
165. Above, para.26-021.
166. The expected profit will either be from the particular contract (performance expenditure: above para.26-023) or from the profit-making activity of which it forms a part (above, para.26-027).
167. Allowance must be made for any salvage value.
168. Macleod [1970] J.B.L. 19; Street, *Principles of the Law of Damages* (1962), pp.242–245; Beale, *Remedies for Breach of Contract* (1980), p.238.
169. *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 Q.B. 292, 308. (This case is explored in more detail below, Vol.II, paras 44-422—44-423); *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60, 63–64.
170. In both the *Cullinane* [1954] 1 Q.B. 292 and *Anglia Television* [1972] 1 Q.B. 60 cases, above,

the relevant profit-making related to the activity in which the plaintiff was engaged (processing clay for sale or making a proposed film) rather than to the individual contract.

171. See *T.C Industrial Plant Pty Ltd v Robert's (Queensland) Pty Ltd* [1964] A.L.R. 1083; *Stoljar* [1975] 91 L.Q.R. 68. In *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 Q.B.D. 670, both wasted expenses and profits were awarded, but it is not clear whether the latter were *net* profits. See also *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 K.B. 99 which accepted a claim involving both. The distinction between gross and net profits is recognised in *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16, 32.
172. Under the rules of mitigation, a deduction must be made from the damages in respect of anything with a salvage value arising from the expenditure.
173. *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60 (the expenditure was part of the overall activity in which the plaintiff was engaged, the making of a film); *Lloyd v Stanbury* [1971] 1 W.L.R. 535, 546 (legal costs, and removal expenses: "the costs of performing an act required to be done by the contract"). See *Ogus* (1972) 35 M.L.R. 423. The question of a ceiling on recovery will be relevant: see above, paras 26-024, 26-028.
174. The facts of the *C.C.C. Films case* [1985] Q.B. 16 show that the expenditure in question was incurred before the making of the subsidiary agreement broken by the defendant.
175. *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All E.R. (Comm) 929 HL (advice to enter the transaction, as distinct from the provision of specific information).
176. [1990] 2 All E.R. 815 CA.
177. ! [1997] A.C. 191 (below, para.26-168).
178. ! sub nom. *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] Q.B. 375.
179. ! [1997] A.C. 191.
180. ! [1997] A.C. 191, 211
181. [1997] A.C. 191, 214. *Hayes v James & Charles Dodd (A Firm)* [1990] 2 All E.R. 815 CA and *County Personnel (Employment Agency) Ltd v Alan R Pulver and Co* [1987] 1 W.L.R. 916 CA were seemingly approved on the basis of the mitigation or "extrication" principle ("a reasonable attempt to cope with the consequences of the defendant's breach of duty") see [1997] A.C. 191, 219, though in *Hayes v James & Charles Dodd* the damages went beyond "extrication" and covered *all* the plaintiff's wasted expenditure from the beginning of the transaction.
182. ! See further below, para.26-168.
183. ! [2017] UKSC 21, [2017] 2 W.L.R. 1029.
184. ! [2017] 1 W.L.R. 1627 HL.
185. ! *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 at [40]–[41].
186. ! *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2001] 2 All E.R. (Comm) 929 HL, as explained in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 at [43]–[44].
187. ! See [2017] UKSC 21 at [47]–[52], disapproving the reasoning in the *Steggles Palmer* and

Colin Bishop cases (two of the cases brought by the *Bristol and West Building Society*, and reported in [1997] 4 All E.R. 582), and also the application of the *Steggles Palmer* case by the Court of Appeal in *Portman Building Society v Bevan Ashford* [2000] P.N.L.R. 344.

188.

! The burden of proving the extent of the defendant's duty is on the claimant: [2017] UKSC 21 at [53].

189.

! It is thought that if the defendant has undertaken such a duty to advise, then the loss will not be one for which the defendant could not reasonably be assumed to be taking responsibility: cf. Main Work, Vol.I, paras 26-126 et seq.

190.

! cf. Main Work, Vol.I, para.26-028.

191.

! As in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, see at [11], [19].

192.

! *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] A.C. 254; see Main Work, Vol.I, paras 7-061—7-065.

193.

! See Main Work, Vol.I, paras 7-055—7-056.

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(c) - Expenditure and Other Types of Loss Caused by the Breach

Incidental losses

26-032

Subject to the rules on causation and remoteness and to the test of acting reasonably, ¹⁹⁴ the claimant may recover as damages reasonable costs ¹⁹⁵ he incurred in mitigating the loss caused by the breach or in otherwise dealing with the consequences of breach. ¹⁹⁶ This expenditure does not fit readily into any of the three categories of “restitution”, “reliance” or “expectation” loss. It is sometimes termed “incidental” loss. ¹⁹⁷ So where the defendant delayed delivery of a crane sold to the plaintiff whom he knew to be an importer of timber, the plaintiff recovered the extra cost of man-handling timber at his wharf. ¹⁹⁸ Other illustrations are the recovery of the cost of substitute performance by a third party ¹⁹⁹; the recovery of storage charges after the defendant refused to accept goods ²⁰⁰; the recovery of the reasonable cost of rebuilding, ²⁰¹ repairing or replacing ²⁰² property of the claimant damaged or destroyed through the defendant’s breach of contract; the recovery of medical or rehabilitation expenses when the breach causes physical injury to the claimant ²⁰³; extra freight and insurance costs arising from late delivery of goods. ²⁰⁴ Unlike in the case of reliance expenditure, there is no question of this category being subject to a ceiling on recovery being fixed by the expected profitability of the contract or activity. ²⁰⁵

Injury, damage or other loss caused by breach

26-033

The claimant may also suffer physical injury or other damage as the result of a breach of contract: for example if a defect in goods supplied causes injury, damage to other property or simply disruption to the running of the claimant’s business. Examples include the recovery of the amount of damages and costs paid by the claimant to a third party as a consequence of the defendant’s breach of contract, ²⁰⁶ as where it was within reasonable contemplation of the parties that the buyer would probably resell the goods, and that the seller’s breach in supplying defective goods was not unlikely to result in the buyer being liable to pay damages and costs to a sub-buyer for breach of the sub-contract. ²⁰⁷ Subject to the normal limitations, the claimant may recover damages for loss of this kind although it is not clear that it was caused by reliance on the contract (save in the most general sense that the claimant assumed that the goods would not be defective) or constituted loss of expectation (save in the general sense that the claimant expected that he would not suffer the injury or damage). ²⁰⁸

^{194.} The cost of “reasonable” action may be recovered even if it later appears that some other action would have been better: *Gebruder Metelmann GmbH v NBR (London) Ltd* [1984] 1 Lloyd’s Rep. 614, 634.

^{195.} See below, para.26-102.

- [196.](#) *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 T.L.R. 317 (cost of sending notices to customers to minimise loss of business); *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1046 (cost of trying to trace goods). On claims for interest charges incurred, see below, paras 26-227 et seq. On mitigation, see below, para.26-079.
- [197.](#) e.g. American Law Institute, Restatement of Contracts 2nd (1981), § 347.
- [198.](#) *John M. Henderson & Co Ltd v Montague L. Meyer Ltd* (1941) 46 Com. Cas. 209, 219–220. See also on the costs caused by delay, *Borries v Hutchinson* (1865) 19 C.B.(N.S.) 445 (extra freight and insurance); *Watson v Gray* (1900) 16 T.L.R. 308 (increased building costs).
- [199.](#) Below, para.26-036.
- [200.](#) *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep. 509 (there was no available market). See also *S.S. Ardennes (Cargo Owners) v S.S. Ardennes (Owners)* [1951] 1 K.B. 55 (increased import duty payable).
- [201.](#) *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447. See also *Smith v Johnson* (1899) 15 T.L.R. 179 (mortar supplied by a builder was below standard; it was used for building a wall which the local authority later condemned as unsafe; the owner recovered from the builder the cost of pulling it down and of rebuilding). See also *Calabar Properties Ltd v Stitcher* [1984] 1 W.L.R. 287 (cost of alternative accommodation during repairs to flat occupied by tenant).
- [202.](#) *Bacon v Cooper (Metals) Ltd* [1982] 1 All E.R. 397.
- [203.](#) The decision in *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85 supports the view that damages for personal injury caused by breach of contract should be assessed on a similar basis to that used in tort.
- [204.](#) *Borries v Hutchinson* (1865) 18 C.B.(N.S.) 445.
- [205.](#) See above, paras 26-024, 26-028.
- [206.](#) See Vol.II, para.44-405. The breach of contract may even result in a tortious claim by a third party against the claimant, the cost of which is within the remoteness test: *Mowbray v Merryweather* [1895] 2 Q.B. 640 (see Vol.II, para.44-431). The claimant's legal liability to a third person (even before it is discharged by payment) constitutes recoverable loss: *Total Liban SA v Vitol Energy SA* [2001] Q.B. 643.
- [207.](#) e.g. *Biggin v Permanite* [1951] 2 K.B. 314. See Vol.II, paras 44-433—44-435. If the claimant acts reasonably in reaching an out-of-court settlement with the third party, he may be entitled to recover the amount of the settlement: Vol.II, para.44-433. The cost of the settlement is not recoverable if the settlement was not a reasonable one to have made: *Symrise AG v Baker & McKenzie* [2015] EWHC 912 (Comm). It is not necessary that he should have been under a legal obligation to pay the third party if it was reasonable to do so: *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All E.R. 180. On the recovery of a fine imposed on the claimant as the result of the defendant's breach of contract, see Vol.II, para.44-421.
- [208.](#) Restatement of Contracts 2nd (1981), § 347 refers to these as "consequential" losses, in contrast to "the loss in the value to him of the other party's performance". However, some claims for loss of expectation will be for "consequential" loss in this sense, as where the claim is for profit that a buyer would have been able to make had the goods been delivered in accordance with the contract. English courts have interpreted the words "consequential loss" when contained in a limitation of liability clause as referring to losses that will not occur in the ordinary course of things and thus may be too remote under the rule in *Hadley v Baxendale* (1854) 9 Ex. 341 (below, para.26-109): see para.15-009.

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Section 3. - Measures of Compensation

(a) - Introduction

Different measures of compensation

26-034

In some cases the court may be faced with a choice over how to measure the loss that the claimant has suffered. One example ²⁰⁹ occurs when the performance rendered was defective: should the loss be measured by the cost of putting the defect right or by the difference in the value of the performance that was rendered? The two measures may produce very different results. In such cases, the outcome seems to depend on what it would be reasonable for the claimant to do in the circumstances. If the cost of correction was lower than the difference in value, the claimant will normally be expected to have the defect corrected. If the cost of correction was higher, the damages may be assessed by the more expensive measure if it was reasonable for the claimant to have the defect corrected. ²¹⁰ A more difficult case is where the contract was to supply goods or services and what was supplied was not in accordance with the contract, but the claimant was nonetheless able to earn the same profit as he had expected to earn had the contract been performed properly, or did not suffer any loss because of the shortcoming. Should the court consider the difference in value or only the final outcome for the claimant? There is some controversy over the correct approach; the question is explored below. ²¹¹

Measures that go beyond strict compensation

26-035

In this section we also consider cases in which the courts have awarded remedies that may go beyond compensation. There are two categories. One is where the measure of damages the defendant is made to pay over a proportion of the profit that he has made through breaking the contract. ²¹² There is some debate whether this measure is compensatory or a form of restitution for wrong-doing. ²¹³ The second is an exceptional category in which the defendant is required to account for the full profit he has made. ²¹⁴ This is better viewed as a restitutionary award, not one of compensatory damages, ²¹⁵ but it is convenient to discuss it here because there is a very close connection to the “share of profit” cases. We also consider punitive or exemplary damages. ²¹⁶ These are not normally available for mere breach of contract.

^{209.} A further example occurs when a breach of contract affects the running of a business, when the loss might be measured by the effect on the value of the business or by the effect on the profit made. In this case the question seems to depend on which measure is more appropriate given what took place after the breach. See below, para.26-172.

^{210.} See below, paras 26-036—26-038.

[211.](#) See paras 26-039—26-042.

[212.](#) See below, para.26-046.

[213.](#) See below, para.26-049.

[214.](#) See below, para.26-055.

[215.](#) See below, para.26-055.

[216.](#) See below, para.26-044.

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(b) - Substitute Performance (Cost of Completion or Repairs)

Damages for the cost of completion, reinstatement or repairs

26-036

In appropriate circumstances, ²¹⁷ damages may be assessed on the basis of what it will cost the claimant to obtain performance (or completion of performance) of the contractual undertaking by a third party. ²¹⁸ Where the contract was one to transfer goods to the claimant, it is assumed that the claimant will obtain performance by purchasing goods which conform to the contractual requirements, and damages will be assessed as the difference between the cost (if reasonable) of the substitute purchase and the price fixed in the original contract (the rules of mitigation apply). In other situations, the damages are assessed as the difference between the market value of the defendant's performance in its defective or incomplete state, and the market value of the performance if it had been properly completed. ²¹⁹ In a contract to perform services or for work and materials it will be assumed that the claimant will have the incomplete or defective performance completed or corrected and the damages will be assessed by the cost of getting this done; however, in *Ruxley Electronics and Construction Ltd v Forsyth* the House of Lords held that if the claimant will not have the work done or it would be unreasonable to do so, the damages will again be measured by the difference in value, which may be less than the cost of having the work done. The claimant is entitled to the reasonable cost of having the remedial work done if, in all the circumstances, it is (or was) reasonable for him to insist on having the work done. ²²⁰ Factors which are relevant to the issue of reasonableness include:

- (i)
the claimant has actually had the work done ²²¹; or
- (ii)
he undertakes to have it done ²²² (but such an undertaking will not, on its own, make it reasonable for the claimant to have it done ²²³); or
- (iii)
he shows a "sufficient intention" to have the work done if he receives damages on this basis ²²⁴.
the claimant's subjective intention is relevant. ²²⁵

26-037

In *Ruxley Electronics and Construction Ltd v Forsyth*,²²⁶ above, the House of Lords emphasised the role of reasonableness and held that where the cost of reinstatement was out of all proportion to the advantage to be gained by the plaintiff from reinstatement,²²⁷ it would be unreasonable for the plaintiff to insist on it. In this case, a swimming pool was not built to the depth specified in the contract but was sufficiently deep for diving according to normal standards so that the market value of the property was not reduced. It was held that it was unreasonable for the plaintiff to claim the cost of rebuilding the pool to the contractual specification. (However, the House of Lords did approve the award of £2,500 as damages for loss of amenity or loss of consumer surplus.)²²⁸ But the courts have refused to assess damages at the cost of repairs where a surveyor negligently failed to report defects in a property purchased by the claimant in reliance on the report.²²⁹

26-038

The time at which the cost of repairs should be assessed is when it would have been reasonable for the claimant to begin repairs,²³⁰ which may be as late as the date of the hearing if the claimant was acting reasonably in not mitigating earlier.²³¹

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- ^{217.} In contrast, in tort cases in which a property has been damaged through the defendant's negligence, the true measure of the claimant's loss is the diminution in the value of the property, which should be pleaded as general damage; the cost of repairs is no more than evidence of the diminution in value and mitigation is not relevant: that loss cannot be mitigated by having the property repaired at a lower cost: *Coles v Hetherton* [2013] EWCA Civ 1704, [2014] 1 W.L.R. 60 at [28]–[29] and [31] (referring to Admiralty cases such as *The Kingsway* [1918] P. 344 and also *Dimond v Lovell* [2002] 1 A.C. 384).
 - ^{218.} The advantages of this remedy are reviewed by Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), pp.210–216.
 - ^{219.} *Tito v Waddell (No.2) (The Ocean Island case)* [1977] Ch. 106. In appropriate circumstances, damages may be awarded for loss of amenity, even the loss of a personal, subjective value in obtaining the benefit of performance. Such a measure will fall between the cost of reinstatement and the diminution in market value.
 - ^{220.} [1996] A.C. 344 (see the comment by Poole (1996) 59 M.L.R. 272; and Coote [1997] C.L.J. 537); *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co* [1970] 1 Q.B. 447, 473. On the question of the reasonableness of substitute performance in building contracts, see *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406 (repairs carried out promptly when defect discovered); *Radford v De Froberville* [1971] 1 W.L.R. 1262 (commented on by Wallace in (1980) 96 L.Q.R. 101, 341); *Bevan Investments Ltd v Blackhall and Struthers (No.2)* [1973] 2 N.Z.L.R. 45; [1978] 2 N.Z.L.R. 97; *G.W. Atkins Ltd v Scott* (1980) 7 Const. L.J. 215, CA.
 - ^{221.} *Jones v Herxheimer* [1950] 2 K.B. 106.
 - ^{222.} *The Ocean Island case* [1977] Ch. 106, 333.
 - ^{223.} *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344, 373.
 - ^{224.} *The Ocean Island case* [1977] Ch. 106, 333; *Radford v De Froberville* [1971] 1 W.L.R. 1262, 1269–1270; cf. the tort case of *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433.
 - ^{225.} *The Ruxley Electronics case* [1996] A.C. 344, 359, 372–373. The principles are summarised in *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const. L.J. 709 at [263] (Ramsey J.) (affirmed [2012] EWCA Civ 904).
 - ^{226.} [1996] A.C. 344. For an application of the case see *Sunrock Aircraft Corp Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882, [2007] 2 Lloyd's Rep. 612.

- [227.](#) On the question whether the “cost of cure” is disproportionate to the benefit, see *Channel Island Ferries Ltd v Cenargo Navigation Ltd (The Rozel)* [1994] 2 Lloyd’s Rep. 161; cf. the use of reasonableness to decide whether the owner of a chattel damaged by negligence (tort) was entitled to the cost of replacing it rather than its market value: *Southampton Container Terminals Ltd v Hansa Schiffahrts GmbH (The Maersk Colombo)* [2001] EWCA Civ 717, [2001] 2 Lloyd’s Rep. 275.
- [228.](#) See below, para.26-145.
- [229.](#) See below, para.26-167.
- [230.](#) *Radford v De Froberville* [1971] 1 W.L.R. 1262; *London Congregational Union Inc v Harriss and Harriss* [1985] 1 All E.R. 335, 344 (the appeal did not deal with this point: [1988] 1 All E.R. 15); *Cormier Enterprises Ltd v Costello* (1980) 108 D.L.R. (3d) 472. See below, para.26-088; and, on the duty to mitigate in general, below, para.26-079; cf. the tort case of *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433.
- [231.](#) *Radford v De Froberville* [1971] 1 W.L.R. 1262; *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 (a tort case where a building was damaged by defendant’s tort; plaintiff reasonably postponed repairs until defendant admitted liability); *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 A.C. 371, PC (claimant entitled to wait until liability had been established for cost of repairs: a tort case); *Bevan Investments Ltd v Blackhall and Struthers (No.2)* [1973] 2 N.Z.L.R. 45 (commented on by Wallace (1980) 96 L.Q.R. 101, 115, and 341); *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297 (defendant denied liability).

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(c) - Claimant's Original Purpose Fulfilled Despite Breach

Defendant has performed in part or defectively but claimant's original purpose not affected

26-039

In at least two types of case a difficult question of the appropriate measure has arisen after the defendant has done less than was promised, or has delivered a good or service that was not up to the contractual requirements; there is no question of making good the deficiency or correcting the defect and it appears that the breach has not affected the claimant's original purpose. Should the damages be merely nominal, or should they be based on the difference (if any) between the "objective" value of what was delivered (e.g. its market value) and the value of what should have been delivered? The approach in sale of goods cases has been to award the difference in value, but in services cases to look at the outcome, with the result that the claimant may recover only nominal damages. However, in recent years there have been changes in approach—in the sale of goods case, towards looking at the outcome, but in services cases to awarding the difference in value. The resulting position is therefore unclear.

Sale of goods cases

26-040

❗ Where the contract was for the sale of goods for which a market price can be established, the traditional answer has been that the claimant is entitled to the difference in value between what should have been delivered and what was delivered, even if he has been able to use the goods for their intended purpose without any loss. ²³² ❗ Thus if the buyer bought the goods to resell, and had agreed a sub-sale before the defect was known, the traditional answer has been to say that the buyer is entitled to the difference in value even if the sub-buyer has paid the full agreed price despite the defect. Thus the Sale of Goods Act 1979 s.53 provides for damages where the seller delivers defective goods which the buyer does not, or is unable, to reject, and provides:

“(3)

In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.”

In *Att-Gen v Blake* Lord Nicholls said:

“If a shop keeper supplies inferior and cheaper goods than those ordered and paid for, he has to refund the difference in price. That would be the outcome of a claim for damages for breach of contract. That would be so irrespective of whether the goods in fact served the intended purpose.”

In *Slater v Hoyle and Smith Ltd* ²³³ it was held by the Court of Appeal that where the seller delivered defective goods, but the buyer was nevertheless able to perform a sub-contract by delivering the goods to his sub-buyer, the buyer's damages against the seller should not be reduced by taking this into account; the buyer was entitled to rely on the normal measure of damages under s.53(3) viz the difference between (a) the market price, at the time and place of delivery, of goods up to the contractual quality; and (b) the market price, at the time and place of delivery, of the goods actually delivered. ²³⁴ However, a contrary approach was taken by the Court of Appeal in *Bence Graphics International Ltd v Fasson UK Ltd*. ²³⁵ The seller knew that the buyer would sell on to others (after manufacturing the goods into another product); the Court of Appeal held that the parties contemplated that the measure of damages for defects in the goods should be the extent of the buyer's liability (if any) to those others resulting from the defect. In *Bence's* case the decision in *Slater's* case was doubted, on the ground that s.53(3) laid down only a prima facie rule, which should not be applied if it would give the buyer “more than his true loss”. ²³⁶ The case has been the subject of trenchant criticism and it is submitted that it should not be followed, particularly in the light of the development described in the next paragraph.

Shortcomings in contracts for services

26-041

⚠ In some cases in which the defendant supplied services which were deficient or defective, but the breach does not appear to have caused the claimant any loss, it has been held that the damages should be nominal. Thus in a famous case from the United States, *City of New Orleans v Firemen's Charitable Association* ²³⁷ the defendants had undertaken to keep available specified numbers of men and lengths of hosepipe, and were paid accordingly. Later it was discovered that they had not kept the proper numbers of men or equipment available (and had thereby saved themselves \$40,000); but the City could not show that it had suffered any loss through fires not being put out. The Louisiana Supreme Court held that substantial damages could not be recovered. But in a rather similar case in this country, the defendants were employed to deliver and collect goods for a mail order company. ²³⁸ They had failed to provide the “enhanced” level of service for which the mail order company had paid, but it was not shown that this had caused any loss to the company. The company sought to recover damages based on the additional price they had paid for the enhanced level of service. This was rejected by the Court of Appeal on the ground that it amounted to seeking to recover the price by way of restitution, which is not permitted when there has been only a partial failure of consideration. It is the value of what should have been received that is relevant to damages, not the price paid. However, Sir Thomas Bingham M.R. said that if there is a clear difference between the market value of what was contracted for and what was supplied, the difference will be the measure of damages. If there is no market price, it may still be possible to quantify the loss by reference to the cost of providing the lacking services, or indeed to use the contract price as best evidence of the value of them. ²³⁹ Thus the value of a performance has sometimes been calculated by assuming that it was worth at least what the buyer had agreed to pay for it. ²⁴⁰ Subsequently it has been held that if the services provided are incomplete or of less than the contracted quality, the buyer is prima facie entitled to the difference in value between the service promised and the service delivered, whether or not he has suffered any further loss and whether or not he has obtained substitute services from another supplier. ²⁴¹ ⚠

Landlord's failure to maintain or repair

26-041A

⚠ A slightly different approach has been taken by the Court of Appeal in a case in which a landlord had failed to repair premises that had been flooded. ²⁴² ⚠ The Court held that the loss consists in the impairment to the rights of amenity afforded to the lessee by the lease; discomfort, inconvenience and distress (and even the deterioration of the health of a loved one) are only symptoms. Therefore the lessee may claim for loss of amenity even though for reasons unconnected with the disrepair itself he may have chosen not to make full use, or even any use, of them during part or all of the relevant period. But the non-use of the premises may be seen as a form of mitigation of loss, and non-use of the premises for other reasons may also be taken into account, so that the lessee will not necessarily recover the full market rental for the period of disrepair. If the lessee has to rent other premises, then the cost of doing so may be the best measure of his loss and may be recoverable even if it exceeds the market rental value of the original property ²⁴³ ⚠; conversely,

“... the court is entitled and, I would say, obliged to temper the rigour of those rules which seek to implement the compensatory principle which lies at the heart of the law of damages, where particular circumstances make it just to do so”. ²⁴⁴ ⚠

The cases on goods and services cited in the previous paragraphs ²⁴⁵ ⚠ were not cited. It is not obvious why a buyer of goods or services should recover the difference between the value of the goods or services that should have been provided and the value of what was provided, but a lessee who has been deprived of the use of the property because of a failure to repair will not recover the full market rental irrespective of whether he would have used the property.

The “performance” interest






26-042

⚠ Recent cases of three different types have recognised that a party to a contract may have an interest in performance of the contract even though the defendant’s breach does not cause the claimant any obvious loss. One class of case is where the claimant has contracted for something which will benefit a third person ²⁴⁶ ⚠. The courts have recognised that though failure to provide the service may not cause loss to the claimant, the claimant nonetheless has an interest in performance. The damages available in this type of case were discussed in Ch.18. ²⁴⁷ It was in a case of this type that Lord Goff (dissenting) said that the courts may now be giving:

“... fuller recognition of the importance of the protection of a contracting party’s interest in the performance of his contract than has occurred in the past.” ²⁴⁸

Secondly, cases in which the claimant is allowed to recover the difference in value between what he should have received and what in fact he received, even though it did not affect his ultimate purpose, also seem to illustrate protection of the performance interest. Third is the exceptional class of case like *Att-Gen v Blake* ²⁴⁹ in which the claimant has not suffered any loss but, because of the strong interest in performance, the courts have found it appropriate to order the defendant to account for his profits. ²⁵⁰ Academic writers have supported this approach, which they see as underlying restitutionary remedies for breach of contract. ²⁵¹ Whenever the court makes an order for specific performance (or injunction) to force the promisor to fulfil exactly what he has undertaken to do (or refrain from doing) the remedy recognises the performance interest by giving the claimant exactly what was promised. But such a remedy has always been a discretionary one ²⁵² and has not been granted as a regular remedy for breach of contract, especially since it is not granted where damages would be “adequate”. ²⁵³ But the new restitutionary remedies recognised in *Att-Gen v Blake* ²⁵⁴ go a considerable way to recognising that the claimant’s interest in performance should be given legal protection. ²⁵⁵

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- [232.](#) **!** This situation must be distinguished from the case in which the claimant has been able to mitigate its loss by subsequent action that reduced or eliminated it: see Vol.I, para.26-095. Most of the cases cited in that paragraph concern the recovery of loss beyond the value of the promised performance itself, but it is thought that mitigation may also reduce the claim below the difference in value between the promised performance and the performance in fact rendered. For example, if the buyer has the goods repaired so that they conform to the contract for less than the difference in value, the buyer will recover only the cost of repair not the difference in value between the goods as they should have been and as they were delivered.
- [233.](#) [1920] 2 K.B. 11.
- [234.](#) The buyers were not obliged to deliver to the sub-buyer the goods which they bought from the original seller, and in fact some of the goods which they delivered to the sub-buyer came from a different source. It is submitted that the decision in this case is to be preferred to the reasoning of the Privy Council in the analogous case of *Wertheim v Chicoutimi Pulp Co* [1918] A.C. 301 (late delivery), which is criticised see Vol.II, para.44-407 n.1951, and in *Benjamin* at paras 17-039, 17-057—17-058. However, in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 at 103–105, Auld L.J. approved the decision in *Wertheim's* case (see below (this paragraph) and Vol.II, para.44-413).
- [235.](#) [1998] Q.B. 87. See *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd's Rep. 243 (parties contemplated sale of the same goods to the sub-buyer under a specific contract); *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) at [124]–[139].
- [236.](#) [1998] Q.B. 87 at 102 (see Vol.II, para.44-413). But see the powerful criticism of Treitel (1997) 113 L.Q.R. 188.
- [237.](#) 9 So 486 (1891).
- [238.](#) See *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] 15 Tr. L.R. 69, noted (1995) 112 L.Q.R. 205.
- [239.](#) It seems that this measure was outside both the preliminary question on which a ruling was sought and the notice of appeal.
- [240.](#) See (1995) 112 L.Q.R. 205, 207–208. For an example of damages based on a “rough and ready” approach of this kind, see *PlayUp Interactive Entertainment (UK) Pty Ltd v Givemefootball Ltd* [2011] EWHC 1980 (Comm) at [268]–[275].
- [241.](#) **!** *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) (“in a contract for services where there is no proof of consequential financial loss by reason of the breach, the claimant is nonetheless entitled to damages for breach of contract, the measure for which is the value to the claimant of the services which were not provided. In an appropriate case the measure of the value to the claimant of the services which should have been but were not provided may be the notional cost to the claimant of obtaining those services elsewhere, it not being a conditional precedent for the award of such damages that equivalent services were in fact purchased elsewhere”: at [424]). See also at [430] and [435]. On another aspect of the *Giedo* case see further below, para.26-053. On recovery although no substitute has been obtained see also *De Beers UK Ltd (formerly: Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) at [344]. When services are not provided as promised, the “clear and obvious” measure is the diminution in value of the promised services: *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361 at [30]–[31]. For a similar issue in a tort case, see *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, [2007] Bus. L.R. 726. But see above, para.26-040, n.210a.

- [242.](#)  *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252, [2016] H.L.R. 6.
- [243.](#)  [2015] EWCA Civ 1252 at [35]–[39] (Briggs L.J., with whom the other members of the court agreed).
- [244.](#)  [2015] EWCA Civ 1252 at [40]. Briggs L.J. relied in particular on *Earle v Charalambous* [2006] EWCA Civ 1090, [2007] H.L.R. 8, in which the lessee had gone to live with his parents and the Court of Appeal limited his damages to 50 per cent of the notional market rent for the period: see [2015] EWCA Civ 1252 at [37].
- [245.](#)  See Vol.I, paras 26-040—26-041.
- [246.](#)  Thus a party who has been deprived by the defendant's breach of the chance to earn freight suffers a substantial loss even if the first party would have directed the money to be paid to a third party who was not the first party's agent nor bound to account for it: *Glory Wealth Shipping Pte Ltd v Flame SA* [2016] EWHC 293 (Comm), [2016] 1 Lloyd's Rep. 571.
- [247.](#) See paras 18-049—18-070.
- [248.](#) *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518, 551.
- [249.](#) [2001] 1 A.C. 268.
- [250.](#) See below, paras 26-055 et seq.
- [251.](#) Friedmann (1995) 111 L.Q.R. 628; Coote [1997] C.L.J. 537.
- [252.](#) Below, para.27-034.
- [253.](#) Below, para.27-005; cf. below, para.26-106.
- [254.](#) [2001] 1 A.C. 268.
- [255.](#) See also the remedies given to consumers (originally in Pt 5A of the Sale of Goods Act 1979 in respect of the purchase of “non-conforming” goods, see below, Vol.II, paras 38-408 et seq.); now see Consumer Rights Act 2015 ss.23 (goods), 43 (digital content) and 55 (services): see Vol.II, paras 38-477, 38-517 and 38-540, especially the use of specific performance to enforce the requirement to repair or replacement.

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(a) - Introduction

Measure that go beyond compensation

26-043

The traditional view was that when assessing damages for breach of contract, the court is “concerned with the [claimant’s] loss and not with the [defendant’s] profit, the latter being wholly irrelevant”. ²⁵⁶ However, in cases of breach of contract the courts have awarded monetary remedies of two kinds that go beyond a strict measure of compensation. The first kind is an award of damages measured in terms of a share of the profit that the defendant made (or that he was expected to make ²⁵⁷) through breaking the contract. This measure is often treated as a “rough” form of compensation: if the defendant had not broken the contract but instead had sought to negotiate with the claimant to be released from the contract, the sum awarded represents the payment the claimant might have demanded as the price of releasing the defendant. It has been described as compensation for loss of the opportunity to bargain. ²⁵⁸ The second kind is to require the defendant to account to the claimant for the full amount of the profit the defendant made by breaking the contract. As explained below, an account of profits will be ordered only in exceptional circumstances. A third possible monetary remedy that goes beyond compensation of the claimant is an award of exemplary (or “punitive”) damages. By “exemplary” damages we mean damages that are intended to punish the defendant, rather than to compensate the claimant or to strip the defendant of some or all of the profit he has made by breaking the contract. As is explained in the next paragraph, exemplary damages in this sense are not awarded for breach of contract.

^{256.} *The Solholt* [1983] 1 Lloyd’s Rep. 605, 608.

^{257.} See below, para.26-054.

^{258.} See below, para.26-051 n.278.

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(b) - Exemplary Damages

Exemplary (or “punitive”) damages ²⁵⁹

26-044

Exemplary damages are damages awarded against the defendant as a punishment, so that the assessment goes beyond mere compensation of the claimant. Such “punitive” or “vindictive” damages were permitted in some cases of tort until 1964 when the House of Lords in *Rookes v Barnard* ²⁶⁰ severely restricted their use in such cases by specifying only two categories where they may be awarded at common law. The right to receive exemplary damages for breach of contract was, for many years before 1964, ²⁶¹ confined to the single case of damages for breach of promise of marriage, ²⁶² but this cause of action was abolished in 1970. ²⁶³ Thus it appears that exemplary damages are not available when the wrong complained of is merely a breach of contract. ²⁶⁴ If the defendant’s conduct amounted to a tort for which exemplary damages are available, they may be awarded even though it also constituted a breach of contract. ²⁶⁵

Wider meaning of “exemplary damages”

26-045

While exemplary damages in the sense explained in the previous paragraph—i.e. damages intended solely to punish the defendant—are not available for breach of contract, it must be noted that some awards that previously have been refused on the ground that the damages would be exemplary or punitive will now be possible under another heading. Thus in 1909, the House of Lords in *Addis v Gramophone Co Ltd* ²⁶⁶ held that exemplary damages could not be awarded for wrongful dismissal: no compensation should be given for the plaintiff’s injured feelings ²⁶⁷ even where the dismissal was carried out in a humiliating manner. ²⁶⁸ The principle of this decision is not confined to cases of wrongful dismissal, and it is submitted that it now prevents the recovery of exemplary ²⁶⁹ damages for any breach of contract. ²⁷⁰ However, in special circumstances, damages may be awarded for mental distress at least where the purpose of the contract was to protect the claimant against such distress, ²⁷¹ as well as for financial loss which may follow from the manner of dismissal. ²⁷² Secondly, in tort cases it has been said that one case in which an award of punitive damages can be made is when the defendant’s conduct was calculated to make a profit for himself ²⁷³; the aim of the punitive damages is to strip the defendant of the profit he has made by his wrongdoing. In some cases of breach of contract the courts may now achieve this result by awarding an account of profits. ²⁷⁴

^{259.} See the Law Commission Report (Law Com. No.247, 1997), Pt III (paras 3.33–3.37, 3.45–3.47 refer to breach of contract cases); Smith (1997) 60 M.L.R. 360.

^{260.} [1964] A.C. 1129, 1220–1231; the ruling was upheld by the House of Lords in *Cassell & Co Ltd v Broome* [1972] A.C. 1027 (libel), but it was not followed by the Privy Council in an appeal from

- Australia: *Australian Consolidated Press v Uren* [1969] 1 A.C. 590. The use of exemplary damages in tort was again examined by the House of Lords in *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 A.C. 122 and in *Borders (UK) Ltd v Metropolitan Police Commissioner* [2005] EWCA Civ 197.
261. In some cases, before *Addis v Gramophone Co Ltd* [1909] A.C. 488, exemplary damages for breach of contract were awarded, e.g. *Lord Sondes v Fletcher* (1822) 5 B. & Ald. 835; *Maw v Jones* (1890) 25 Q.B.D. 107.
262. *Quirk v Thomas* [1916] 1 K.B. 516, 527, 531, 538.
263. Law Reform (Miscellaneous Provisions) Act 1970 s.1 provides that an engagement to marry shall not have effect as a contract giving rise to legal rights. (See notes in (1971) 87 L.Q.R. 158, 314.)
264. *Crawfordsburn Inn Ltd v Graham* [2013] NIQB 79 (breach of contract and breach of confidence).
265. *Drane v Evangelou* [1978] 1 W.L.R. 455 (exemplary damages awarded for trespass when landlord wrongfully evicted his tenant).
266. [1909] A.C. 488 (see further, below, para.26-140).
267. Followed in *Bliss v S.E. Thames Regional H.A.* [1987] I.C.R. 700.
268. Some of the general statements in the *Addis* case [1909] A.C. 488 have been qualified by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20. In *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 the House of Lords recognised that some “inroads” had been made into the general principle laid down by *Addis*’s case, but refused to make further inroads. cf. *Dunk v George Waller & Son Ltd* [1970] 2 Q.B. 163 (employer’s breach of contract of apprenticeship: see Vol.II, para.40-203); *Edwards v Society of Graphical and Allied Trades* [1971] Ch. 354 (damages for wrongful expulsion from a trade union, leading to dismissal from employment, may include damages “for the difficulty the dismissal causes to a plaintiff in getting fresh employment”: at 379).
269. The decision in *Addis*’s case [1909] A.C. 488 is wide enough to mean that aggravated damages (as sometimes available in tort) cannot be awarded in contract: see *Kralj v McGrath* [1986] 1 All E.R. 54, 61; and *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 where a claim for aggravated damages was struck out. In *Abbey Forwarding Ltd (In Liquidation) v Hone* [2012] EWHC 3525 (Ch), [2013] 2 W.L.R. 1368, a case involving assessment of damages due in accordance with a cross-undertaking given when a freezing injunction was obtained, it was said that the decision in *Johnson*’s case does not mean that aggravated damages can never be awarded in breach of contract cases (at [122]); but it is submitted that this is permissible only in the situations discussed in paras 26-139—26-149.
270. *Perera v Vandiyar* [1953] 1 W.L.R. 672; *Kenny v Preen* [1963] 1 Q.B. 499 (but both doubted in *McCall v Abelesz* [1976] Q.B. 585, 594). cf. *Lavender v Betts* [1942] 2 All E.R. 72 (action in tort in similar circumstances); cf. also *Drane v Evangelou* [1978] 1 W.L.R. 455 (exemplary damages awarded for trespass when landlord wrongfully evicted his tenant). The Supreme Court of Canada has allowed exemplary damages for breach of contract in exceptional circumstances: *Royal Bank of Canada v W. Gott & Associates Electric Ltd* (2000) 178 D.L.R. (4th) 385 (noted in 117 (2001) L.Q.R. 539); *Whiten v Pilot Insurance Co* (2002) 209 D.L.R. (4th) 257 (noted in 119 (2003) L.Q.R. 20).
271. See below, para.26–144. However, even in a tort case, aggravated damages in the sense of damages designed to compensate the successful claimant for distress and injury to feelings caused by the defendant’s conduct cannot be awarded to a limited company: *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] H.L.R. 4 at [30].
272. See below, paras 26-147—26-148.

- [273.](#) *Rookes v Barnard* [1964] A.C. 1129, 1225–1226.
- [274.](#) In *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 A.C. 122, Lord Nicholls (at [67]) and Lord Scott (at [109]) had said that the growth of remedies for unjust enrichment mean that the defendant's profit may be removed without an award of exemplary damages. Lord Scott referred to *A-G v Blake*.

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(c) - Depriving the Defendant of Part of his Profit

Depriving the defendant of profit made through his breach

26-046

Until *Blake*'s case ²⁷⁵ in 2000, the only recognised exceptions to the principle that, when assessing damages for breach of contract, the court is "concerned with the [claimant's] loss and not with the [defendant's] profit" ²⁷⁶ were where the claimant had a remedy in restitution or could enforce a fiduciary obligation; or where he had a remedy in tort or had an interest in property used by the defendant without permission. In these two types of case, the claimant may be awarded damages on a broad measure which is not necessarily related to a real loss he has suffered. They are briefly reviewed in turn. ²⁷⁷

Restitutionary remedies

26-047

Restitutionary remedies may be used to deprive the defendant of a profit, ²⁷⁸ e.g. to deprive an agent of a bribe or secret profit ²⁷⁹ or an employee of profits arising from misuse of confidential information. ²⁸⁰ The equitable proprietary remedies of the holding profits on trust or imposing a lien ²⁸¹ and the wide use of the remedial device of a constructive trust, ²⁸² have also been used to deprive a defendant of his profit. So the Privy Council held a defendant liable to account for the profits made through the wrongful use of a telegraph wire. ²⁸³ The House of Lords in *Blake* ²⁸⁴ reviewed and approved the earlier cases on interference with rights of property at common law and equity mentioned in both this and the next paragraph.

Broad measures of damages in tort

26-048

In tort, damages have often been awarded for unauthorised use of the claimant's land. ²⁸⁵ On a similar principle, damages for retaining goods or buildings beyond the period of a letting to the defendant are assessed at the ordinary letting value of their use ²⁸⁶; the same approach has been used in assessing damages against a buyer who refused to remove the goods from the seller's premises. ²⁸⁷ It is not always the case that the claimant would have used the goods or land himself or have rented them to someone else ²⁸⁸; the claimant may not have suffered any loss at all. A famous example was given by Lord Shaw: the owner of a horse which the defendant has ridden without permission may recover damages even though the horse may actually be the better for having been ridden. ²⁸⁹ So the damages cannot be described as compensatory in the strict sense. It is sometimes stated that they are on a restitutionary basis, ²⁹⁰ but in the light of dicta on the nature of damages in analogous cases of breach of contract, it seems that they should be described as a broad measure of compensation. ²⁹¹

Invasion of property interest

26-049

Where a breach of contract also amounts to the invasion of a property interest vested in the claimant, he may obtain a remedy which has the effect of depriving the contract-breaker of some of his profit.²⁹² So in the *Wrotham Park* case²⁹³ where the defendant built on his land in defiance of a restrictive covenant in favour of the plaintiff, the damages were assessed at the price which the plaintiff could reasonably have expected to receive from a negotiated partial release from the covenant; this price could be a proportion of the profits expected to be made by the defendant. The damages in the *Wrotham Park* case were in lieu of an injunction²⁹⁴ but the House of Lords has said that the assessment of damages was governed by the same principles whether the damages were awarded under the Act or at common law.²⁹⁵ In *Blake's* case²⁹⁶ the House of Lords explicitly approved the basis of the award in *Wrotham Park*, preferring it to some inconsistent Court of Appeal authority.²⁹⁷ It may be that in *Blake's* case the compensation for loss of the opportunity to bargain was viewed as a form of restitutionary remedy rather than a form of damages, but subsequently the Court of Appeal has held it to be a form of compensatory damages, in contrast to the account of profits ordered in *Blake's* case itself.²⁹⁸

The extension made by *Att-Gen v Blake*

26-050

In *Att-Gen v Blake*²⁹⁹ the House of Lords, while upholding the exceptions set out in paras 26-020 and 26-023 above, extended the principles in two ways. First, the *Wrotham Park* basis was approved without it being restricted to the invasion of a property interest:

“In a suitable case damages for breach of contract may be measured by the benefit gained by the wrong-doer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.”³⁰⁰

This basis is discussed in this section. The second extension was that in exceptional circumstances the defendant may be made to account for the full profit he made. The second extension is discussed further below under the heading of “account of profit”.³⁰¹

Hypothetical bargain damages on the *Wrotham Park* basis.³⁰²

26-051

❗ On this basis, the claimant is awarded “hypothetical bargain” damages representing what the claimant could reasonably have charged for giving permission to the defendant to act contrary to his contractual undertaking. Such damages (in earlier editions of this Work called “partial disgorgement” of the “wrongful” profits made through the breach) were explained in *Experience Hendrix* on a

restitutionary, not a compensatory, basis. In the later *WWF* case³⁰³ ❗ it was held to be a form of compensatory damages. Whichever is correct, strict compensation for loss which the claimant can prove to have been caused by the breach is treated as irrelevant: the defendant is required to make a “reasonable” payment in respect of the benefit he has gained.³⁰⁴ In another phrase, it is the “value of a bargaining opportunity”,³⁰⁵ but it does not matter that had the claimant’s permission been sought it would never have given it.³⁰⁶ Another possible explanation is that the award represents the value of the claimant’s right to use his property as he wished.³⁰⁷ At the very least it can be said that the same broad measure of damages previously applied in tort cases of deliberately wrongful interference may now be used in cases of breach of contract where the defendant acted in disregard of the claimant’s rights³⁰⁸ but the latter cannot show that he suffered a loss.³⁰⁹ ❗

26-052

Wrotham Park damages have been awarded or discussed in a number of cases since *Att-Gen v Blake*.³¹⁰ Many of the cases have involved either infringements of intellectual property rights or breach of confidence. In the Privy Council case of *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*,³¹¹ a case of breach of confidence, Lord Walker said that the phrase “*Wrotham Park* damages” is mostly helpfully used to describe damages awarded in lieu of specific performance or injunction under s.2 of Lord Cairns’ Act, including both cases involving invasion of a proprietary right and cases involving other breaches of contract.

Lord Walker continued that the cases on *Wrotham Park* damages:

“... establish the following general principles [*citations omitted*]

(1)

Damages (often termed ‘user damage’) are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass): ...

(2)

Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character: ...

(3)

Damages under Lord Cairns’s Act are intended to provide compensation for the court’s decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief: ... The breach of a restrictive covenant is also generally regarded as the invasion of a property right ... since a restrictive covenant is akin to a negative easement. (It is therefore a little surprising that Lord Nicholls in *Blake* ... referred to *Wrotham Park* as a ‘solitary beacon’ concerned with breach of contract; that case was concerned with the breach of a restrictive covenant to which neither the plaintiff nor the defendant was a party; but the decision of the House of Lords in *Blake* decisively covers what their Lordships have referred to as a non-proprietary breach of contract.)

(4)

Damages under this head ... represent ‘such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]’ ...

(5)

Although damages under Lord Cairns’s Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted: ...”³¹²

Breach of contract cases

26-053

⚠ Where there has been only a breach of contract and not an infringement of property rights or breach of confidence, the court may be willing to make an award on the “hypothetical bargain” basis only if there are special circumstances to justify it. Thus in *Experience Hendrix* ³¹³ the Court of Appeal used some of the factors relevant to the granting of an account of profits ³¹⁴ as also relevant to their discretion to grant *Wrotham Park* damages. The court took into account the fact that the defendant “did do the very thing it had contracted not to do” ³¹⁵; that the defendant “knew that it was doing something which it had contracted not to do” ³¹⁶; that it was a “deliberate breach”, ³¹⁷ a “flagrant contravention” of the defendant’s obligation. ³¹⁸ In cases of a breach of non-competition clauses in a

sale of a business, a fourth factor is whether it is doubtful that interim relief could be obtained. ³¹⁹ ⚠ However, the circumstances need not be exceptional in the way required if an account of profits is to

be ordered. ³²⁰ ⚠ it has been held that where the defendant has failed to provide the services promised but the claimant cannot show a consequential loss, if damages cannot be awarded on the simple difference in value between the services promised and those provided, ³²¹ an award on the hypothetical bargain basis may be made instead. ³²² It has been said that “the inability to demonstrate identifiable financial loss of the conventional sort is a pre-condition to the award of such damages”. ³²³ However, in *One Step (Support) Ltd v Morris-Garner* the Court of Appeal declined to follow this dictum and held that *Wrotham Park* damages may be awarded when it will be very difficult to prove the loss that has been caused by the breach; the question is whether an award would be a just

response. ³²⁴ ⚠ It is submitted that *Wrotham Park* damages may also be awarded when the conventional measure of damages would leave the claimant undercompensated. ³²⁵, or possibly if the real loss would be suffered by a third party. ³²⁶ ⚠

Assessing hypothetical bargain damages



26-054

⚠ “Hypothetical bargain” damages have been assessed at a modest level (5 per cent of the defendant’s anticipated profit in *Wrotham Park* ³²⁷; in *Experience Hendrix* “significantly in excess of 2%” as a royalty on retail sales (sums yet to be assessed). ³²⁸ In *Vercoe v Rutland Fund Management Ltd* ³²⁹ Sales J. said the factors to be taken into account in assessing the damages include:

“(i) the likely parameters given by ordinary commercial considerations bearing on each of the parties ... (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties ... and (iii) the court’s overriding obligation to ensure that an award of damages for breach of contract—which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties—does not provide relief out of proportion to the real extent of the claimant’s interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court.”

In the *Pell Frischmann* case, ³³⁰ Lord Walker said that the court should consider a hypothetical negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages); both parties to be assumed to act reasonably, so that the fact that one or other would have refused to make a deal is to be ignored. But the fact that the alternative project could not proceed unless the negative rights were bought out can properly be taken into account. ³³¹ Events subsequent to the hypothetical bargain, such as that the contract-breaker’s profit turned out to be much smaller than expected, should not normally be taken into account. ³³² ⚠

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- [275.](#) *Att-Gen v Blake* [2001] 1 A.C. 268.
- [276.](#) *The Solholt* [1983] 1 Lloyd's Rep. 605, 608.
- [277.](#) In *Blake* 's case [2001] 1 A.C. 268 the House of Lords upheld all the exceptions set out in this paragraph.
- [278.](#) Goff and Jones, *The Law of Restitution*, 7th edn (2007), paras 20–024 et seq.; Dawson (1959) 20 Ohio State L.J. 175, 185–188.
- [279.](#) Below, para.29-164.
- [280.](#) See Vol.II, paras 31-122 and 31-127 et seq., 40-066—40-068.
- [281.](#) Below, paras 29-172 et seq.
- [282.](#) Below, para.29-168. The US Supreme Court has used a remedial constructive trust to deprive a cynical contract-breaker of his profits: *Snepp v United States* 444 US 507 (1980), but the English Court of Appeal preferred not to use this concept: *Att-Gen v Blake* [1998] Ch. 439, 459. See also Deane J. (dissenting) in *Hospital Products Ltd v US Surgical Corp* (1984) 156 C.L.R. 41, *High Ct of Australia*.
- [283.](#) *Reid Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] A.C. 555 (a promise to account for the profits of breach). See also *Reading v Att-Gen* [1951] A.C. 507.
- [284.](#) [2001] 1 A.C. 268, 278–280.
- [285.](#) e.g. the wayleave cases, such as *Phillips v Homfray* (1871) L.R. 6 Ch. App. 770; or where the defendant had trespassed by tipping soil on the plaintiff's land: *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch. 538; or where a landlord wrongfully ejected his tenant and the damages for trespass were assessed as a reasonable rent for the entire period of the trespass, whether or not the landlord had derived any benefit from using the property: *Invergie Investments Ltd v Hackett* [1995] 1 W.L.R. 713 PC. See Cooke (1994) 110 L.Q.R. 420. General damages may also be awarded when a claimant's goods have been put out of action by a tortfeasor but the claimant had a replacement available: for a recent example, see *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2013] EWCA Civ 887, where the damages were assessed on the basis of the capital tied up in the goods, wasted expenditure and depreciation (at [28]). See also above, para.26-010, n.68.
- [286.](#) *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246; *Swordheath Properties Ltd v Tabet* [1979] 1 W.L.R. 285.
- [287.](#) *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep. 359 (the reasonable charge for storage facilities was allowed as damages).
- [288.](#) See *Experience Hendrix LLC v PPX Enterprises Inc and Edward Chaplin* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830 at [25] (Mance L.J.).
- [289.](#) *Watson, Laidlaw & Co Ltd v Potts, Cassels and Williamson* (1914) 31 R.P.C. 104, 119.
- [290.](#) See the discussion in McGregor on Damages, 19th edn (2014), paras 37–045—37–053; and see below, para.29-148.
- [291.](#) See below, para.26-051.
- [292.](#) e.g. *Lake v Bayliss* [1974] 1 W.L.R. 1073.

- [293.](#) *Wrotham Park Estate Co v Parkside Homes* [1974] 1 W.L.R. 798, approved by the House of Lords in *Blake's case* [2001] 1 A.C. 268; followed in *Bracewell v Appleby* [1975] Ch. 408.
- [294.](#) Senior Courts Act 1981 s.50 (formerly Lord Cairns' Act).
- [295.](#) *Johnson v Agnew* [1980] A.C. 367, 400.
- [296.](#) [2001] 1 A.C. 268.
- [297.](#) *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361; *Jaggard v Sawyer* [1995] 1 W.L.R. 269. The cases subsequent to *Wrotham Park* are exhaustively analysed in *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 W.L.R. 445.
- [298.](#) *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 W.L.R. 445. It was necessary for the court to examine the *Wrotham Park* basis for assessing damages in order to reach its decision, which was based on the claimant's abuse of process in seeking such damages after inviting the judge below to decide whether to order an account of profits on the basis that there would be no claim for *Wrotham Park* damages: at [74].
- [299.](#) [2001] 1 A.C. 268. See below, paras 29-159 et seq.
- [300.](#) [2001] 1 A.C. 268, 283–284.
- [301.](#) See below, para.26-055.
- [302.](#) See also below, para.29-162.
- [303.](#)  *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 W.L.R. 445. See also *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180 at [81].
- [304.](#) *Experience Hendrix case* [2003] EWCA Civ 323 at [58]. Since *Att-Gen v Blake* there is no need for such damages to be available only where an injunction is not granted: *Experience Hendrix* at [34] and [56].
- [305.](#) *Experience Hendrix case* [2003] EWCA Civ 323 at [45]. See Sharpe and Waddams (1982) 2 Oxf. J. Leg.S. 290.
- [306.](#) See *Experience Hendrix LLC v PPX Enterprises Inc and Edward Chaplin* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830 at [25] (Mance L.J.).
- [307.](#) See Stevens, *Torts and Rights* (2007), 59–61; Barnett [2009] R.L.R. 79, 81 and work cited there. See also Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2011), paras 26–023–26–024.
- [308.](#) See below, para.26-055.
- [309.](#)  However, in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] I.C.R. 791 no award was made when the defendant had wrongfully made a copy of the claimant's data. The claimants had not attempted to show that they had suffered any loss (at [155]) or that the defendants had made any gain (at [156]); the defendants had not benefitted from having the data (the defendant had made very little use of it and the claimant based its case solely on the making of the copy: at [243]); and the remedy must match the wrong (at [256]). Unlike the cases of wrongful use of the claimant's goods, making a copy did not deprive the claimant of anything (at [159]). Leggatt J. said that it may be appropriate to award what he termed “licence fee damages” in a mere breach of contract case if the defendant has obtained a benefit that has a market value (at [189]), or where there was an alternative way in which the

defendant could have obtained the same thing; or if it was reasonable to expect that the claimant would grant a licence if a reasonable fee was paid (at [233]). But if it was not reasonable to expect this and the defendant could not obtain the same thing from elsewhere, then a hypothetical bargain makes no sense and the appropriate method of valuation is to assess the amount of profit actually made by the wrongdoer which is fairly attributable to its wrongful use of the claimant's property or other wrongful act (at [235]–[236]). As the mere copying of the files neither harmed the claimant nor benefitted the defendant, no reasonable person would charge or agree to pay more than a token sum for that right (at [260]).

[310.](#) See *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* (2006) 25 E.G. 210; *Field Common Ltd v Elmbridge BC* [2008] EWHC 2079 (Ch), [2009] 1 P. & C.R. 1 and *Devenish Nutrition v Sanofi-Aventis* [2008] EWCA Civ 1086, [2009] 3 All E.R. 27.

[311.](#) [2009] UKPC 45, [2010] B.L.R. 73 at [46].

[312.](#) [2009] UKPC 45 at [48].

[313.](#) [2003] EWCA Civ 323 at [44], [58].


[314.](#) Below, para.26-055.

[315.](#) [2003] EWCA Civ 323 at [36].

[316.](#) [2003] EWCA Civ 323 at [36].

[317.](#) [2003] EWCA Civ 323 at [58].

[318.](#) [2003] EWCA Civ 323 at [54].


[319.](#)  Longmore L.J. in *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180 at [151] (defendant's furtive conduct deprived claimant of opportunity to obtain interim relief).

[320.](#)  [2003] EWCA Civ 323 at [24]–[25]; *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180 at [126] and [149].



[321.](#) See above, para.26-041.

[322.](#) *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB). Hamblen J. pointed out that an award was not “precluded by any of the following factors: (i) that the claimants advanced no claim for an injunction or specific performance, or the fact that there would have been no prospect of such an order being granted; (ii) the fact that damages are not claimed under Lord Cairns’ Act in lieu of an injunction; (iii) the fact that the claim is not based on a breach of a restrictive covenant; and (iv) the fact that the claim is based on breach of contract rather than invasion of property rights” (at [533]). On the facts of the case, the loss assessed on this basis would be same amount as the difference in value (at [559]).

[323.](#) *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch) at [225].

[324.](#)  [2016] EWCA Civ 180, [2017] Q.B. 1 at [122] and [145]–[146]. In that case the defendants had made wrongful use of confidential information and broken no-solicitation covenants. The case is noted by Davies [2017] L.M.C.L.Q. 201. In *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) Leggatt J. said (at [217]) he did not find it easy to discern the principle on which the award for breach of obligations not to compete had been made in the *One Step* case. The fact that the claimant’s loss would be difficult to prove or quantify might be a good reason for granting an injunction rather than leaving the claimant to seek damages, but it is not a principled reason for awarding a sum of money which does not depend on whether the claimant has suffered any loss at all. Awarding a gain-based remedy can only be a just response where compensatory damages are an inherently inadequate remedy because they

would not represent adequate redress for the wrong done to the claimant even where any loss caused by the defendant's wrong can be fully identified and reversed (at [214]-[215]).

- [325.](#) In *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 W.L.R. 445 the Court said (at [59]) that *Wrotham Park* damages may be awarded as “a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss”. See also *Arroyo v Equion Energia Ltd* [2013] EWHC 3150 (TCC) at [65] and at [66], where Stuart Smith J. said that “In theory, a claim for *Wrotham Park* or ‘negotiation’ damages could have been made in conjunction with a claim for reinstatement costs if the facts of the case justified it”. See also *Primary Group (UK) Ltd v Royal Bank of Scotland Plc* [2014] EWHC 1082 (Ch) (breach of an express contractual obligation of confidentiality), below, para.34-310.
- [326.](#)  cf. *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172, below, paras 26-195 et seq.
- [327.](#) *Wrotham Park Estate Co v Parkside Homes* [1974] 1 W.L.R. 798, 816.
- [328.](#) [2003] EWCA Civ 323 at [46]. In a case of trespass and breach of covenant it was held that the damages should be assessed on the basis of the period of the trespass that actually occurred, not of some longer period for which the defendants might have tried to negotiate: *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] H.L.R. 4 especially at [21].
- [329.](#) [2010] EWHC 424 (Ch) at [292].
- [330.](#) *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] B.L.R. 73 at [49].
- [331.](#) [2009] UKPC 45 at [53].
- [332.](#)  *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2010] B.L.R. 73 at [50]–[51]. See also *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] I.C.R. 791 at [245]–[252].

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(d) - Account of Profits

Total disgorgement by an account of profits

26-055

In *Att-Gen v Blake* ³³³ the traitor Blake had written and published a book in breach of the confidentiality agreement made by him when he entered the Secret Intelligence Service. ³³⁴ The House of Lords gave the claimant the “exceptional” remedy of an account of profits, which would amount to a total disgorgement of the profits made by the defendant as a result of the breach. Their Lordships avoided any definition of “exceptional” circumstances which would justify an account of profits as the remedy for breach of contract.

“Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. ³³⁵ No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity and, hence, in depriving him of his profit.

It would be difficult, and unwise, to attempt to be more specific ...” ³³⁶

It appears that no one factor is crucial. But judges have given some factors which may be relevant to their decision:

(a)

The moral character of the defendant’s conduct in breaching, e.g. was it “deliberate and cynical”; did it involve “doing exactly what one promised not to do”? In *Blake*, Lord Nicholls said that none of the following facts “would be, by itself, a good reason for ordering an account of profits”:

“... the fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff.” ³³⁷

But his words imply that these lacks might contribute to the cumulative weight in favour of the remedy. Other relevant factors in *Blake* were that the breach of contract involved committing a criminal offence ³³⁸; and that he committed repeated breaches. ³³⁹ In *Hendrix* an account of profits was not awarded on the particular facts ³⁴⁰ but it was recognised that such a remedy was possible in a commercial case ³⁴¹; in granting hypothetical bargain damages the Court of Appeal took into account the fact that the defendant “did do the very thing it had contracted not to do” ³⁴²; that the defendant “knew that it was doing something which it had contracted not to do” ³⁴³; that it was a “deliberate breach”, ³⁴⁴ a “flagrant contravention” of the defendant’s obligation. ³⁴⁵ But prior to *Hendrix* courts did not treat moral considerations as relevant in commercial transactions.

(b)

The question whether the claimant “had a legitimate interest in preventing the defendant’s profit-making activity”. ³⁴⁶ In *Blake*, the Crown’s interest in protecting the Secret Service’s information met this test but in *Experience Hendrix*, a case between commercial parties, such a legitimate interest was found because on orthodox rules the claimant would be confined to nominal damages—the claimant could not adequately prove any loss, or could prove only minor loss. ³⁴⁷ It is submitted that this interpretation may be too wide, because it could allow many claims to be based (at the claimant’s choice) on either restitution or compensation for loss.

(c)

The analogy with fiduciary obligations. Before the *Blake* decision it was clear that an account of profits could be awarded for breach of a fiduciary obligation: although *Blake* was not a fiduciary, their Lordships said that his obligation was “closely akin to a fiduciary obligation”. ³⁴⁸ In effect, *Blake* extended the previous category of fiduciaries by creating a quasifiduciary out of a contractual obligation. In *Experience Hendrix* it was said that an account of profits was not justified on the facts because the defendant’s situation was not analogous with a fiduciary’s duty: “there is no direct analogy between [the defendant’s] position and that of a fiduciary”. ³⁴⁹ The concept that contractual obligations may give rise to remedies previously given only to genuine fiduciaries is unsatisfactory because it is uncertain and so unpredictable in its application.

Analogies with intellectual property rights

26-056

An account of profits has been a standard remedy for infringements of property rights such as passing off, infringement of trade marks, copyrights and breach of confidence. ³⁵⁰ So the House of Lords has treated the infringement of a patent as an injury to the claimant’s property right so that damages were assessed as a royalty for every infringing article. ³⁵¹ The facts in *Experience Hendrix* give a flavour of intellectual property rights, ³⁵² but the remedy was not based on such rights.

Account of profit in commercial cases

26-057

In the *Experience Hendrix* case an account of profits was not awarded on the particular facts ³⁵³ but it was recognised that such a remedy was possible in a commercial case. To date, however, an account of profits has been awarded only in one case at first instance. In *Esso Petroleum Co Ltd v Niad Ltd* ³⁵⁴ the defendant had agreed to participate in a “Price Watch” scheme under which participating petrol stations agreed not to sell at above set prices. The defendant broke the agreement by selling at higher prices. The claimants were unable to show what loss this had caused them but it was held that they had a strong interest in performance and an account of profits was ordered. In

most subsequent decisions ³³⁵ an account of profits has not been granted. Thus in the *WWF* case at first instance the judge refused to treat a breach of restraint of trade (a contractual obligation) as sufficient to justify an account of profits, despite the facts giving the flavour of a trademark case. The judge said that the common law should not provide what statute provides for the infringement of an intellectual property right. ³³⁶ In *Vercoe v Rutland Fund Management Ltd* ³³⁷ Sales J said:

“where one is not dealing with infringement of a right which is clearly proprietary in nature ... and there is nothing exceptional to indicate that the defendant should never have been entitled to adopt a commercial approach in deciding how to behave in relation to that right, the appropriate remedy is likely to be an award of damages assessed by reference to a reasonable buy out fee rather than an account of profits.” ³³⁸

^{333.} [2001] 1 A.C. 268. See also below, paras 29-159 et seq.

^{334.} Though subsequently it has questioned whether he had in fact given a contractual undertaking: see Simpson (2009) 125 L.Q.R. 433.

^{335.} Although Scott [2007] L.M.C.L.Q. 465, 468 treats both the remedy given in the *Wrotham Park* case and in *Blake's* case as compensatory, these words show that the remedy in *Blake's* case is not one of damages; and a compensatory analysis is must now be doubted: see above, para.26-051.

^{336.} [2001] 1 A.C. 268, 285 (per Lord Nicholls).

^{337.} [2001] 1 A.C. 268, 286 E–F.

^{338.} [2001] 1 A.C. 268, 286 G–H.

^{339.} [2001] 1 A.C. 268, 286 G. Repetition of breaches was an important factor in the *Niad* case [2001] All E.R. (D) 324.

^{340.} The situation was not sufficiently exceptional for an account of all profits. See below, para.29-161.

^{341.} An account of profits in a commercial case was granted at first instance in *Esso Petroleum Co Ltd v Niad Ltd* [2001] All E.R. (D) 324, see below para.26–057.

^{342.} [2003] EWCA Civ 323 at [36].

^{343.} [2003] EWCA Civ 323 at [36].

^{344.} [2003] EWCA Civ 323 at [58].

^{345.} [2003] EWCA Civ 323 at [54].

^{346.} *Att-Gen v Blake* [2001] 1 A.C. 268, 285.

^{347.} *Experience Hendrix* [2003] EWCA Civ 323 at [58].

^{348.} *Att-Gen v Blake* [2001] 1 A.C. 268, 287 F–G.

^{349.} *Experience Hendrix* [2003] EWCA Civ 323 at [37].

^{350.} *Att-Gen v Blake* [2001] 1 A.C. 268, 279.

- [351.](#) *Watson, Laidlaw & Co Ltd v Pott. Cassels and Williamson (1914) 31 R.P.C. 104.*
- [352.](#) *Campbell and Wylie [2003] C.L.J. 605, 623–628.*
- [353.](#) The situation was not sufficiently exceptional for an account of all profits. See below, para.29-161.
- [354.](#) *[2001] All E.R. (D) 324 (Nov).*
- [355.](#) Compare *AB Corp v CD Co (The Sine Nomine) [2002] 1 Lloyd's Rep. 805*; *Devenish Nutrition v Sanofi-Aventis [2008] EWCA Civ 1086*, *[2009] 3 All E.R. 27*, especially at [148] and [157] (a cartel case; facts must be exceptional for an account of profits); *Luxe Holding Ltd v Midland Resources Holding Ltd [2010] EWHC 1908 (Ch)* (ordinary commercial contract broken so that seller could take advantage of better offer; normal compensatory measure should apply).
- [356.](#) *World Wide Fund for Nature v World Wrestling Foundation Entertainment Inc [2002] F.S.R. 32* at 63. See now the Court of Appeal decision in the *World Wide Fund* case, above, para.26-049 n.271.
- [357.](#) *[2010] EWHC 424 (Ch)* at [336]–[343].
- [358.](#) *[2010] EWHC 424* at [341].

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(a) - Causation

Requirement of a causal connection

26-058

⚠ Although the issue of remoteness—whether a particular loss was within the reasonable contemplation of the parties—tends to the prominent one in cases of liability for damage in the law of contract, ³⁶⁰ before any issue of remoteness can arise causation must first be proved: there must be a causal connection between the defendant's breach of contract ³⁶¹ and the claimant's loss. ³⁶² The claimant may recover damages for a loss only where the breach of contract was the “effective” or “dominant” cause of that loss. ³⁶³ The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. ³⁶⁴ The answer to whether the breach was the cause of the loss or merely the occasion for the loss must “in the end” depend on “the court's commonsense” in interpreting the facts. ³⁶⁵ ⚠ So where a company continued to trade after a negligent audit by the defendant failed to reveal the true financial position of the company, the Court of Appeal held that the auditor's breach of contract gave the company “the *opportunity* ... to incur ... trading losses: it did not *cause* those trading losses”. ³⁶⁶ The trading losses flowed from trading, not auditing.

26-059

The problems of causation most likely to arise concern intervening acts of either a third party or of the claimant; but an issue of causation may also arise when the alleged loss is claimed on the basis of a hypothesis as to what the claimant or a third person would have done had the defendant not broken the contract. ³⁶⁷

Intervening act of third party

26-060

Although the voluntary act of a third person intervening between the breach of contract by the defendant and the loss suffered by the claimant will normally “break the chain of causation”, this will depend on the court's appraisal of the particular circumstances. Thus, where the negligence of a solicitor (in breach of his contractual duty to his client) creates a risk for the client, an “error of judgment” made subsequently by counsel advising the client may not interrupt the chain of causation resulting from the solicitor's negligence. ³⁶⁸ Similarly, in a case where insurers were held liable to a bank, the mortgagee of a ship, for failing (in breach of contract) to notify the bank that the ship had been trading in a war zone prohibited by the terms of the insurance, the fact that the shipowners lied to the bank when seeking the refinancing of their loan, did not break the chain of causation between the breach of contract and the bank's loss as a result of the refinancing. ³⁶⁹

Duty to prevent third party's act

26-061

If the defendant owes a contractual duty to the claimant to take care to ensure that an intervening and voluntary act of a third party is not permitted, then the defendant will be liable if he fails to take such care. ³⁷⁰ Thus a customer of a bank owes a duty to the bank to draw his cheques carefully so as not to facilitate fraud; where the customer drew a cheque in such a way that the amount could be readily altered, he was held liable to the bank for the increase forged by a third party, who obtained payment of the increased amount ³⁷¹.

"The fact that a crime was necessary to bring about the loss does not prevent its being the natural consequence of the carelessness." ³⁷²

26-062

⚠ In *Weld-Blundell v Stephens*, ³⁷³ ⚠ the defendant, in breach of his contract, negligently left a libellous letter (written by the plaintiff) where it was read by a third party, who was likely to, and did, communicate its contents to the persons libelled; the latter recovered damages for libel from the plaintiff, who thereupon sued the defendant. The House of Lords, by a bare majority, held that the plaintiff could recover only nominal damages for the defendant's breach of contract, and not the damages and costs paid in the libel action. There appear to have been two reasons: the client was liable in any event, and though in general terms, disclosure by a third party was foreseeable, it was a "new and independent" cause. ³⁷⁴ Much seems to depend on the court's assessment of the facts; it is submitted that a party may be liable when his breach and a foreseeable breach of duty by a third party, even a deliberate breach, have combined to cause the loss. ³⁷⁵ ⚠

Intervening act or omission of the claimant

26-063

There may be a break in the chain of causation where the claimant, following the defendant's breach of contract, has suffered loss through his own voluntary act or omission. In *Quinn v Burch Bros (Builders) Ltd* ³⁷⁶ the defendants could have foreseen that their failure (in breach of contract) to supply the plaintiff, an independent contractor, with adequate equipment might result in an accident if he used unsuitable equipment. When this actually happened so that the plaintiff was injured, the Court of Appeal held that it was the voluntary choice of the plaintiff following the breach of contract which caused the accident; the breach of contract did not cause it but merely gave the plaintiff the opportunity to injure himself by his choice to use the unsuitable equipment, despite his appreciation of the risk involved. ³⁷⁷ Similarly, where a buyer engaged a third party to repair the defect in a machine supplied by the seller, but the buyer then failed to inspect the repairs before using the machine, the Court of Appeal held ³⁷⁸ that the cause of the subsequent explosion was the negligence of the buyer in using the machine without inspecting it to see whether the defect had been adequately repaired. ³⁷⁹ However, "it is difficult to conceive that anything less than unreasonable conduct on the part of the claimant would be capable of breaking the chain of causation"; merely unreasonable conduct on a claimant's part will not necessarily do so, whereas reckless conduct often will. ³⁸⁰ A highly relevant factor is whether the claimant knew of the defendant's breach; he need not have "exact knowledge of the legal niceties" or even "actual knowledge that a breach of contract has occurred—otherwise there would be a premium on ignorance", but "the more the claimant has actual knowledge of the breach, of the dangerousness of the situation which has thus arisen and of the need to take appropriate remedial measures, the greater the likelihood that the chain of causation will be broken". ³⁸¹

26-064

! Other contract cases ³⁸² ! dealing with the causal effect of the claimant's intervening act concern the actions of masters of ships in obeying instructions of the charterers. Thus where a charterer was obliged to nominate a safe port of loading, but nominated a port which in fact was unsafe, and the master of the ship acted reasonably in accepting the nomination, the owners of the ship were entitled to recover damages from the charterer for injury sustained by the ship ³⁸³; the master of a ship cannot enter a port which is obviously unsafe and then charge the charterers with damage done, but normally:

“a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly.” ³⁸⁴

If the claimant is put on the horns of a dilemma by the defendant's breach of contract, the defendant cannot escape liability if the claimant acts in a reasonable way. ³⁸⁵

A fact-specific issue

26-065



“[U]ltimately, the question of whether there has been a break in the chain of causation is fact sensitive ... ‘it is almost impossible to generalise’.” ³⁸⁶

The doctrines of mitigation ³⁸⁷ and possibly of contributory negligence ³⁸⁸ may be relevant in addition to causation. ³⁸⁹ !

Apportionment between claimant and defendant

26-066

In one case, the Court of Appeal unusually allowed apportionment of causation between the claimant and the defendant. ³⁹⁰

Intervening events

26-067

An intervening event which could reasonably be expected will not excuse the defendant for loss caused by the combined operation of the defendant's breach of contract ³⁹¹ and the intervening event. ³⁹² Thus in *Monarch S.S. Co Ltd v Karlshamns Oljefabriker (A/B)* ³⁹³ the defendants' ship was chartered to carry a cargo from Manchuria to Sweden. The ship should have reached Sweden in July 1939 but the defendants broke their contractual duty to provide a seaworthy ship and she was delayed till September. By this time war had broken out, and the vessel was ordered by the British Admiralty to unload at Glasgow. The plaintiffs (indorsees of the bills of lading) incurred expenses in forwarding the cargo to Sweden in neutral ships, and the House of Lords held that these could be recovered from the defendants. Reasonable business men, knowing of the possibility of war, would have foreseen that a delay might lead to the risk that the vessel would be diverted by the Admiralty. The House of Lords held that the cost of transhipment was due to, or caused by, the breach of contract, and was damage arising as a direct and natural consequence of the breach. ³⁹⁴

Two causes

26-068

If a breach of contract is one of two causes, both co-operating and both of equal efficacy in causing loss to the claimant, the party responsible for the breach is liable to the claimant for that loss. ³⁹⁵ The contract-breaker is liable so long as his breach was “an” effective cause of his loss: the court need not choose which cause was the more effective. ³⁹⁶

The claimant's lost opportunities: hypothetical consequences

26-069

⚠ The claimant may claim that, in the absence of the defendant's breach of contract, he might have obtained a benefit or avoided a loss ³⁹⁷; this consequence was not certain to follow proper performance of the contract but the breach deprived the claimant of the opportunity to benefit from it. The question usually arises when the defendant has failed to do something, but it could arise where his performance had been inadequate or deficient in some way. ³⁹⁸ ⚠ The law distinguishes three situations: where the hypothetical consequence involves the hypothesis of the claimant's act, where it involves that of a third person and where it involves the occurrence of a contingency outside the control of either party to the contract. It seems, however, that the second and third cases are treated in the same way.

A hypothetical action of the claimant

26-070

This situation arises where a particular contingency depends on the hypothetical question whether the claimant himself would have acted in a certain way. It is illustrated by the case where a solicitor failed to give proper advice to his client and the issue is whether the client would have accepted the advice and acted on it in a particular way. The client must prove, on the balance of probabilities, that he would have done so: unless he can prove this, he fails to establish the causal link between the defendant's omission and the loss he would have avoided if he had accepted and acted on the hypothetical advice. ³⁹⁹ But if he can satisfy this burden of proof, it is not a case of loss of a chance, because the claimant has proved what he would have done and damages must be assessed on this basis. ⁴⁰⁰

A hypothetical action of a third party

26-071

⚠ This situation arises where a particular contingency depends on whether a third party would have acted in a certain way. ⁴⁰¹ Where the claimant claims that, in the absence of the breach of contract by the defendant, a third party would have acted in a particular way, so as to benefit the claimant, he need not prove that hypothetical action on the balance of probabilities. Provided that the claimant can prove ⁴⁰² that in the absence of the breach there was a “real” or “substantial” (not a speculative) chance of the third party's action, and the loss of chance is not too remote, ⁴⁰³ ⚠ the court must assess the chance of that action resulting (usually as a percentage) and then discount the claimant's damages for his loss by reference to that percentage. ⁴⁰⁴ ⚠ In the leading case of *Chaplin v Hicks* ⁴⁰⁵ the defendant, by a breach of contract in conducting a contest, deprived the plaintiff, one of 50 finalists, of the opportunity to compete for one of the 12 prizes. Although there could be no precision in calculating the value of her lost chance, she was entitled to substantial damages. Similarly, where the breach of contract caused the claimant to lose his chance of success in litigation, the question is

what chance the claimant would have had of a favourable outcome. So where the client's claim became statute-barred because his solicitor failed to bring proceedings within time, the measure of the client's damages recovered from the solicitor was the expected proceeds of the original claim ⁴⁰⁶: what he might have recovered in the original claim must be discounted by reference to his chances of success in recovering it. ⁴⁰⁷ "The more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived." ⁴⁰⁸ Where one contingency may depend on another, the chance should be evaluated as a percentage of a percentage. ⁴⁰⁹

26-072

A similar approach to assessing damages is found in other "loss of a chance" cases not involving litigation: for instance, where through a solicitor's failure to give proper advice, the client lost the chance to negotiate better terms in a commercial transaction with a third party, who might have accepted such terms ⁴¹⁰; or where an author or actor lost the opportunity to enhance his reputation ⁴¹¹; or where, but for the breach, there was a real or substantial chance that the claimant would have continued to make profits from "repeat orders" from customers. ⁴¹²

Other contingencies

26-073

The amount of the claimant's loss may depend on a contingency not involving hypothetical action by the claimant or a third person. If, at the time when damages are assessed, a relevant contingency has not yet occurred, the future risk that it might occur should be assessed as a percentage chance and damages adjusted accordingly: e.g. the risk that war might break out so as to entitle a party to cancel a long-term contract under a war clause.

Contingency has occurred by time of trial

26-074

⚠ If the contingency has actually occurred before the time of assessment, the damages should be assessed on the basis of the actual facts as then known, despite the fact that the contingency occurred only after the breach of contract. So in *The Golden Victory*, ⁴¹³ ⚠ where a charterparty to be performed over seven years contained a war clause, the House of Lords assessed damages for the charterer's repudiation on the basis that war had actually broken out before the time when damages were assessed so that the charterparty would have been brought to an end at that time. In *Bunge SA v Nidera BV* ⁴¹⁴ the Supreme Court held that the principle applies to a sale contract for a single delivery as much as to a contract for performance over a period of time.

The contract-breaker's opportunity to minimise the cost of performance ⁴¹⁵

26-075

A contingency may depend on whether the contract-breaker would have acted in a certain way. If the defendant fails to perform, when he had an option to perform the contract in one of several ways, ⁴¹⁶ damages are assessed on the basis that he would have performed in the way which would have benefited him most, ⁴¹⁷ e.g. at the least cost to himself. ⁴¹⁸ So damages were assessed against charterers on the basis that they would have used their contractual entitlements to produce the least profitable result for the owners. ⁴¹⁹ A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, ⁴²⁰ but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for the breach on the assumption that the defendant would have exercised the option. ⁴²¹

Single obligation that is not precisely specified

26-076

It seems that the principle stated in the last paragraph applies only where the contract gives defendant a choice as to how to perform. If the defendant is under a single contractual obligation that it could have performed in a number of ways, it is not necessarily correct to assume that the defendant would have done the absolute minimum. The court should:

“... conduct a factual inquiry as to how the contract would have been performed had it not been repudiated ... The court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind.”

[422](#)

[359.](#) This topic has been developed mainly in the law of torts, but may arise in the law of contract (see Hart & Honoré, *Causation in the Law*, 2nd edn (1985), Ch.11). No doubt the numerous decisions on causation in the law of torts may be used as analogies in the law of contract.


[360.](#) See below, paras 26-107 et seq.

[361.](#) The loss must have been caused by the breach itself, since “damages for breach of contract may ...[not] be awarded ... for loss caused by the manner of the breach”: per Lord Steyn in *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20, 51 (citing *Addis v Gramophone Co* [1909] A.C. 488).




[362.](#) *Monarch S.S. Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196, 225; *Quinn v Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 Q.B. 113.

[363.](#) *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374–1375. The breach of contract need not be the sole cause: below, para.26-068.

[364.](#) This sentence was quoted with approval by the CA in *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1374–1375.

[365.](#)  *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360; *Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All E.R. 667, 671–672, 681–682. See also *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834 CA (causation does not depend on the parties' contemplation). In *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22, 31 Lord Hoffmann said “One cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule”. That was not a contract case but the dictum is applicable to contract cases: e.g. *IG Index Ltd v Ehrentreu* [2015] EWHC 3390 (QB) at [110] (purpose of contractual obligation considered).

[366.](#) The *Galoo* case [1994] 1 W.L.R. 1360, 1375. The contrast between the “occasion” (or “opportunity”) and the “cause” is also made in *Quinn v Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370 (below, para.26-063).

- [367.](#) See below, paras 26-069—26-070.
- [368.](#) *Cook v S.* [1966] 1 W.L.R. 635, 642 (the Court of Appeal did not discuss this aspect of the case: [1967] 1 W.L.R. 457). cf. *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406 (failure of architect to notice defective work by builder).
- [369.](#) *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233, 266–268.
- [370.](#) *London Joint Stock Bank Ltd v Macmillan* [1918] A.C. 777. See also *De la Bere v Pearson* [1908] 1 K.B. 280; *Stansbie v Troman* [1948] 2 K.B. 48; *Marshall v Rubypoint Ltd* [1997] 25 E.G. 142; cf. *Cobb v G.W. Ry* [1894] A.C. 419.
- [371.](#) *London Joint Stock Bank Ltd v Macmillan* [1918] A.C. 777.
- [372.](#) [1918] A.C. 777, 794. See also the cases cited in n.339, above.
- [373.](#)  [1920] A.C. 956 (some intervening act was foreseeable: see at 974, 987, 991. But see Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–097).
- [374.](#) *Weld-Blundell v Stephens* [1920] A.C. 956, 986.
- [375.](#)  See Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–097; Clerk & Lindsell on Torts, 21st edn (2014), paras 2-107 et seq.
- [376.](#) [1966] 2 Q.B. 370 (followed in *Sole v W. J. Hallt Ltd* [1973] Q.B. 574 but it is submitted that this decision is unsatisfactory on this point); see also *O'Connor v B. D. Kirby & Co* [1972] 1 Q.B. 90.
- [377.](#) cf. *Galoo v Bright Grahame Murray* [1994] 1 W.L.R. 1360 (above, para.26-058). cf. also *Young v Purdy* [1997] P.N.L.R. 130. An analogous situation is dealt with in *Lambert v Lewis* [1982] A.C. 225 (below, para.26-087; Vol.II, para.44-417). This decision indicates that a buyer who negligently fails to discover a defect in the goods may not be able to recover from the seller for breach of his implied undertakings as to the quality of the goods: see Hervey (1981) 44 M.L.R. 575.
- [378.](#) *Beoco Ltd v Alfa Laval Co Ltd* [1995] Q.B. 137. Compare the outcome in *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482, where the buyers had no reason to suspect the contamination which caused the damage that occurred.
- [379.](#) Although the seller was liable for the cost of repairing the original defect, and for the loss of the buyer's profit while the original repairs were made, the seller was not liable for the cost of repairing the explosion damage, nor for the further loss of production after the explosion. The need for further repairs to remedy the original defect had been overtaken by the need for more extensive repairs due to the explosion, and the buyer could not recover damages for the loss of production during the notional period which would have been necessary for further repairs even if there had been no explosion.
- [380.](#) *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [42]–[47]. The *Borealis* case was applied in *Flanagan v Greenbanks Ltd* [2013] EWCA Civ 1702.
- [381.](#) [2010] EWHC 2789 (Comm) at [46], referring to *Lambert v Lewis* [1982] A.C. 225, 276–277 and *Schering Agrochemicals Ltd v Resibel NVSA Unreported*, [1992] CA Transcript 1298.
- [382.](#)  See also cases on a party's decision to continue with spread betting: e.g. *IG Index Ltd v Ehrentreu* [2015] EWHC 3390 (QB) at [107]–[118]. Permission to appeal has been granted: [2017] EWCA Civ 326.
- [383.](#) *Reardon Smith Line Ltd v Australian Wheat Board* [1956] A.C. 266, 282–283 (PC, approving

the judgment of Devlin J. in *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 Q.B. 68).


[384.](#) *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd* [1955] 2 Q.B. 68, 77.

[385.](#) [1955] 2 Q.B. 68, 77, 88; cf. *Lambert v Lewis* [1982] A.C. 225.

[386.](#) *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm) at [47], citing a dictum by Evans-Lombe J. in *Barings Plc v Coopers & Lybrand* [2003] EWHC 1319 (Ch) at [838].

[387.](#) See below, para.26-079.

[388.](#) See below, para.26-077. A similar problem arises when loss is caused by breaches of contract by both the claimant and the defendant: *Government of Ceylon v Chandris* [1965] 3 All E.R. 48.

[389.](#)  e.g. *IG Index Ltd v Ehrentreu* [2015] EWHC 3390 (QB), in which both mitigation and contributory negligence were considered. Permission to appeal has been granted: [2017] EWCA Civ 326.

[390.](#) *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41 (discussed below para.26-078, where later doubts in the Court of Appeal are noted).

[391.](#) The defendant will not be liable if his breach did not contribute to the risk of the event occurring: see below, n.361; cf. the cases dealing with a fall in the property market: below, para.26-168.

[392.](#) *Monarch S.S. Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196. See also *The Wilhelm* (1866) 14 L.T. 636; cf. *Associated Portland Cement Manufacturers (1900) Ltd v Houlder Bros & Co Ltd* (1917) 86 L.J.K.B. 1495; *Diamond v Campbell-Jones* [1961] Ch. 22.


[393.](#) [1949] A.C. 196.

[394.](#) But if during the delayed voyage the ship ran into a typhoon and suffered damage, it could not be said that the delay caused the damage: [1949] A.C. 196, 215; cf. the explosion in *Beoco Ltd v Alfa Laval Co Ltd* [1995] Q.B. 137 (above, para.26-063) for which the plaintiff (the buyer) was held responsible, and which put an end to any continuing liability on the seller for the cost of further repairs even though the original defect was due to the seller's breach of contract.



[395.](#) *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1047–1048; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] Q.B. 665, 813–814 (the decision of the HL did not deal with this point: [1991] 2 A.C. 249); *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349. The defendant may seek contribution from a third party who contributed to the causation of the loss and who would also have been liable to the claimant: s.1(1) of the Civil Liability (Contribution) Act 1978. See Ch.17.


[396.](#) *County Ltd v Girozentrale Securities* [1996] 3 All E.R. 834 CA.

[397.](#) The question whether a past event occurred must be decided on the balance of probabilities—once the claimant proves that it was more likely than not to have occurred, the court treats it as a definite fact: *Davies v Taylor* [1974] A.C. 207, 213 (a tort case); it does “not raise any question of what might have been the situation in a hypothetical state of facts”: *Hotson v East Berkshire A.H.A.* [1987] A.C. 750, 785; and so “chances” are not legally relevant. See Reece (1996) 59 M.L.R. 188.

[398.](#)  Where the defendant's negligence has allegedly led to the claimant losing an opportunity to pursue a claim in litigation or in commercial negotiation, the defendant may bear an evidential burden to prove that there is no causal link between the negligence and the loss: see *Mount v Barker Austin* [1998] P.N.L.R. 493, 510, applied in *Harding Homes (East Street) Ltd v Bircham Dyson Bell* [2015] EWHC 3329 (Ch) at [34]. Where there are multiple contingencies that are not

independent, the court should make an overall assessment rather than simply multiplying the percentage chances of each one: *Tom Hoskins Plc v EMW Law* [2010] EWHC 479 (Ch), [2010] E.C.C. 20 at [133]–[134]; *Harding Homes (East Street) Ltd v Bircham Dyson Bell* [2015] EWHC 3329 (Ch) at [42].

399. *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 W.L.R. 1602 CA; *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 617, 638 CA. See also *Sykes v Midland Bank Executor and Trustee Co* [1971] 1 Q.B. 113.
400. The case of *Otter v Church, Adams Tatham & Co* [1953] 1 Ch. 280, which decided the contrary, was criticised in the Court of Appeal in both the *Allied Maples case* [1995] 1 W.L.R. 1602, 290; and *Sykes v Midland Bank Executor and Trustee Co* [1971] 1 Q.B. 113, 130.
401. This issue could arise in a case where it was also relevant to decide how the claimant himself would have acted: the *Allied Maples case* [1995] 1 W.L.R. 1602. Loss of profits will always depend on many speculative factors, such as third parties continuing to deal with the claimant: this paragraph, however, deals with the loss of a specific opportunity.
402. On the balance of probabilities: *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 All E.R. (Comm) 173, 187 CA (no substantial chance shown). A case is not one of loss of chance merely because the court has to evaluate what someone would have done had the contract not been broken: *Law Debenture Trust Corp Plc v Elektrim SA* [2010] EWCA Civ 1142 at [45]–[46]; *AerCap Partners 1 Ltd v Avia Asset Management AB* [2010] EWHC 2431 (Comm), [2010] 2 C.L.C. 578 (“The rationale of the loss of a chance doctrine is to permit recovery to a claimant who, by reason of uncertainty, would otherwise be unable to prove causation to the standard of a balance of probabilities; it is not to deny full recovery to a claimant who successfully meets that burden. Underlying the loss of a chance doctrine, are, as it seems to me considerations of policy and good sense. But where a claimant can establish causation on a balance of probabilities, such considerations do not oblige the court and the parties nonetheless to evaluate the chances involved”: Gross L.J. at [76]).
403.  As in *Wright v Lewis Silkin LLP* [2016] EWCA Civ 1308 at [62]–[66]. On remoteness see Main Work, Vol.I, paras 2-107 et seq.
404.  The *Allied Maples case* [1995] 1 W.L.R. 1602. (CA: a claim in tort, but the facts also amounted to a breach of contract: the case was considered in *Bank of Credit and Commerce International SA v Ali (No.3)* [2002] EWCA 82, [2002] 3 All E.R. 750 (loss of the chance of employment)). See also *Maden v Clifford Coppock & Carter (A Firm)* [2004] EWCA Civ 1037, [2005] 2 All E.R. 43 (80 per cent chance of obtaining a particular level of damages in an out of court settlement); *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch. 529 (distinguishing, at [96]–[98], the different exercise of assessing or quantifying the loss once the loss of chance has been established; on assessment, see Vol.I, para.26-015); *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP* [2016] EWHC 727 (QB); *McGill v Sports and Entertainment Media Group* [2016] EWCA Civ 1063. The chance of the third party’s action can be considerably less than 50 per cent. But no discount for contingency is appropriate if it is certain what the third party would have done: see *White v Jones* [1995] 2 A.C. 207, 228 CA; *Dickinson v Jones Alexander & Co* [1993] 2 F.L.R. 321. Where the claim is for the loss of a chance to sell property to a third party, the court must consider the price that the third party might have offered as well as the chance of the resale: *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch) at [200].
405. [1911] 2 K.B. 786 CA. (This case, and *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 were cited by the House of Lords in *Hotson v East Berkshire A.H.A.* [1987] A.C. 750, 782, 792–793 (a tort case).)
406. *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563, 575–576; *Cook v Swinfen* [1967] 1 W.L.R. 457; *Malyon v Lawrence, Messer & Co* [1968] 2 Lloyd’s Rep. 539.
407. cf. *Yeoman’s Executrix v Ferries* (1967) S.L.T. 332 (the value of an “out-of-court” settlement of the plaintiff’s claim).

- [408.](#) *Hall v Meyrick* [1957] 2 Q.B. 455, 471 (reversed by the Court of Appeal on other grounds).
- [409.](#) *Ministry of Defence v Wheeler* [1998] 1 All E.R. 790 CA. Where the claimant had different chances of success on different issues in litigation it is not appropriate to multiply the chances together; an overall view should be taken: *Hanif v Middleweeks* [2000] Lloyd's Rep. P.N. 920 CA.
- [410.](#) The *Allied Maples case* [1995] 1 W.L.R. 1602; *Stovold v Barlows* [1996] P.N.L.R. 91. cf. *First Interstate Bank of California v Cohen Arnold* [1996] P.N.L.R. 17 CA (negligence claim against accountants); *Davies v Taylor* [1974] A.C. 207 (loss of chance of widow's fatal accident claim); *Spring v Guardian Assurance* [1995] A.C. 296, 327 (tort claim for former employee's loss of reasonable chance of a particular employment).
- [411.](#) Below, para.26-149.
- [412.](#) *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377.
- [413.](#)  *Golden Strait Corp v Nippon Yusen Kubishika Kaisha, The Golden Victory* [2007] UKHL 12, [2007] 2 A.C. 353; applied in *Tele2 International Card Co SA v Kub 2 Technology Ltd* [2009] EWCA Civ 9. It has been held that when assessing damages for breach of contract by reference to the value of a company or other property at the date of breach, whose value depends upon a future contingency, account can be taken of what is subsequently known about the outcome of the contingency as a result of events subsequent to the valuation date, but only where that is necessary in order to give effect to the compensatory principle and where to do so would not cut across the contractual allocation of risk: (*UK*) *Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB) at [35]–[38] (but for a contrary suggestion, see *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778 at [56]); *Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB) at [184] (purchaser of shares bore risk of fall and chance of rise in value, so when shares not as warranted, difference in value should be calculated at time of breach and subsequent increase in value of shares should not be taken into account: at [218]).
- [414.](#) [2015] UKSC 43, especially at [22] and [87]. Dicta by Lord Scott in *The Golden Victory* ([2007] UKHL 12 at [34]–[35]), which had led Hamblen J. to doubt whether the approach used in that case applies to a sale contract for a single delivery (see [2013] EWHC 84 (Comm), [2013] 1 Lloyd's Rep. 621 at [55]) were taken to have been referring to the simple case of repudiation by non-delivery or non-acceptance: [2015] UKSC 43 at [87].
- [415.](#) cf. *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278, 294 (above, para.26-001).
- [416.](#) See above, paras 21-006 et seq.
- [417.](#) But where the defendant had a choice of alternative methods of performance, the damages will be assessed on the basis of the method least onerous to him only where that method was reasonable in all the circumstances: *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All E.R. 390; cf. *Abrahams v Herbert Reisch Ltd* [1922] 1 K.B. 477.
- [418.](#) *Re Thornett, Fehr and Yuills* [1921] 1 K.B. 219; *Withers v General Theatre Corp* [1933] 2 K.B. 536; *Beach v Reed Corrugated Cases* [1956] 1 W.L.R. 807, 816–817; *Bunge Corp, New York v Tradax SA Panama* [1981] 1 W.L.R. 711 HL; *Johnson Matthey Banking v State Trading Corp of India* [1984] 1 Lloyd's Rep. 427 (sellers entitled to take advantage of 1.5 per cent tolerance).
- [419.](#) *Spiliada Maritime Corp v Louis Dreyfus Corp* [1983] Com. L.R. 268. See also *Kaye Steam Navigating Co v Barnett* (1932) 48 T.L.R. 440; *Becher v Koplak Enterprises* [1991] 2 Lloyd's Rep. 23 CA.
- [420.](#) See above, paras 24-027—24-028, 24-031.
- [421.](#) *The Mihalis Angelos* [1971] 1 Q.B. 164 (see above, para.24-023); *Comau UK Ltd v Lotus Lightweight Structures Ltd* [2014] EWHC 2122 (Comm); cf. the principles on which damages are assessed for wrongful dismissal: Vol.II, paras 40-200—40-206. cf. also the *Golden Strait*

case [2007] UKHL 12, above, para.26-074.

[422.](#) *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep. 68 at [79] (Patten L.J.); distinguished in *Comau UK Ltd v Lotus Lightweight Structures Ltd* [2014] EWHC 2122 (Comm) at [23].

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Section 5. - Causation ³⁵⁹ and Contributory Negligence
(b) - Contributory Negligence

Contributory negligence and breach of contract. ⁴²³

26-077

⚠ The Law Reform (Contributory Negligence) Act 1945 permits apportionment of loss by the reduction of the claimant's damages where he "suffers damage as the result partly of his own fault and partly of the fault of any other person". ⁴²⁴ Although the Act was obviously designed for claims in tort, ⁴²⁵ the definition of "fault" as (inter alia) "negligence" raises the question whether a defendant guilty of a breach of contract can take advantage of this provision if the claimant has himself contributed to causing his loss by some "fault" on his part. In *Forsikringsaktieselskapet Vesta v Butcher* ⁴²⁶ the Court of Appeal accepted that three categories are relevant to this question: category 1, where the defendant is liable only in contract for breach of a strict duty (negligence being irrelevant); category 2, where the defendant is liable only in contract for breach of an obligation to take care (there being no corresponding duty of care in tort); and category 3, where the defendant's liability in contract is the same as his liability in negligence (the tortious duty of care arising independently of the contract). In *Forsikringsaktieselskapet Vesta v Butcher* ⁴²⁷ the Court of Appeal held ⁴²⁸ that the Act of 1945 applied only to category 3 cases, ⁴²⁹ namely those where the breach of contract is co-extensive with the breach of the tortious duty. ⁴³⁰ In this situation it would be anomalous if the claimant could avoid the apportionment provisions of the Act by the simple device of suing only in contract. ⁴³¹ ⚠ The decision in *Forsikringsaktieselskapet Vesta v Butcher* means that where the defendant's liability arises only in contract (categories 1 ⁴³² and 2 ⁴³³) contributory negligence cannot be relied on to reduce the claimant's damages. ⁴³⁴


Recovery barred on other grounds

26-078

But even where the Act does not apply to claims founded only on contract, there are many situations where conduct of the claimant which would have constituted contributory negligence under the Act will bar his recovery on the ground of his failure to mitigate, ⁴³⁵ or his failure to prove causation—his own carelessness may be held to be the sole cause of the loss. ⁴³⁶ In one case, the Court of Appeal, after holding that contributory negligence did not apply to a Category 1 case, nevertheless reached a similar result by an unusual application of causation: a landlord's damages against his lessees for breach of a repairing covenant (a strict obligation) were reduced by 90 per cent because he (the landlord) had negligently failed to keep clear the drainage outlets of the roof. ⁴³⁷ The landlord's failure was held to be a concurrent cause of the collapse of the roof, to which 90 per cent of the total causation was assigned.

^{359.} This topic has been developed mainly in the law of torts, but may arise in the law of contract

(see Hart & Honoré, *Causation in the Law*, 2nd edn (1985), Ch.11). No doubt the numerous decisions on causation in the law of torts may be used as analogies in the law of contract.

423. Proposals to change the law were made in the Law Commission's Report No.219, *Contributory Negligence as a Defence in Contract* (1993). See the comment by Porat (1995) 111 L.Q.R. 228. The proposals were not accepted by the Government.
424. s.1(1). At common law, the claimant's contributory negligence was a complete defence in an action in tort; the defence had never been applied (eo nomine) in an action in contract before 1945: see the discussion in Williams, *Joint Torts and Contributory Negligence* (1951), pp.214–222; and in the Law Commission's Report No.219 Pt II.
425. Contributory negligence may be raised in a claim under s.2(1) of the Misrepresentation Act 1967: *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch. 560, 572–575 (see above, para.7-082). But contributory negligence is no defence against a claim in deceit: *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] UKHL 43, [2003] 1 A.C. 959 (above, para.7-071). (The case has an extensive discussion of the meaning of the word "fault" in the 1945 Act.)
426. [1989] A.C. 852 CA and HL, 860–867, 875, 879 (in the decision of the House of Lords, contributory negligence was not dealt with).
427. [1989] A.C. 852.
428. Following a New Zealand decision, *Rowe v Turner Hopkins and Partners* [1980] 2 N.Z.L.R. 550. The question had been examined by academic writers: Swanton (1981) 55 A.L.J. 278; Chandler (1989) 40 N.I.L.Q. 152; Anderson [1987] L.M.C.L.Q. 10.
429. This decision has been followed (obiter) by the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818, 904. (The appeal was allowed by the House of Lords on another issue, with the result that contributory negligence was not considered: [1992] 1 A.C. 233, 266.) But the High Court of Australia has not followed the decision: *Astley v Austrust Ltd* [1999] Lloyd's Rep. P.N. 758 (no defence even when concurrent liability).
430. In other words, the claim in contract is founded on an act or omission by the defendant which would also have given rise to liability in tort. Illustrations of category 3 are: *Sayers v Harlow U.D.C.* [1958] 1 W.L.R. 623 (see the comments on this case in *Vesta v Butcher* [1989] A.C. 852, 861, 866–867); *Vesta v Butcher* (insurers' claim against brokers for failing to inform reinsurers that the insured could not comply with a clause in the contract of reinsurance); *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190 (lender suing valuer for negligent over-valuation of the security). The decision in *Vesta v Butcher* leaves open the question whether the Act of 1945 applies where the claimant's claim in tort is not co-extensive with his claim in contract: see the Law Commission's Report No.219 (1993), para.3.29.
431.  Category 3 cases will be more frequent after the decision in *Henderson v Merrett* [1995] 2 A.C. 145 (see above, paras 1-166 et seq.) (especially where clients sue those providing professional services and advice). For an illustration see *U.C.B. Bank Plc v Hepferd Winstanley & Pugh* [1999] Lloyd's Rep. P.N. 963 CA; *IG Index Ltd v Ehrentreu* [2015] EWHC 3390 (QB), in which the judge, had he considered it to be a category 3 case, would have made a deduction of 95 per cent (at [130]). Permission to appeal has been granted: [2017] EWCA Civ 326.
432. Illustrations of category 1 cases are: *Basildon DC v J.E. Lesser (Properties) Ltd* [1985] Q.B. 839 (claim for an indemnity under a deed); *Quinn v Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370 (the Court of Appeal did not discuss contributory negligence: see above, para.26-063); *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41 (but see below, n.402); *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] Q.B. 665, 720–721 (neither the Court of Appeal, at 815–817, nor the House of Lords [1991] 2 A.C. 249 deal with this point); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818, 904; *Barclays Bank Plc v Fairclough Building Ltd* [1995] Q.B. 214 (strict undertakings by builder that roofing work should be done by specialists, and that the

workmanship should be the best of its kind).

- [433.](#) Illustrations of category 2 cases are: *A.S. James Pty Ltd v Duncan* [1970] V.R. 705; *De Meza v Apple* [1974] 1 Lloyd's Rep. 508 (solicitor's claim for both negligence and breach of contract against auditors: the appeal did not deal with the point: [1975] 1 Lloyd's Rep. 498, 509; it is submitted that the decision at first instance is not consistent with *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852); *Marintrans (AB) v Comet Shipping Ltd* [1985] 1 W.L.R. 1270.
- [434.](#) See *Oakapple Homes (Glossop) Ltd v DTR (2009) Ltd* [2013] EWHC 2394 (TCC), citing this paragraph (at [42]).
- [435.](#) Below, paras 26-079 et seq. For an illustration, see *Lambert v Lewis* [1982] A.C. 225 (below, para.26-087).
- [436.](#) Above, para.26-063.
- [437.](#) *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41 (but the principle applied in this case was doubted by the Court of Appeal in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818, 904; the House of Lords did not deal with this point: [1992] 1 A.C. 233, 266). See also Bennett (1984–85) 4 Litigation 195, 197; the Law Commission's Report No.219 (above, para.26-077 n.388), 3.13 to 3.15; and *Schering Agrochemicals Ltd v Resibel NVSA unreported*, 1992; noted at (1993) 109 L.Q.R. 175.

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(a) - The Principles of Mitigation

Mitigation

26-079

There are three rules often referred to under the comprehensive heading of “mitigation”: they will be considered in turn. First, the claimant cannot recover damages for any part of his loss consequent upon the defendant’s breach of contract that the claimant could have avoided by taking reasonable steps. Secondly, if the claimant in fact avoids or mitigates his loss consequent upon the defendant’s breach, he cannot recover for such avoided loss, even though the steps he took were more than could be reasonably required of him under the first rule. Thirdly, where the claimant incurs loss or expense in the course of taking reasonable steps to mitigate the loss resulting from the defendant’s breach, the claimant may recover this further loss or expense from the defendant. [438](#)

Purpose of mitigation rule

26-080

The purpose of the rules on mitigation is to prevent the waste of resources in society, since they are obviously limited. Wherever the innocent party, following the defendant’s breach, is able to find substitute performance from a third party, the mitigation rules give him a strong incentive to accept the substitute. The rules inevitably give some incentive to the defendant deliberately to break his contractual undertaking whenever he finds a better opportunity for the resources he intended to use in performing the contract: if he makes a higher profit on a new contract, he may be better off even after paying damages to compensate the original promisee (because these damages may be relatively low whenever substitute performance is readily available). [439](#)

Avoidable loss

26-081

! The first rule:

“... imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.” [440](#)

It is not strictly a “duty” to mitigate, but rather a restriction on the damages recoverable, which will be calculated as *if* the claimant had acted reasonably to minimise his loss. [441](#) ! The onus of proof is on

the defendant, who must show that the claimant ought, as a reasonable man, to have taken certain steps to mitigate his loss,⁴⁴² and that the claimant could thereby have avoided some part of his loss.⁴⁴³ Any loss which is directly caused by a failure to meet this standard is not recoverable from the defendant. Thus an employee who has been wrongfully dismissed and unreasonably⁴⁴⁴ refuses to accept another equally remunerative post to date from the dismissal is only entitled to nominal damages.⁴⁴⁵ Where there is an available market in which the innocent party can obtain what has not been supplied to him, he is normally expected to go into that market to obtain it.⁴⁴⁶

“Reasonable steps”

26-082

❗ The question as to what it was reasonable for a person to do in mitigation of damage is not a question of law but one of fact in the circumstances of each particular case.⁴⁴⁷ ❗ A business claimant is not “under any obligation to do anything other than in the ordinary course of business”⁴⁴⁸ ❗; the standard is not a high one, since the defendant is a wrongdoer:

“The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.”⁴⁴⁹

Questions about the reasonableness of the claimant’s steps to mitigate his loss have arisen in cases (discussed elsewhere⁴⁵⁰) where the defendant has failed to complete the contractual work (e.g. building or repair work) and the claimant claims damages for the cost of substitute performance by a third party. But the claimant need not take risks with his money⁴⁵¹ in attempting to mitigate, nor need he take a step which might endanger his own commercial reputation, e.g. by enforcing sub-contracts.⁴⁵² The claimant is under no duty, even under an indemnity from the defendant, to embark on a complicated and difficult piece of litigation against a third party,⁴⁵³ nor is the claimant required to sacrifice any of his property or rights in order to mitigate the loss.⁴⁵⁴ It has been suggested⁴⁵⁵ that the claimant’s duty to mitigate does not require him to guard against the effects of inflation per se, i.e. it does not apply to the risk of pure price increases which may lead to “inflationary increases in damages” after the date of the breach of contract.⁴⁵⁶ Nor does a claimant who has been forced to mitigate by making short-term arrangements in a spot market have to keep checking whether a market for longer alternatives has since become available.⁴⁵⁷

^{438.} For a recent judicial summary of the principles of mitigation, see *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) at [31]–[38] during which Leggatt J. remarked that the three rules are all aspects of the principle of causation (see at [33]).

^{439.} This leads many writers on law-and-economics to argue that mitigation supports “efficient” breaches of contract (viz breaches which will leave society as a whole better off, while the original promisee is left no worse off). This “efficiency” argument is reviewed and criticised by Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at pp.11–21, 263–267, 279–280; see also Goetz and Scott (1983) 69 Virg.L.Rev. 967; and Macneil (1982) 68 Virg.L.Rev. 947.

^{440.} *British Westinghouse Electric Co Ltd v Underground Electric Rys* [1912] A.C. 673, 689. See also *Le Blanche v L.N.W. Ry* (1876) 1 C.P.D. 286; *Tucker v Linger* (1882) 21 Ch. D. 18; *Macrae v H. G. Swindells (Trading as West View Garage Co)* [1954] 1 W.L.R. 597. The test for mitigation in a fraud case does not differ from that in any tortious or contractual claim: *Standard*

Chartered Bank v Pakistan National Shipping Corp [1999] 1 All E.R. (Comm) 417 (upheld [2001] 1 All E.R. (Comm) 822 CA).

441.

! *Darbishire v Warran* [1963] 1 W.L.R. 1067, 1075; *The Solholt* [1983] 1 Lloyd's Rep. 605, 608 CA. For a recent example, see *IG Index Ltd v Ehrentreu* [2015] EWHC 3390 (QB), quoting this passage in the 31st edn (at [120]). Permission to appeal has been granted: [2017] EWCA Civ 326. Only the claimant's net gain from his mitigating effort will be deducted—he may set off against his substitute profits or earnings the reasonable expenses incurred in obtaining them: *Westwood v Secretary of State for Employment* [1985] A.C. 20, 44. See further below, para.26-095.

442.

Roper v Johnson (1873) L.R. 8 C.P. 167; *Pilkington v Wood* [1953] Ch. 770; *Edwards v Society of Graphical and Allied Trades* [1971] Ch. 354; *Strutt v Whitnell* [1975] 1 W.L.R. 870.

443.

Standard Chartered Bank v Pakistan National Shipping Corp [2001] 1 All E.R. (Comm) 822 CA.

444.

Shindler v Northern Raincoat Co Ltd [1960] 1 W.L.R. 1038; *Yetton v Eastwoods Froy Ltd* [1967] 1 W.L.R. 104. See Vol.II, para.40-200.

445.

Brace v Calder [1895] 2 Q.B. 253. See also *Beckham v Drake* (1849) 2 H.L.C. 579, 607–608; cf. *Harries v Edmunds* (1845) 1 Car. & Kir. 686; *British Ticket & Stamp Automatic Delivery Co v Haynes* [1921] 1 K.B. 377; *Houndsditch Warehouse Co v Waltex Ltd* [1944] K.B. 579. An employee dismissed without the minimum statutory notice must nevertheless seek alternative employment: *Westwood v Secretary of State for Employment* [1985] A.C. 20.

446.

Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12, [2007] 2 A.C. 353 at [79]; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [314]. Likewise, the owner of a vessel who has justifiably terminated a charter is expected to re-charter the vessel if there is an available market: *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm). In that case it was held that there was no market in charters for the period remaining under the original charter, so the owner was entitled to the difference between the original charter rate and the actual amount it had been able to earn by employing the vessel in other ways, provided it acted reasonably (at [222]–[223]).

447.

! *Payzu Ltd v Saunders* [1919] 2 K.B. 581, 588, 589; *Gul Bottlers (PVT) Ltd v Nichols Plc* [2014] EWHC 2173 (Comm) at [22]. Nonetheless it requires an objective analysis that may involve more than just fact-finding, so an appellate court may interfere if the trier of fact has clearly gone wrong: *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359, [2016] P.N.L.R. 21 at [39].

448.

! *Dunkirk Colliery Co v Lever* (1878) 9 Ch. D. 20, 25 (approved by Lord Haldane in *British Westinghouse Electric Co Ltd v Underground Electric Rys* [1912] A.C. 673, 689). For a recent application of this principle see *Pacific Interlink Sdn Bhd v Owner of the Asia Star (The Asia Star)* [2009] SGHC 91, [2009] 2 Lloyd's Rep. 387. The test of whether the claimant took reasonable steps is whether what they did was objectively reasonable for someone in that position: *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [159]. The claimant may have to take an obvious step even if it is not part of its ordinary business: *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359, [2016] P.N.L.R. 21 (lender on security of lease should have pursued lessor's offer to remove clause providing for forfeiture on lessee-borrower's insolvency).

449.

Banco de Portugal v Waterlow [1932] A.C. 452, 506. See also *Moore v DER Ltd* [1971] 1 W.L.R. 1476, 1479; *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [50] and [137].

450.

See above, para.26-036 and the cases cited in n.199 to that paragraph. See also *Farley v Skinner* [2001] UKHL 49, [2002] 2 A.C. 732: it may be reasonable for a house purchaser not to sell and move out when he discovers a breach of contract affecting his use and enjoyment.

- [451.](#) *Jewelowski v Propp* [1944] K.B. 510; *Lesters Leather & Skin Co v Home and Overseas Brokers* (1948) 64 T.L.R. 569. The duty of the buyer to purchase substitute goods if the seller defaults (below, para.26-090, and Vol.II, para.44-388) will, of course, involve the buyer in expenditure, but the buyer will normally have available the money with which he intended to pay for the seller's goods. The impecuniosity of the claimant is discussed below, paras 26-083—26-086.
- [452.](#) *Finlay & Co v N. v Kwik Hoo Tong H.M.* [1929] 1 K.B. 400; *Banco de Portugal v Waterlow* [1932] A.C. 452 (which also, at 471, supports the proposition that the claimant need not act so as to injure innocent persons); *Anglo-African Shipping Co of New York Inc v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 81, 94 (on appeal, [1962] 1 Lloyd's Rep. 610); *London and South of England Building Society v Stone* [1983] 1 W.L.R. 1242.
- [453.](#) *Pilkington v Wood* [1953] Ch. 770. cf. simple litigation: *Walker v Geo H. Medlicott & Son* [1999] 1 All E.R. 685 at 697 (a tort case).
- [454.](#) *Elliott Steam Tug Co v Shipping Controller* [1922] 1 K.B. 127, 140–141. cf. *Weir (Andrew) & Co v Dobell & Co* [1916] 1 K.B. 722.
- [455.](#) Libling and Feldman (1979) 95 L.Q.R. 270, 282. See also *Radford v De Froberville* [1977] 1 W.L.R. 1262, 1287; and Wallace (1980) 96 L.Q.R. 101, 341.
- [456.](#) See below, para.26-088 on the relevant date for the assessment of damages.
- [457.](#) *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd* [2010] EWHC 903 (Comm), [2011] 2 Lloyd's Rep. 360 at [65]; followed in *Glory Wealth Shipping Pte Ltd v Korea Line Corp (The Wren)* [2011] EWHC 1819 (Comm), [2011] 2 Lloyd's Rep. 370 (owners not entitled to have damages assessed on market basis at later date from which the market revived; the revived market is relevant to mitigation but does not itself give the measure of damages: at [30]–[32]).

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(b) - Claimant Unable to Mitigate for Lack of Funds

Impecuniosity of the claimant

26-083

A tort case in the House of Lords leads to the question whether the impecuniosity of the claimant could be relevant in a contractual claim. In *Lagden v O'Connor* ⁴⁵⁸ the House of Lords held that it would not follow the dicta in *The Liesbosch* case ⁴⁵⁹ to the effect that the plaintiff's impecuniosity was not relevant to the assessment of damages. *Lagden v O'Connor* was a claim in tort where the claimant's car had been damaged by the defendant's negligence. Since the claimant could not afford simply to hire a replacement car while his was being repaired (the car-hire firm would require him to make an up-front payment) he entered into a more expensive hire arrangement with an "accident hire" insurance company under which he need not pay anything in advance. The majority of their Lordships held that it was reasonably foreseeable that an impecunious claimant might reasonably incur the higher cost of credit hire because he had no other choice in obtaining a replacement car. Thus the claimant's foreseeable impecuniosity resulted in his entitlement to higher damages in tort than would have been awarded to others who could afford to pay for ordinary hire. This rule:

"... requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages." ⁴⁶⁰

This language ("wrongdoer", "injured party") is not appropriate to a claim in contract where the main remoteness rule (the first rule in *Hadley v Baxendale*) is different from that in tort: the kind of loss within the reasonable contemplation of the parties at the time of making the contract. ⁴⁶¹ But even in contract the claimant's impecuniosity might be relevant if it prevented him from choosing a cheaper form of mitigation. The rules on mitigation and those on remoteness are entwined in some cases, where what was "within reasonable contemplation" and what was "reasonable" mitigation are treated as inter-changeable concepts. In the *Monarch S.S.* case, ⁴⁶² Lord Wright said (with reference to the decision of the House of Lords in *Muhammad Issa el Sheikh Ahmad v Ali* ⁴⁶³) that:

"... damages consequent on impecuniosity were held not too remote because ... the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken." ⁴⁶⁴

This means that the claimant's impecuniosity will be relevant in contract if it falls within the defendant's reasonable contemplation (as at the time of contracting) as not unlikely to affect the claimant's ability to mitigate after a breach of the particular undertaking, viz that the claimant would be likely to incur greater than usual expense (or higher than normal interest charges) in a reasonable attempt to mitigate. This test will not be easy for the claimant to satisfy if he cannot prove that the defendant actually knew of his impecuniosity (which is the situation examined in the next paragraph.)

Thus, there is no reported case holding his impecuniosity to be relevant in relation to the market price rule in the sale of goods ⁴⁶⁵ or to the similar market price rule for breach of a contract of hire. ⁴⁶⁶

Actual knowledge of the claimant's impecuniosity

26-084

The claimant's impecuniosity will be relevant in contract if the second rule in *Hadley v Baxendale* is satisfied viz if, at the time of contracting, the contract-breaker had actual knowledge of special circumstances under which a breach was likely to cause the claimant greater or different loss from that to be normally expected under normal circumstances. ⁴⁶⁷ The claimant's impecuniosity could be a "special circumstance" under this rule if, with his knowledge of it, the defendant could foresee that the claimant could mitigate his loss caused by the breach only by incurring greater expense than would be incurred by a financially secure person. The claimant must act "reasonably" in his mitigating actions but what is reasonable for a claimant known to be impecunious may be different from the case of a person with financial resources. ⁴⁶⁸ One of the mitigation rules is that the claimant is entitled to damages for any loss or expense incurred by him in reasonably attempting to mitigate his loss, even where this attempt was unsuccessful or led to greater loss. ⁴⁶⁹

Illustrations

26-085

Several cases illustrate the position. ⁴⁷⁰ In *Wroth v Tyler* ⁴⁷¹ the contract-breaker's knowledge of the plaintiffs' lack of resources was treated as relevant to their ability to mitigate. ⁴⁷² Both the seller and the purchasers of a house contemplated at the date of the contract that there would be a rise in house prices after the contract; the seller knew that the purchasers:

"... had no financial resources beyond [the price] that they could have put together for the purchase of [the seller's house] ... [The purchasers] were therefore to the [seller's] knowledge unable at the time of breach to raise a further £1500 to purchase an equivalent house forthwith, and so ... mitigate their loss." ⁴⁷³

In *Wadsworth v Lydall*, ⁴⁷⁴ on the dissolution of a farming partnership between the parties, the defendant was obliged to pay £10,000 to the plaintiff on a fixed date. The defendant knew that the plaintiff needed another farm and would be dependent on payment of that sum on that date to finance any purchase. When the defendant failed to pay, the Court of Appeal awarded the plaintiff as special damages the extra interest charges and legal costs incurred by him as a result of the breach. ⁴⁷⁵ In *Bacon v Cooper* ⁴⁷⁶ the rotor of the plaintiff's machine was damaged beyond repair as a result of the defendant's breach of contract. The only available replacement cost £41,500 which the plaintiff, a dealer in scrap metal, could not finance out of his own resources. It was held that the plaintiff had acted reasonably in obtaining it on hire purchase at a high rate of interest. ⁴⁷⁷ A further authority is *Trans Trust SPRL v Danubian Trading Co Ltd*. ⁴⁷⁸ The buyers undertook that a confirmed credit was to be opened forthwith in favour of the firm from which the sellers were obtaining the goods. The buyers knew that the sellers were not in a position themselves to open the necessary credit. The Court of Appeal held that the loss due to this impecuniosity of the sellers was not too remote because it was within the reasonable contemplation of the parties as likely to flow from the buyer's breach of contract in failing to obtain the credit.

26-086

Another case appears to accept the principle but it was found on the facts that the defendants did not know of the plaintiff's special financial arrangements. In *Compania Financiera "Soleada" SA v Hamoor Tanker Corp Inc* ⁴⁷⁹ the plaintiff's vessel was arrested in breach of contract: since it was reasonably foreseeable that the plaintiff would seek to obtain its release and for that purpose would obtain a guarantee for payment of the debt, the Court of Appeal held that the expense in doing so, if

reasonable, would be recoverable either because it was within the remoteness rules, or as the expense of reasonable mitigation. ⁴⁸⁰ But because the particular financial arrangements between the plaintiffs and their bank were not known to the defendants, the high interest charges actually incurred by the plaintiffs were held to be “wholly unreasonable” and so not recoverable.

^{458.} [2003] UKHL 64, [2004] 1 A.C. 1067.

^{459.} [1933] A.C. 449, 460.

^{460.} [2003] UKHL 64, per Lord Hope at [61].

^{461.} See paras 26-115 et seq.

^{462.} *Monarch S.S. Co Ltd v Karlshamms Oljefabriker (A/B)* [1949] A.C. 196.

^{463.} [1947] A.C. 427.

^{464.} [1949] A.C. 196, 224.

^{465.} See para.26-090 and Vol.II, para.44-387.

^{466.} See para.26-090 n.467.

^{467.} See paras 26-122—26-125.

^{468.} On the question of actual knowledge, see para.26-122.

^{469.} See para.26-102.

^{470.} See also para.26-090, below.

^{471.} [1974] Ch. 30.

^{472.} On the relevance of this knowledge, see para.26-084, above.

^{473.} [1974] Ch. 30, 57.

^{474.} [1981] 1 W.L.R. 598.

^{475.} See para.26-175.

^{476.} [1982] 1 All E.R. 397; see also para.26-229.

^{477.} The case was not explicitly put on the ground of the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341 but on the reasonableness of mitigation, as was *Robbins of Putney Ltd v Meek* [1971] R.T.R. 345 (see para.26-090, below).

^{478.} [1952] 2 Q.B. 297.

^{479.} [1981] 1 W.L.R. 274.

^{480.} Although Lord Denning preferred the former, his colleagues seemed to use the two concepts interchangeably.

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(c) - Timing of Mitigation and the Assessment of Damages

The time for mitigating action

26-087

⚠ There is no duty on a party to mitigate before there has been a breach or, normally, an anticipatory repudiation that the party has accepted. ⁴⁸¹ ⚠ The time when the claimant should have mitigated may depend on when he discovered or ought to have discovered that the defendant had broken his contractual obligation. ⁴⁸² ⚠ So, as soon as the claimant discovers that an item supplied to him by the defendant is unsafe because it is defective (in breach of the contract) he cannot continue to use it at the defendant's risk: he must either make it safe or replace it, since he cannot recover damages from the defendant for any loss which arose after he discovered ⁴⁸³ ⚠ the defect but which he could reasonably have avoided by taking remedial steps. ⁴⁸⁴ After he knows (or ought to have known) of the breach, the claimant still has a reasonable time, depending on all the circumstances, before he must decide how to mitigate. ⁴⁸⁵ In the case of damages for the cost of repairs or reinstatement, it may be reasonable for the claimant to delay getting the repairs or remedial work done so long as there is a reasonable chance that the defendant will repair or cure the defect, ⁴⁸⁶ or until the time when the defendant has accepted liability or been held liable. ⁴⁸⁷

The relevant date for the assessment of damages ⁴⁸⁸

26-088

⚠ It is convenient to deal here with the date for the assessment of damages, since it appears to be closely linked to the doctrine of mitigation. ⁴⁸⁹ ⚠ The general rule is that damages for breach of contract should be assessed as at the date when the cause of action arose, viz the date of the breach ⁴⁹⁰ (which rule usually applies where substitute performance is readily available in the market ⁴⁹¹):

“But this is not an absolute rule: if to follow it would give rise to injustice the court has power to fix such other date as may be appropriate in the circumstances.” ⁴⁹²

Two departures from this principle require special note. First, if one party commits an anticipatory repudiation of the contract and the other elects to accept the repudiation and terminate the contract, ⁴⁹³ the innocent party comes under a duty to mitigate at the date of termination. ⁴⁹⁴ Secondly, if, after a breach, the innocent party reasonably ⁴⁹⁵ continues to treat the contract as in force, damages may be assessed as at the later date “when (otherwise than by his default) the contract is lost”, ⁴⁹⁶ viz when performance becomes impossible, ⁴⁹⁷ or when the innocent party terminates the contract. ⁴⁹⁸ (Any further delay in his receiving compensation should be met by the award of interest. ⁴⁹⁹) If the claimant

did not know of the breach of contract at the time it occurred, damages will usually be assessed as at the time when he should reasonably have discovered the breach, and was able to act on his knowledge, ⁵⁰⁰ e.g. by attempting to mitigate. ⁵⁰¹ When a property owner claimed an agent had acted without authority but the agent disputed this, it was held to be reasonable to assess the purchaser's damages for breach of warranty of authority at the date of trial. ⁵⁰² The assessment of damages by the cost of substitute performance ⁵⁰³ or by the cost of a reasonable attempt to mitigate ⁵⁰⁴ are other situations where the time for assessment may be postponed after the date of breach.

Inflation and interest rates

26-089

If the date for the assessment of damages is postponed so that the claimant is protected against inflation until that date, the full market rate of interest (which largely reflects current expectations of inflation) should not be awarded for any earlier period. ⁵⁰⁵

Sale of goods

26-090

In contracts for the sale of goods, the normal rule for the measure of damages assumes that the innocent party should act immediately upon the breach, and buy or sell in the market, if there was an available market. ⁵⁰⁶ The relevance of the claimant's impecuniosity is discussed above. ⁵⁰⁷ The market price rule is fundamental to the sale of goods: if the seller fails to deliver, the buyer's damages are prima facie the difference between the contract price and the market price at the date of breach. ⁵⁰⁸ The rule assumes that the buyer should be able to finance the purchase of substitute goods at the time of the breach, even though he may not receive the damages until much later. The rule works reasonably well if he retains the balance of the price and there has not been a substantial rise in the market price. But the buyer's lack of financial resources could prevent his purchase of a substitute if he had paid the price (or a substantial deposit) in advance, or if the rise in price has been substantial. But to date none of these factors has prevented the application of the prima facie rule. ⁵⁰⁹ Actual knowledge of the buyer's lack of resources has been treated as relevant to the purchase of a house ⁵¹⁰; and the seller's decision to re-sell quickly because he was short of liquid resources was held to be reasonable mitigation in *Robbins of Putney Ltd v Meek*. ⁵¹¹

26-091

Another instance of mitigation arises where the defendant in breach of contract refuses to accept goods which he has agreed to buy, ⁵¹² but the claimant is able to sell the goods at the same price to a third person: if the state of the market is such that demand exceeds supply, so that the claimant could always find a purchaser for every article he could get from the manufacturer, he is entitled only to nominal damages from the defendant (and not his loss of profit on the repudiated sale) since he sold the same number of articles and made the same number of fixed profits as he would have done if the defendant had duly performed his contract. ⁵¹³ If an exact substitute is not available to the buyer in the market, it is not clear whether he should be required to accept a "near equivalent", ⁵¹⁴ but if he does reasonably choose to do so, he can recover damages on the basis of the cost of the nearest available equivalent in quality and price. ⁵¹⁵

Mitigation and anticipatory breach in sale of goods

26-092

Where the claimant does not accept the defendant's anticipatory breach of contract, ⁵¹⁶ there is generally no duty on the claimant to mitigate his loss before the actual breach on the due date for performance. ⁵¹⁷ However, where the buyer repudiates the contract before delivery, the position may be different. If the property in the goods has not yet passed to the buyer, ⁵¹⁸ for example because the goods have to be obtained or manufactured by the seller, then even if the seller is able to perform

without the buyer's co-operation, his right to do so may be qualified. In *White and Carter (Councils) Ltd v McGregor* ⁵¹⁹ the majority held that the innocent party was entitled to ignore an anticipatory breach and, if he could do so, perform his side of the bargain and then claim the price. This obviously applies only if he is able to perform without the co-operation of the party who has repudiated. Frequently the seller will not be able to deliver without the buyer's co-operation. But even if this would be possible, Lord Reid said that the innocent party might not be entitled to carry on performing if he had no legitimate interest in doing so, and subsequent cases have treated this dictum as representing the law. ⁵²⁰

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- ^{481.} **!** *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038, 1048; *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] EWCA Civ 1043 at [41]. On mitigation after an anticipatory breach see further, Main Work, Vol.I, para.26-092.
- ^{482.} **!** *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406; *Van den Hurck v R. Martens & Co Ltd* [1920] 1 K.B. 850 (see Vol.II, para.44-413). One judge has held that the mitigation rules do not apply until the plaintiff knows of the breach: *Youell v Bland Welch & Co Ltd (The "Superhulls Cover" case)* [1990] 2 Lloyd's Rep. 431, 461–462; but another judge has applied the rules when the plaintiff should have known of the breach: *Toepfer v Warinco* [1978] 2 Lloyd's Rep. 569, 578. cf. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–072.
- ^{483.} **!** It has been argued that the same result should follow as soon as the claimant *ought* to have discovered the defect: Benjamin's *Sale of Goods*, 9th edn (2014), paras 17–059–17–060.
- ^{484.} *Lambert v Lewis* [1982] A.C. 225 (defective trailer coupling: see Vol.II, para.44-431).
- ^{485.} *C. Sharpe & Co Ltd v Nosawa* [1917] 2 K.B. 814, 821; *Asamera Oil Corp Ltd v Sea Oil & General Corp* (1978) 89 D.L.R. (3d) 1, Sup. Ct of Canada. If there is a rising market, the defendant may know that the claimant lacks the financial ability to buy a substitute, which may justify him in not attempting to do so: *Wroth v Tyler* [1974] Ch. 30. See also below, paras 26-088 and 26-166; Vol.II, para.44-390.
- ^{486.} *Radford v De Froberville* [1977] 1 W.L.R. 1262.
- ^{487.} *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 A.C. 371, PC (a tort case).
- ^{488.} *Waddams* (1981) 97 L.Q.R. 445.
- ^{489.} **!** *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [166]. See also A. Dyson and A. Kramer, "There is No 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment" (2014) 130 L.Q.R. 259; *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm) at [250].
- ^{490.} *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443, 468; *Johnson v Agnew* [1980] A.C. 367, 400 (see below, paras 26-165 and 26-166).
- ^{491.} See Vol.II, paras 44-368 et seq., paras 44-388 et seq.
- ^{492.} *Johnson v Agnew* [1980] A.C. 367, 401; *Kennedy v K. B. Van Emden & Co* (1997) 74 P. & C.R. 19; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 A.C. 353 at [79]–[80]. For the assessment of damages for anticipatory breach, see below, para.26-103; Vol.II, paras 44-380, 44-393.
- ^{493.} See above, para.24-013.
- ^{494.} See below, para.26-103; *Bunge SA v Nidera BV* [2015] UKSC 43 at [12] and [80]–[83].

- [495.](#) In *Malhotra v Choudhury* [1980] A.C. 52, 77, 81, delay by the plaintiff led to the date for valuing a property being moved back one year from the date of judgment: see below, para.26-165. In *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) it was reasonable to assess the damages at the expiry of the deadline given to D to remedy its breach: at [166].
- [496.](#) *Johnson v Agnew* [1980] A.C. 367, 401, citing *Ogle v Earl Vane* (1867) L.R. 2 Q.B. 275 (on appeal, L.R. 3 Q.B. 272) (see Vol.II, para.44-392); *Hickman v Haynes* (1875) L.R. 10 C.P. 598 (see Vol.II, para.44-376); and *Radford v De Froberville* [1977] 1 W.L.R. 1262. cf. above, para.26-087.
- [497.](#) *Johnson v Agnew* [1980] A.C. 367, 401. If the seller postponed delivery, but later repudiated, damages will be assessed at the date of the repudiation: *Barnett v Javeri & Co* [1916] 2 K.B. 390.
- [498.](#) For cases decided before *Johnson v Agnew* [1980] A.C. 367, where the damages were assessed at dates later than the original breach of contract, see below, para.26-165 n.837. In *Hooper v Oates* [2013] EWCA Civ 91, [2013] 3 All E.R. 211 the claimant vendors were held to have acted reasonably in letting property for which there was no ready market; damages were assessed by date at which they took back possession.
- [499.](#) See below, paras 26-227 et seq.
- [500.](#) *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406.
- [501.](#) *Van den Hurck v R. Martens & Co Ltd* [1920] 1 K.B. 850 (damages assessed as at the time when, after delivery of sealed packages, it was reasonable to expect them to be opened and the contents inspected: see Vol.II, para.44-413); *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] 1 Q.B. 44 (damages assessed as at the date of arrival of the goods).
- [502.](#) *Greenglade Estates Ltd v Chana* [2012] EWHC 1913 (Ch).
- [503.](#) See above, para.26-036. cf. the assessment of damages in tort for the cost of repairs to damaged property: *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433; *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 A.C. 371, PC, and the comments of Waddams (1981) 97 L.Q.R. 445, 457–461 on the incentives to the claimant to maximise his damages which might arise from permitting postponement of the date for assessing damages.
- [504.](#) *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916, 925–926. See above, para.26-031 and below, para.26-102.
- [505.](#) *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433. See Waddams (1981) 97 L.Q.R. 445, 454–455; and 1 O.J.L.S. 134 (1980); Swan (1980) 10 Real Property Reports (Canada) 267; Wallace (1980) 96 L.Q.R. 101, 115, 341 and (1982) 98 L.Q.R. 406.
- [506.](#) See ss.50(3) and 51(3) of the Sale of Goods Act 1979; *Dunkirk Colliery Co v Lever* (1878) 9 Ch. D. 20, 25: see also *Alcoa Minerals of Jamaica Inc v Broderick* [2002] 1 A.C. 371; *SC Confectia SA v Miss Mania Wholesale Ltd* [2014] EWCA Civ 1484 at [20]. A similar rule applies in the case of contracts for the hire of goods (e.g. charterparties): where there is an available market in which to hire a substitute, the hirer's damages for breach by the owner in terminating the hire will normally be the difference between the contract rate and the market rate of hire for the remaining period of the contract: *Koch Marine Inc v D'Amica Societa di Navigazione A.R.L. (The "Elena D'Amico")* [1980] 1 Lloyd's Rep. 75, 87–90; *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm) (see above, para.26-081 n.410) at [220]. See also *Bunge SA v Nidera BV* [2015] UKSC 43 at [17] and [77]. cf. the position of the owner who retakes the goods after the hirer has broken his hire-purchase agreement: see Vol.II, paras 39-347–39-350.
- [507.](#) See above, paras 26-083–26-086.
- [508.](#) See Vol.II, para.44-387. The seller may show that contingency that has come to pass would in

any event have led to cancellation of the contract, so that the buyer's damages should be nil, whether the contract was one for performance over a period of time or was for a single delivery: *Bunge SA v Nidera BV* [2015] UKSC 43, see above, para.26-074.

- [509.](#) See Benjamin's Sale of Goods, 9th edn (2014), para.17-008. On the prima facie nature of the rule, see Vol.II, para.44-388.
- [510.](#) *Wroth v Tyler* [1974] Ch. 30: see above, para.26-085.
- [511.](#) [1971] R.T.R. 345 (sale of goods).
- [512.](#) If the property in the goods has passed to the buyer, the seller is entitled to the price, and no question of mitigation arises. See Vol.II, paras 44-359 et seq. The buyer cannot insist on the goods being valued as at the date of breach if he was at that date indicating that he would complete the purchase: *Lakatamia Shipping Co Ltd v Nobu SU/Hisin Chi Su* [2014] EWHC 3611 (Comm) at [111].
- [513.](#) *Charter v Sullivan* [1957] 2 Q.B. 117 (see s.50(3) of the Sale of Goods Act 1979). cf. the cases cited in Vol.II, paras 44-371—44-383. On the burden of proof see below, para.44-379 n.1746.
- [514.](#) In cases of wrongful dismissal, any alternative employment can obviously be no more than a "near equivalent": see Vol.II, para.40-200.
- [515.](#) *Hinde v Liddell* (1875) L.R. 10 Q.B. 265; *Erie County National Gas and Fuel Co Ltd v Carroll* [1911] A.C. 105, 117. The nearest equivalent may be of superior quality and so higher in price: *Diamond Cutting Works v Treifus* [1956] 1 Lloyd's Rep. 216. The claimant may also recover any extra cost arising from his adapting the nearest substitute to suit his requirements, to the extent that goods of the contractual description would suit these requirements: *Blackburn Bobbin Co Ltd v T. W. Allen & Sons Ltd* [1918] 1 K.B. 540, 554 (appeal decided on another ground: [1918] 2 K.B. 467). Similarly, where a seller manufactured goods to the buyer's requirements, but he failed to accept them, the seller may recover as part of his damages the expense incurred in adapting the goods to suit another buyer: *Re Vic Mill Ltd* [1913] 1 Ch. 465, 473, 474.
- [516.](#) See above, para.24-025.
- [517.](#) *Brown v Muller* (1872) L.R. 7 Ex. 319; *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Melachrino v Nickoll & Knight* [1920] 1 K.B. 693. See below, para.26-103; Vol.II, paras 44-380, 44-393.
- [518.](#) If the property in the goods has passed to the buyer, the seller is entitled to the price, and no question of mitigation arises. See Vol.II, paras 44-359 et seq.
- [519.](#) [1962] A.C. 413 (below, para.26-104).
- [520.](#) See below, para.26-106.

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Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

Section 6. - Mitigation of Damage

(d) - Offers by the Defendant

Offer by defendant

26-093

The opportunity to mitigate the loss may arise through an offer made by the party who committed the breach of contract: if the claimant unreasonably ⁵²¹ refuses to accept the offer he is in breach of his duty to mitigate his loss. ⁵²² Thus in a construction contract, the employer's refusal to allow the contractor to remedy defective work may amount to a failure to mitigate with the result that the employer can recover no more than it would have cost the contractor to do the work. ⁵²³ Where a seller in breach of his contract declined to deliver goods on the agreed credit terms but offered to do so on terms of "cash on delivery", and the buyer refused and claimed as damages the difference between the contract price and the higher market price on the date for delivery, the refusal of the buyer to accept the seller's offer was held to be unreasonable, and resulted in a reduction in the damages. ⁵²⁴ Similarly, where the plaintiff bought a ship from the defendant, who could not deliver her on the agreed date, it was held that it would have been reasonable for the plaintiff to mitigate his loss by accepting her late delivery at the original price. ⁵²⁵ (The plaintiff was, of course, entitled to claim damages for any residual loss arising from the delay.) Where the vendor offered to repurchase a house which he sold with vacant possession but which was in fact occupied by a protected tenant, it was held that the buyer was not obliged by the doctrine of mitigation to accept the offer: his choice to retain the house and to sue for damages for the breach of contract was not to be subjected to the test of reasonableness. ⁵²⁶

Amount of damages or cost to the defendant?

26-094

It is not clear that *Payzu v Saunders* ⁵²⁷ was correctly decided. While the plaintiff's refusal of the defendant's offer to supply for cash at the original contract price increased the amount of damages claimed, it does not seem to have increased the overall cost to the defendant. The defendant would have been left with the original goods and could have sold them at the higher market price. It is submitted that the reasonableness of the claimant's actions should be judged by whether or not they increase the overall cost to the defendant rather than by whether they increase the amount of damages claimed. ⁵²⁸

^{521.} It is not reasonable for the offer to be on terms that the claimant should relinquish his claim against the defendant for damages: *Shindler v Northern Raincoat Co Ltd* [1960] 1 W.L.R. 1038. It was reasonable to reject an offer from a defendant whose behaviour has been such as to cause a complete lack of trust: *Gul Bottlers (PVT) Ltd v Nichols Plc* [2014] EWHC 2173 (Comm) at [24].

- [522.](#) *Payzu v Saunders* [1919] 2 K.B. 581; *Houndsditch Warehouse Co v Waltex* [1944] K.B. 579; *Brace v Calder* [1895] 2 Q.B. 253 (contract of service). cf. *Edwards v Society of Graphical and Allied Trades* [1971] Ch. 354; *A.B.D. (Metals & Waste) Ltd v Anglo Chemical & Ore Co Ltd* [1955] 2 Lloyd's Rep. 456.
- [523.](#) *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254, [2011] B.L.R. 365 at [24]. The contract may give the contractor to the right to rectify defects, in which case if the employer refuses to allow the contractor to do so, the employer's recovery will be similarly limited: see *Pearce & High Ltd v Baxter* 66 Con. L.R. 110 at [19].
- [524.](#) *Payzu v Saunders* [1919] 2 K.B. 581. But a buyer who rejects goods on the ground of defective quality is not required to accept them if offered by the seller in mitigation since this would undermine the buyer's right to reject: *Heaven & Kesterton Ltd v Etablissements François Albiac & Cie* [1956] 2 Lloyd's Rep. 316.
- [525.](#) *The Solholt* [1983] 1 Lloyd's Rep. 605. (The Court of Appeal held that on the facts it would have been reasonable for the buyer to have taken the initiative in making the offer.)
- [526.](#) *Strutt v Whitnell* [1975] 1 W.L.R. 870; cf. *The Solholt* [1983] 1 Lloyd's Rep. 605; cf. also *Hussey v Eels* [1990] 2 Q.B. 227 (see below, para.26-095 n.493). On the choice between remedies, see below, para.26-103. In *Activa DPS Europe Sarl v Pressure Seal Solutions Ltd* [2012] EWCA Civ 943 a buyer who claimed that the goods were not fit for the purpose had offered them back to the seller, who had refused to take them back. The buyer then argued that the seller had failed to mitigate. The Court of Appeal upheld the Recorder's findings that, first, the goods were not unfit and secondly, that "the duty to mitigate did not extend to requiring the party who had suffered damage to undo the transaction which had caused it loss" (see at [34]). Patten L.J. remarked that "there is an obvious difference between taking what steps are available to reduce the loss under the contract caused by the breach and in effect reversing the transaction at least to the extent that goods remain in the possession of [the buyer]" (at [36]). With respect, there is an even simpler explanation for this case. The seller's claim was for the price. The buyer's defence that the goods were not fit for the purpose had failed, and as the property in the goods must have passed to the buyer, the seller was entitled to the full price under the Sale of Goods Act 1979 s.49(1). The doctrine of mitigation does not apply to claims under s.49. See Vol.II, paras 44-359—44-370.
- [527.](#) [1919] 2 K.B. 581.
- [528.](#) See the discussion in *Bridge* (1989) 105 L.Q.R. 398.

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Section 6. - Mitigation of Damage

(e) - Savings to be Taken into Account

Loss which is avoided cannot be recovered

26-095

⚠ The second rule of mitigation concerns potential loss which is not actually suffered. If the claimant has in fact avoided the potential loss resulting from the defendant's breach of contract, whether or not the steps he took could reasonably have been required of him, he cannot recover damages in respect of such potential loss ⁵²⁹:

"When in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act." ⁵³⁰

The claimant is entitled to damages only for his actual loss, which is assessed by taking account of all the items in his notional "profit and loss" calculation for the whole transaction. ⁵³¹ The court is required to decide whether the claimant's actions arose *out of* his attempts to mitigate the potential loss resulting from the breach, or whether his actions were "independent" of his mitigating steps, so that any benefit to him should not be used to reduce the damages payable by the defendant. ⁵³² ⚠ So where a seller delivers defective goods, and the buyer acquires a substitute through which he gains a consequential benefit, e.g. a greater profit, this benefit must be set off against the cost of the substitute when the buyer sues the seller to recover such cost, ⁵³³ since the benefit arises directly from the act of mitigation.

Seller's claim for loss of profits

26-096

If the defendant, in breach of his contract, has refused to accept goods sold ⁵³⁴ or hired ⁵³⁵ to him by a dealer or goods manufactured for him, ⁵³⁶ but the claimant has found a third person who will take the goods by a similar contract (under which the claimant makes a similar profit), the claimant is entitled to recover his loss of profit on the defendant's contract where the supply of such goods exceeds the demand; for in such a case the claimant has lost one profit he would otherwise have made. ⁵³⁷ If, however, in similar circumstances, the demand for such goods exceeds the supply, the claimant will recover only nominal damages, since he has received the same profit through the substituted contract as he would have received if the defendant had performed his contract. ⁵³⁸

Betterment as a result of mitigation

26-097

Damages will not be reduced where reasonable steps taken by the claimant by way of mitigation result in a notional betterment of his position, unless the betterment will result in an immediate saving to the claimant or give him an advantage that is readily realisable.⁵³⁹ Thus, where a breach of contract caused the destruction of a building, and the owners acted reasonably both in deciding to rebuild and in choosing the plan for the new building, it was held that the defendants were not entitled to a reduction in damages (which consisted in the actual cost of rebuilding) on account of the “betterment” enjoyed by the claimants in having a new building in place of the old one—the claimants had no effective choice: but a reduction would be made for any extra accommodation or improvement going beyond replacement.⁵⁴⁰ Similarly, where, as a result of breach of contract, a partly used working part of a machine had to be replaced with a new part which would last longer, the plaintiff was nevertheless entitled to the full cost of the replacement.⁵⁴¹ In contrast, in *British Westinghouse Electric Co Ltd v Underground Electric Rys*⁵⁴² the buyers replaced the defective turbines supplied with a newer design of much greater efficiency, and the saving to them was taken into account.

Benefits independent of mitigation

26-098


Where a seller of goods chooses not to resell upon the date of the buyer's breach (which is the normal date when his duty to mitigate must be tested⁵⁴³) but retains the goods for some time and resells at a gain when the market price later rises, the benefit to the claimant does not arise from any act of mitigation⁵⁴⁴ and is irrelevant in assessing damages.⁵⁴⁵ The seller could not have made the buyer liable for additional loss had the market price fallen after the date of the breach,⁵⁴⁶ so he is entitled to the gain when the market price happens to rise after that date. The decision to retain the goods was an independent speculation by the seller. On a similar principle, advantages gained by the claimant from wholly independent transactions, especially those entered into before the defendant's breach of contract, as for example, a sum due under an insurance policy,⁵⁴⁷ cannot be relied on in mitigation of loss arising from the defendant's breach.⁵⁴⁸ So where the claimant, by another contract with a third party entered into before the defendant's breach of his contract with the claimant, has made an arrangement which should or does in fact prevent loss to the claimant from the defendant's breach, the defendant cannot rely on that other contract to reduce his damages⁵⁴⁹; it is res inter alios acta, or an extraneous circumstance. Even where a benefit to the claimant arises in the course of his mitigating action, there may not be a sufficient causal connection between the defendant's breach and that benefit to justify taking it into account in assessing the claimant's damages.⁵⁵⁰


Benefit arising from decision to sell property required in order to perform contract



26-099


⚠ A very difficult question of whether there was a sufficient link between the breach and a benefit obtained by the innocent party arose in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU*.⁵⁵¹ ⚠ The owners of a vessel that the time-charterer had, in breach of contract, redelivered early could find no alternative employment for her and sold her for over US \$23 million, whereas by the end of the charter (after the financial crisis of 2007–08) she would have been worth only US \$7 million. The owners claimed for loss of net profit that would have been earned during the remaining two years of the charter. The arbitrator held that the price obtained on the sale should be taken into account, which would reduce the claim for loss of profit to nil. Popplewell J., after a detailed review and summary⁵⁵² ⚠ of the authorities, held that the owner's decision to sell the vessel was independent of the breach and the sale should not be taken into account. The Court of Appeal allowed the charterer's appeal.⁵⁵³ ⚠ Longmore L.J. said:


“... if a claimant adopts by way of mitigation a measure which arises out of the



consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant. That should be a principle sufficient to guide the decision of the fact-finder in any particular case.”⁵⁵⁴ 

Where there is an available market, the innocent party is expected to make use of it, and any further profit as well as any further losses will normally irrelevant⁵⁵⁵ ; and where there are no such opportunities and the owner decides to sell the vessel, the resale price should equally be taken into


account.⁵⁵⁶  The Supreme Court, however, restored the order made by Popplewell J.⁵⁵⁷  Lord Clarke, with whom the other members of the Supreme Court agreed, said that the owners' interest in the capital value had nothing to do with the interest injured by the charterers' repudiation, not because the benefit must be of the same kind as the loss caused by the wrongdoer, which is “too vague and potentially too arbitrary a test” but because it must have been caused either by the breach or by a


successful act of mitigation.⁵⁵⁸  There was not a sufficient causal link between the breach and the benefit from the sale because the owners could have sold the vessel during the term of the charter party and they were making a decision at their own risk about the disposal of an interest in the vessel which was no part of the subject matter of the charterparty and had nothing to do with the charterers. If the value of the vessel had risen after it had been sold, the owners could not have claimed the difference in value, and equally they were not required to bring into account the benefit obtained by its sale. Nor was there any reason to pick on the sale price at the end of the charter period as the comparator, as the ship would not necessarily have been sold then. “The causal link fails at both ends


of the transaction”.⁵⁵⁹  Equally, Lord Clarke continued, the sale of the vessel was not a relevant act of mitigation. The measure of loss was the difference between the contract rate and what might have been earned from employing the vessel under similar or shorter charters, whereas the sale did

not provide a substitute income stream and therefore was incapable of mitigating the loss.⁵⁶⁰  A sale of the vessel, say a year, after the repudiation might have been relevant as it would shorten the period for which there was a lost income stream to mitigate, and if such a sale had been for less than the price that would have been obtainable by selling the vessel with the benefit of the income of the remaining charter period, they might have been able to recover that loss, but neither would make the sale an act of mitigation.⁵⁶¹ 

26-099A

 This decision may prove controversial. As the owners would not have sold the vessel in 2007 but for the breach, and selling then meant that they did not suffer its subsequent loss in the value, it is certainly possible to argue that the Court of Appeal was right: the benefit arose directly from the breach and wiped out any loss. It can also be argued that Lord Clarke was not correct to say that, had the market price for vessels risen between 2007 and 2009, the charterers would not have been liable for the owners' loss, as the claimant may recover damages for loss or expense incurred by him in reasonably attempting to mitigate his loss following the defendant's breach, even when the mitigating

steps were unsuccessful or in fact led to greater loss.⁵⁶²  However, it is submitted that the Supreme Court's approach is correct. While the owners would not have sold in 2007 but for the breach, the fact that they could have sold the vessel (subject to the charter) at any time before 2009, and equally might have retained it after that date, suggests that the sale was a completely independent transaction. Nor is it clear that the owners would have been entitled to recover for the loss in value of the ship had prices gone up not down: again, it was not known whether they would have sold in 2009, and at least where (as on the facts of the *Fulton* case) selling the ship was not

something they were required to do by way of mitigation,⁵⁶³  the loss again followed from their independent decision to sell rather than from the breach. One statement made by Lord Clarke may be questioned, however. Lord Clarke said that a sale of the vessel a year after the repudiation might have been relevant as it would shorten the period for which there was a lost income stream to mitigate, and if such a sale had been for less than the price that would have been obtainable by

selling the vessel with the benefit of the income of the remaining charter period, they might have been able to recover that loss. ⁵⁶⁴ **!** What difference does it make that the sale is a year after the repudiation rather than immediate? It is submitted that selling the vessel after a year would no more affect the owner's loss of income than did the immediate sale. And if the owners are to be compensated for loss of the charter income, it would be wrong also to compensate them because the sale produced a lower price than a sale with the benefit of the charter would have done, as that would in effect compensate them twice for the same loss.

Act by third party

26-099B

! When a lender claimed damages from a valuer for negligence in preparing a report on a borrower, and the individual who controlled the lender, but to whom the valuers owed no duty, personally lent further funds to the borrower that enabled the borrower to pay off some of the loans, that was taken into account, as it discharged the very liability which the lenders claimed as their loss and it was a distinct transaction between different parties. ⁵⁶⁵ **!** Nor was the cost recoverable as a cost of mitigation, as it was not an act done by the claimant and was not caused by the valuer's breach of duty. ⁵⁶⁶ **!**


Release of resources for other uses ⁵⁶⁷

26-100















When the claimant terminates his contract with the defendant on the ground of the latter's breach of contract, the resources which the claimant would otherwise have devoted to his performance (whether capital, skill, labour, etc.) are always released for redeployment elsewhere. Even where there is no substitute or "near equivalent" use to which the claimant can be expected to devote his released resources (under the "avoidable loss" rule) he will always in practice devote them to some other use, which raises the application of the "avoided loss" rule. So an employee who was wrongfully dismissed will have his damages reduced *either* (under the "avoidable loss" rule) by the hypothetical earnings he should reasonably have earned for the relevant period in some similar employment *or* (whether or not the "avoidable loss" rule applied) by his *actual* earnings under another contract which he was able to undertake *only* as the result of the defendant's breach of contract. ⁵⁶⁸ If the claimant could not have undertaken the second contract but for the defendant's breach, and he deployed substantially the same skills, time and effort as he would have done in working for the defendant, ⁵⁶⁹ his earnings can legitimately be treated as substitute earnings even when the employment was different. If he is required to employ different skills in his new work, or to put in a greater effort, it is submitted that the courts should make allowance for this greater or different input from the claimant by deducting only a proportion of his substitute earnings. ⁵⁷⁰

26-101

Except in the extremely rare situation where a resource cannot be redeployed to any other use at all, the release of resources always confers some benefit on the claimant, because he can find some use for them. But the courts have seldom taken this benefit into account where the alternative use chosen by the claimant was substantially different from his promised performance under the original contract. Where the alternative use has a similar goal (e.g. the earning of profits or wages), the courts have been more likely to take it into account in assessing damages. But, since there is nearly always some value to the claimant arising from the release of his resources, it is submitted that some assessment of that value should be made no matter where the redeployment is made. ⁵⁷¹ However, it is submitted that the assessment should not deprive someone in the claimant's position of all incentive to redeploy: some incentive would remain if the court did not deduct the whole of the net benefit but left him to enjoy some of it as a reward for his initiative in seeking the alternative use. ⁵⁷²

529. *British Westinghouse Electric Co Ltd v Underground Electric Rys [1912] A.C. 673, 689, 690.*
530. [1912] A.C. 673, 689; *Thai Airways International Public Co Ltd v KI Holdings Co Ltd [2015] EWHC 1250 (Comm)* at [39]–[45]. See also *R. Pagnan & Fratelli v Corbisa Industrial Agropacuaria Limitada [1970] 1 W.L.R. 1306* (see Vol.II, para.44-396); and cf. *The World Beauty [1969] P. 12*; affirmed in part [1970] P. 144. In contrast, in tort cases in which a property has been damaged through the defendant's negligence, the true measure of the claimant's loss is the diminution in the value of the property; the cost of repairs is no more than evidence of the diminution in value and the fact that the claimant has had the damage repaired at a lower cost is treated as irrelevant: *Coles v Hetherington [2013] EWCA Civ 1704, [2014] 1 W.L.R. 60* at [28]–[29].
531. The amount of "avoided loss" to be deducted from his damages will be his *net* gain after deducting his reasonable expenses in earning the gross gain: *Westwood v Secretary of State for Employment [1985] A.C. 20, 44.*
532.  *Hussey v Eels [1990] 2 Q.B. 227 CA ((pet. dis.) [1990] 1 W.L.R. 414)* (induced by defendant's misrepresentation, plaintiff bought and lived in a defective house for over two years, before reselling it at a profit to a developer: held, the resale profit arose from an independent transaction, and should not be taken into account in assessing the damages payable by defendant); *Needler Financial Services Ltd v Taber [2002] 3 All E.R. 501*. The authorities were analysed and helpfully summarised by Popplewell J. in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU [2014] EWHC 1547 (Comm)*, see below, para.26-099.
533. *British Westinghouse case [1912] A.C. 673* (and see Vol.II, para.44-414). See also *Dalwood Marine Co v Nordana Line SA [2009] EWHC 3394 (Comm)* (substitute charter reduced loss to nil; earnings after date ship should have been redelivered can be taken into account if could not have been earned had contract not been broken). (The principle was applied in the tort case of *Dimond v Lovell [2002] 1 A.C. 384, 402–403.*) See also *Erie County Natural Gas Co v Carroll [1911] A.C. 105*; *Hill v Showell (1918) 87 L.J.K.B. 1106*; *Nadrep Ltd v Willmetts & Co [1978] 1 W.L.R. 1537*; *Levison v Farin [1978] 2 All E.R. 1149* (the breach of contract resulted in a trading loss, which enabled the innocent party to claim a reduction in tax on subsequent profits: the tax benefit was deducted from the damages). cf. *Bellingham v Dhillon [1973] Q.B. 304* (approved in *Dimond v Lovell [2002] 1 A.C. 384, 402.*)
534. *W. L. Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177.*
535. *Interoffice Telephones Ltd v Robert Freeman Co Ltd [1958] 1 Q.B. 190*; *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428* (below, Vol.II, para.39-319). On damages for loss of profits under a hire-purchase agreement, see Vol.II, paras 39-347—39-350.
536. *Re Vic Mill Ltd [1913] 1 Ch. 465.*
537. It is a "lost volume" case. This assumes that the claimant would have made both contracts. If his operation would have been operating at maximum efficiency in order to fulfil the first contract, he might not have taken on the second. See Beale, *Remedies for Breach of Contract* (1980), p.200
538. *Charter v Sullivan [1957] 2 Q.B. 117*. The claimant should also be entitled to recover any extra expenses incurred in making the substituted contract: see below, para.26-032. (To a certain extent, this decision and that in *W. L. Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch. 177*, depend on the absence of an "available market" where the price fluctuates in accordance with supply and demand: see Vol.II, paras 44-368—44-378.)
539. In *Thai Airways International Public Co Ltd v KI Holdings Co Ltd [2015] EWHC 1250 (Comm)* Leggatt J. said that credit must be given for any monetary benefit the claimant has or will receive from actions taken to mitigate its loss (at [81]). The burden of proving that the claimant benefitted is on the defendant (at [92]).

540. *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447. (This case has been overruled by the House of Lords on another point: *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (above, para.15-005).)
541. *Bacon v Cooper (Metals) Ltd* [1982] 1 All E.R. 397.
542. [1912] A.C. 673. cf. *Re-Source America International Ltd v Platt Site Services Ltd* [2005] EWCA Civ 97, [2005] 2 Lloyd's Rep. 50 CA (the saved cost of refurbishment was deducted from the full cost of replacement).
543. Sale of Goods Act 1979 s.50(3). See Vol.II, paras 44-367 et seq.
544. *Jebsen v East and West India Dock Co* (1875) L.R. 10 C.P. 300.
545. *Campbell Mostyn v Barnett* [1954] 1 Lloyd's Rep. 65 (distinguished in *R. Pagnan & Fratelli v Corbisa Industrial Agropacuaria Limitada* [1970] 1 W.L.R. 1306 where the claimant buyer finally accepted the same goods at a reduced price; but the *Pagnan Fratelli* case was itself distinguished in *Mobil North Sea Ltd v P.J. Pipe & Valve Co* [2001] EWCA Civ 741, [2001] 2 All E.R. (Comm) 289 (see Vol.II, para.44-396). See also *Jones v Just* (1868) L.R. 3 Q.B. 197 (breach by seller but loss avoided by buyer when market price later rose); *Jamal v Moolla Dawood* [1916] 1 A.C. 175; and *Hussey v Eels* [1990] 2 Q.B. 227, para.26-095 n.493; *Gardner v Marsh & Parsons* [1997] 1 W.L.R. 489 (see para.26-167 n.845).
546. *Koch Marine Inc v D'Amico Società di Navigazione A.R.L. (The "Elena D'Amico")* [1980] 1 Lloyd's Rep. 75, 87–90.
547. *Bradburn v G.W. Ry* (1874) L.R. 10 Ex. 1. Similarly, an employee's damages for wrongful dismissal should not be reduced by reference to a pension payable before his normal retirement age to the employee from his employer's pension scheme: *Hopkins v Norcross Plc* [1993] 1 All E. R. 565. (The pension entitlement was "earned" and thus "paid for" by the employee; and the pension scheme should be treated as a form of insurance.) See also Vol.II, para.40-200. The damages recoverable by a lender from a negligent valuer (see above, para.26-168) should not be reduced by the proceeds of a mortgage indemnity guarantee policy taken out with an insurer for the benefit of the lender: such a policy is for indemnity insurance, under which the insurer's rights of subrogation will prevent any question of double recovery by the lender: *Arab Bank Plc v John D. Wood Commercial Ltd* [2000] 1 W.L.R. 857 CA. See also *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 (damages payable by valuer not reduced by arrangement by which a third party paid the lender, when the arrangement was not in ordinary course of business).
548. *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278. cf. *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 640–641; *Mobil North Sea Ltd v P.J. Pipe & Valve Co* [2001] EWCA Civ 741, [2001] 2 All E.R. (Comm) 289.
549. *Haviland v Long* [1952] 2 Q.B. 80, especially at 84. See also *Joyner v Weeks* [1891] 2 Q.B. 31; *Slater v Hoyle and Smith* [1920] 2 K.B. 11 (buyer of defective goods able to avoid loss on sub-sale; but see *Bence Graphics International Ltd v Fassoun UK Ltd* [1998] Q.B. 87 and the decision of the Privy Council in *Wertheim v Chicoutimi Pulp Co* [1911] A.C. 301 in both of which a sub-sale was taken into account; arguably both decisions are wrong: see above, para.26-040 and Vol.II, para. 44-407 n.1951).
550. *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd (The "Fanis")* [1994] 1 Lloyd's Rep. 633.
551. [2014] EWHC 1547 (Comm); [2015] EWCA Civ 1299, [2016] 1 W.L.R. 2450; [2017] UKSC 43, [2017] 1 W.L.R. 2581. The first instance decision was applied in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) at [51].
552. [2014] EWHC 1547 (Comm) at [63]–[64], quoted in full by Lord Clarke [2017] UKSC 43 at [16].

553.  [2015] EWCA Civ 1299. The CA decision was the subject of a critical note by Hooper (2016) 132 L.Q.R. 547. See also McLauchlan [2016] L.M.C.L.Q. 459.
554.  [2015] EWCA Civ 1299 at [23]. For the application of a similar principle in a case of a solicitor's negligence in failing to discover a restriction on use of property the client was buying, where subsequently the client was able to get the restriction lifted at minimal cost, see *Bacciottini v Gotelee & Goldsmith* [2016] EWCA Civ 170, [2016] 4 W.L.R. 98.
555.  [2015] EWCA Civ 1299 at [24] and [49].
556.  [2015] EWCA Civ 1299 at [30] and [50].
557.  [2017] UKSC 43, [2017] 1 W.L.R. 2581.
558.  [2017] UKSC 43 at [29]–[30].
559.  [2017] UKSC 43 at [32]–[33].
560.  [2017] UKSC 43 at [34].
561.  [2017] UKSC 43 at [35].
562.  See Main Work, Vol.I, para.26-102. In the Court of Appeal, counsel for the charterers had accepted that if the sale had been in consequence of the breach and had been undertaken by way of mitigation, and the price had risen between 2007 and 2009, the charterers would have been liable for the owner's inability to take advantage of the rise: see [2017] UKSC 43 at [28].
563.  See [2017] UKSC 43 at [20].
564.  [2017] UKSC 43 at [35].
565.  *Swynson Ltd v Lowick Rose LLP (In Liquidation) (formerly Hurst Morrison Thomson LLP)* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [13], [47]–[49], [97] and [99].
566.  [2017] UKSC 32 at [13], [46] and [97]; see below, para.26-102.
567. The arguments in this paragraph are developed more fully in Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), pp.115–120
568. *Jackson v Hayes Candy and Co Ltd* [1938] 4 All E.R. 587; *Collier v Sunday Referee Publishing Co* [1940] 2 K.B. 647, 653; *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278.
569. The causal test should be: (1) that the claimant used substantially the same resources as he would have done in the contractual activity; and (2) that the opportunity for the claimant to use them in the new activity would not have arisen *but for* the defendant's breach of contract, that is, it was the breach alone which released them for the alternative use. For instance, in *Hill v Showell* (1918) 87 L.J.K.B. 1106, 1108, the breach enabled the plaintiff to execute other profitable orders: it led to "the situation in which his machinery was rendered *free by reason of the breach*" (*italics supplied*).
570. Some support for this is found in *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278.
571. For the causal test, see above, para.26-100 n.515.

572. In *Lavarack v Woods of Colchester Ltd* [1987] 1 Q.B. 278, above (wrongful dismissal), the court took into account only *part* of the profit made by the plaintiff through his personal exertions in enhancing the value of his shares in the company where he took employment after his wrongful dismissal by the defendant. However, in *British Westinghouse Electric Co v Underground Electric Ry Co* [1912] A.C. 673 (see Vol.II, para.44-414) the House of Lords held that the *whole* of the benefit of the mitigating action of the plaintiff could be used to reduce the damages payable by the defendant, even though the plaintiff would not have been obliged under the “avoidable loss” rule to take that action: see Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at pp.119–120.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

Section 6. - Mitigation of Damage

(f) - Expenses of Mitigation

Recovery of loss or expense suffered while attempting to mitigate

26-102

! The third rule of mitigation is that the claimant may recover damages for loss or expense incurred by him ⁵⁷³ ! in reasonably ⁵⁷⁴ attempting to mitigate his loss following the defendant's breach, even when the mitigating steps were unsuccessful or in fact led to greater loss. ⁵⁷⁵ As most attempts are successful, it is in the interests of the defendant (as well as of the wider society) that the claimant, who is usually in the better position to minimise his loss, should be encouraged to try to do so: he may recover the cost of his reasonable attempt to "extricate" himself from the disadvantageous position in which he was placed by the breach. ⁵⁷⁶

^{573.} ! The rule has no application to the cost of actions carried out by a third party, not at the claimant's request, even though they may reduce the claimant's loss: *Swynson Ltd v Lowick Rose LLP (In Liquidation) (formerly Hurst Morrison Thomson LLP)* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [13], [46] and [97]; see above, para.26-099B.

^{574.} For an illustration of unreasonable expenses incurred by the claimant, see *Compania Financiera "Soleada" SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 W.L.R. 274. cf. the tort case of *Dodd Properties Ltd v Canterbury City Council* [1980] 1 W.L.R. 433 (above, para.26-038 n.210).

^{575.} *Wilson v United Counties Bank* [1920] A.C. 102, 125; *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 Q.B. 764, 782–783; *The World Beauty* [1970] P. 144, 156; *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1996] 3 All E.R. 667 (legal costs incurred by the plaintiff); *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) (claimant hedged against market falling; in fact it rose). See also *Erie County Natural Gas and Fuel Co Ltd v Carroll* [1911] A.C. 105, 119; cf. *Le Blanche v L.N.W. Ry* (1876) 1 C.P.D. 286; *Quinn v Burch Bros (Builders) Ltd* [1966] 2 Q.B. 370 (above, para.26-063); *Westwood v Secretary of State for Employment* [1985] A.C. 20, 44. cf. also the cases on reinstatement damages, above, para.26-036.

^{576.} *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 W.L.R. 916, 926. This "extrication" principle was accepted by the House of Lords in *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191, 218–219 (see above, para.26-031).

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(g) - Choosing between Remedies

Innocent party's choice between remedies

26-103

There have been suggestions that the rules of mitigation do not apply to the innocent party's choice between different remedies open to him following the other party's breach of contract: he is not bound to act "reasonably" in exercising his choice ⁵⁷⁷ or, more broadly, if the law offers the claimant a choice, he does not act unreasonably if he chooses one remedy rather than another. ⁵⁷⁸ Where the buyer commits an anticipatory breach by repudiating his obligation to take delivery of the goods before the date fixed for delivery, the seller has an option: he may either accept the repudiation and so treat it forthwith as a breach, or (subject to what was said earlier on the possible effect of the decision in *White and Carter (Councils) Ltd v McGregor* ⁵⁷⁹) he may continue to treat the contract as binding and thus not accept the repudiation as a breach. ⁵⁸⁰ In exercising this choice between these alternative courses of action, the seller is not obliged to act "reasonably". ⁵⁸¹ If the seller accepts the buyer's anticipatory repudiation, he is thereupon obliged to take reasonable steps to mitigate his loss ⁵⁸²; but if the seller does not accept the anticipatory repudiation he does not have any duty to mitigate unless and until the buyer actually commits a breach of contract. ⁵⁸³ After the innocent party has terminated the contract, however, the rules on mitigation will apply to any claim for damages he makes; it may then be reasonable for him to act in a way which has the effect of nullifying the consequences of that decision, e.g. by entering into a new contract with the contract-breaker. ⁵⁸⁴ Moreover, once there has been an actual breach the rules on mitigation may in effect require the innocent party to terminate: if he waits an unreasonably long time before going into the market to make a replacement purchase or sale, he may find that the damages will be assessed by the date at which he should have acted. ⁵⁸⁵ This may result in him recovering less than his full loss.

Recovery of sum due on performance

26-104

By implication, the House of Lords has decided that the rules on mitigation do not apply to a claim for a debt due under a contract in return for the claimant's performance of his obligation ⁵⁸⁶; such a claim is distinct from one for damages for breach of contract. ⁵⁸⁷ In *White and Carter (Councils) Ltd v McGregor* ⁵⁸⁸ the plaintiff refused to accept the defendant's anticipatory repudiation of the contract ⁵⁸⁹ and was able thereafter to complete the performance of his side of the contract without the co-operation of the defendant ⁵⁹⁰; the majority of their Lordships held that the plaintiff could recover the full amount due for his performance: he was under no obligation to terminate the contract on the ground of the defendant's anticipatory breach and sue for damages. The two of their Lordships in the minority thought the plaintiff should have mitigated his loss by discontinuing his performance of the contract, but the majority held (by implication) that in the special circumstances of the case there was no such duty on the plaintiff to act reasonably. ⁵⁹¹

Price can be earned without defendant's co-operation

26-105

The circumstances of the *White & Carter* ⁵⁹² case were unusual, in that there was nothing which the defendant had to do or accept in order to enable the plaintiff to complete his performance. The claimant cannot ignore the defendant's repudiation, perform and claim the contract price if the price is not due at the time of the defendant's anticipatory repudiation, and the claimant can earn it only by performance which will require the defendant's co-operation. ⁵⁹³ Thus in a case in which a demise charterer of a vessel indicated that they had no further use for the vessel it has been held that the owners cannot simply keep the vessel idle and claim the hire; performance requires the charterers' co-operation. ⁵⁹⁴ Although it had been suggested that the same might apply in the case of a time charter, ⁵⁹⁵ it has been held that with a time charter the owners can perform by keeping the ship ready and awaiting charterer's orders. ⁵⁹⁶ In other cases also, where according to the terms of the contract the price will become payable irrespective of the performance of the claimant's outstanding obligations, the claimant may recover it. ⁵⁹⁷

"Legitimate interest" in performing

26-106

⚠ The difficulty of this situation is that the policy of the mitigation rules (viz to avoid the waste of resources and effort) seems to be contravened if the innocent party, following a repudiation, can elect (despite his knowledge that the expense of performance is now useless to the other party) to *continue* his performance of the contract so as to recover an agreed sum of money greater than the damages which the law would allow if the repudiation were treated at the time as a breach of contract. ⁵⁹⁸ Lord Reid, one of the majority in the *White and Carter* case, introduced a qualification, to the effect that the plaintiff could not insist on completing performance so as to be able to claim the agreed price as a debt, if he had "no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages". ⁵⁹⁹ The Court of Appeal ⁶⁰⁰ ⚠ has accepted this qualification, it has been referred to by the Supreme Court with apparent approval, ⁶⁰¹ ⚠ and a judge at first instance ⁶⁰² has applied it to a shipping dispute, where for seven months the plaintiff shipowner kept a ship at anchor with a full crew ready to sail, despite the fact that the defendant treated the charterparty as ended. In *The Aquafath*, after a full review of the authorities referred to in the last paragraph, Cooke J., concluded that:

"[t]he effect of the authorities is that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and his insistence on maintaining the contract can be described as 'wholly unreasonable', 'extremely unreasonable' or, perhaps, in my words, 'perverse'." ⁶⁰³ ⚠

^{577.} *Strutt v Whitnell* [1975] 1 W.L.R. 870 (see above, para.26-093); *The Solholt* [1983] 1 Lloyd's Rep. 605, 608–609 CA; cf. *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.

^{578.} *Strutt v Whitnell* [1975] 1 W.L.R. 870, 874.

^{579.} [1962] A.C. 413; see above, para.26-092.

^{580.} See above, paras 24-022 et seq.; and Vol.II, para.44-381. cf. Vol.II, paras 44-393—44-394.

^{581.} *Tredegar Iron and Coal Co (Ltd) v Hawthorn Bros & Co* (1902) 18 T.L.R. 716, 716–717; *White*

- and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 (above, para.24-092; below, para.26-104); *Fercometal SARL v Mediterranean Shipping Co SA* [1989] A.C. 788.
582. See Vol.II, para.44-380. cf. the situation when it is the seller's anticipatory repudiation: Vol.II, para.44-393.
583. See Vol.II, para.44-381 and 44-394.
584. *The Solholt* [1983] 1 Lloyd's Rep. 605, 609. (See above, para.26-093.)
585. See above, para.26-090.
586. *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 (a full statement of facts will be found above, para.24-010); followed in *Anglo-African Shipping Co of New York Inc v J. Mortner Ltd* [1962] 1 Lloyd's Rep. 81, 610; but distinguished in *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250, 254–256 and in *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All E.R. 129.
587. See above, para.26-008.
588. [1962] A.C. 413.
589. On anticipatory breach, see above, paras 24-022 et seq.
590. *Hounslow LBC v Twickenham Gardens Developments Ltd* [1971] Ch. 233, 253–254 (plaintiff cannot insist on being given access to the defendant's land to enable him to complete work there). A wrongfully dismissed employee cannot sue for his wages as such, but is relegated to a claim for damages. See further next paragraph.
591. As to whether the principle will extend to the sale of goods, see Lord Keith (dissenting) [1962] A.C. 413, 437; above, para.26-092; and Benjamin's Sale of Goods, 8th edn (2010), paras 16-022, 16-059.
592. *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413.
593. *Hounslow LBC v Twickenham Gardens Developments Ltd* [1971] Ch. 233, 253–254.
594. *Attica Sea Carriers Corp v Ferrostaal, etc., GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250.
595. *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All E.R. 129.
596. *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafait)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [40], where it is pointed out that in *Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd's Rep. 357 Kerr J. seems also to have accepted that in principle a time charter can be performed without the charterer's co-operation. (See also *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep. 693, and also the first instance decision in *Stocznia Gdanska SA v Latvian Shipping Co* [1995] 2 Lloyd's Rep. 592, 600–607 (ship-building contract).)
597. *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All E.R. (Comm) 823; *Reichman v Beveridge* [2006] EWCA Civ 1659 (tenancy); *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm) at [105].
598. See [1962] Camb. L.J. 12, 213; (1962) 78 L.Q.R. 263; (1962) 25 M.L.R. 364. cf. the American Law Institute's Restatement of the Law of Contracts, s.338, especially Comment (c). (See (1962) 78 L.Q.R. 263, 267.)
599. [1962] A.C. 413, 431. This standard could be interpreted so as to bring it close to the reasonableness standard in the mitigation rules.

600.

⚠ *Attica Sea Carriers Corp v Ferrostaal, etc., GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250, 254–256; *Reichman v Beveridge* [2006] EWCA Civ 1659 (but held that landlord did have a legitimate interest in claiming rent from tenant who had no further use for property). Strictly speaking the point did not arise in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 (see below, n.547), but the Court of Appeal clearly accepted the “legitimate interest” qualification as part of the law.

601.

⚠ *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172 at [29].

602.

Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader) [1984] 1 All E.R. 129. In *Ministry of Sound (Ireland) Ltd v World On-line Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All E.R. (Comm) 823 the point was said not to arise.

603.

⚠ *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [44]. The judge went on to hold that that the exception did not apply on the facts of the case, where the owner would be left “in a difficult market where a substitute time charter was impossible, and trading on the spot market very difficult” (at [56]). In *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm), Popplewell J. also accepted the “legitimate interest” limitation but held that the innocent party had a legitimate interest in performing (at [108]). cf. *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [94]–[105] (carrier had no legitimate interest in keeping contract in force in order to claim demurrage on containers). The Court of Appeal in that case ([2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494) held that the issue did not arise because it was impossible to continue to perform the contract, as the contractual adventure had been frustrated (at [41]) but agreed that had it been open to the carrier to affirm the contract, the carrier would have had no legitimate interest in continuing to insist on performance by the shipper (at [43]).

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

Section 7. - Remoteness of Damage and Assumption of Responsibility ⁶⁰⁴

(a) - General Rules

Introduction

26-107

The term “remoteness of damage” refers to the legal test used to decide which types of loss caused by the breach of contract may be compensated by an award of damages. ⁶⁰⁵ The law supplies a standard test which specifies the extent of responsibility implicitly undertaken by the promisor. The parties may agree to depart from the standard. Thus in principle the promisor can agree that if he breaks the contract he will be responsible for some loss which the promisee may suffer and which might otherwise be too remote to be recoverable; or (more commonly) the parties may agree that the promisor will not be liable for a loss which otherwise would be recoverable. In either case, if the fairness or reasonableness of the clause has to be assessed, ⁶⁰⁶ an important factor will be the degree to which the agreement departs from the normal rule. ⁶⁰⁷ There is a reciprocal allocation of risks; the precise legal test is examined below, but it can be said in general terms that the promisor implicitly accepts responsibility for the usual consequences of a breach of the promise in question, while the promisee implicitly accepts the risk of any other consequences. (In other words, the promisee implicitly agrees not to hold the promisor responsible for unusual consequences.) ⁶⁰⁸ The test seems ultimately to depend on the express or implied intention of the parties. However, until the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* ⁶⁰⁹ it seemed that responsibility for losses which occur “in the ordinary course of things” were treated slightly differently from those which were not likely to occur. In the cases of losses that occur in the ordinary course of things (or, to use another phrase, which “are not unusual”) it seemed that the promisor would be treated as accepting responsibility unless there was an explicit agreement to the contrary in the form of an exclusion or restriction of liability clause in the contract. In relation to unusual kinds of loss, he was liable only if he was informed of the possibility in such a way that, by entering the contract, he appeared to assume responsibility for it. ⁶¹⁰ However, following *The Achilleas* ⁶¹¹ it now seems that a defendant is not necessarily liable for losses, whether they were usual or unusual, merely because he knew or should have known that they were not unlikely to occur. A defendant will not be liable for losses in either category if he cannot reasonably be regarded as assuming responsibility for losses of the particular kind suffered. Thus even in cases in which the loss claimed is not of an unusual kind, the test of liability is no longer applied in a standardised fashion, depending on the principally factual questions of the likelihood or knowledge of the loss. However, judgments since *The Achilleas* have emphasised that the decision in *The Achilleas* has not brought about a major change: in the majority of cases in which a particular kind of loss was “not unusual” the defendant will be treated as having assumed responsibility for it unless the contract contains an effective ⁶¹² express term to the contrary.

A separate rule?

26-108

What is not clear is whether “assumption of responsibility” is just part of the remoteness test or

whether there are now two tests, the remoteness test and, in addition, whether in the particular circumstances it can be said that the defendant was implicitly undertaking responsibility. There are reasons for thinking there are two rules, as the question of whether a kind of loss was too remote has been treated as a question of fact, whereas the question of whether there was an assumption of responsibility appears to be one of law.⁶¹³ Even if there are two tests, remoteness and assumption of responsibility are so intertwined that it is helpful to discuss them both in this section of the chapter. However, it is easier to explain the current state of the law by beginning with the traditional test of remoteness, and then considering the effect of the requirement of assumption of responsibility.

- ^{604.} The term “remoteness of damage” has been distinguished from the term “measure of damages” (or “quantification”), the former referring to the rules as to which types of consequences or losses may be compensated, the latter to the method of assessing in money the compensation for a particular consequence or loss which has been held to be not too remote. In *Wroth v Tyler* [1974] Ch. 30, 60–62 (below, para.26-116) it was held that the parties need not have contemplated the quantum of damage; see also *Vacwell Engineering Co Ltd v B.D.H. Chemicals Ltd* [1971] Q.B. 88, 110; *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 805, 813. It seems that in principle the distinction is between the type or kind of loss (see below, para.26-116) and its amount or the precise way in which it occurred, but we will see that in contract cases the courts have sometimes drawn narrow distinctions between different types of loss of profit (e.g. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, see below, para.26-114) and different ways in which loss of profit might have occurred (e.g. the speeches of Lord Rodger, Lord Walker and Baroness Hale in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61, see below, para.26-128). The distinction between remoteness and quantum is also drawn for the purposes of conflicts of laws: Cheshire and North, *Private International Law*, 5th edn, pp.708–712 (approved in *D’Almeida Araujo v Becker* [1953] 2 Q.B. 329; see now 14th edition by Cheshire, North and Fawcett, pp.96–97). This distinction has not always found favour with the courts in a domestic case: see *Handel (NV) My. J. Smits Import-Export v English Exporters Ltd* [1955] 2 Lloyd’s Rep. 69, 72; affirmed at 317; *Boys v Chaplin* [1968] 2 Q.B. 1, 31; but the distinction has been accepted in a conflict of laws problem: *Boys v Chaplin* [1971] A.C. 356, 378–379, 382–383, 392–393, 394. In *Harding v Wealands* [2006] UKHL 32, [2007] 2 A.C. 1 the assessment of damages in a tort case was held to be a matter of procedure governed by the *lex fori*.
- ^{605.} For a comparison between the rules on remoteness in tort and in contract, see Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), pp.331–333; and Cartwright [1996] C.L.J. 488.
- ^{606.} Clauses of the first type would be subject to a fairness test only if they fall within the Unfair Terms in Consumer Contracts Regulations 1999 or Consumer Rights Act 2015 Pt 2 (see below, Vol.II, paras 38-201 et seq. and 38-334 et seq. Limitation of liability clauses will frequently be subject to a reasonableness test under Unfair Contract Terms Act 1977, see above, paras 15-104 et seq., or Consumer Rights Act 2015 s.62, see below, Vol.II, para.38-359.
- ^{607.} See above, paras 15-104 et seq. and Vol.II, paras 38-242 et seq.
- ^{608.} In an exemption clause (see Ch.15, above), the promisee expressly accepts that the promisor is not to be liable for specified consequences.
- ^{609.} [2008] UKHL 48, [2009] 1 A.C. 61. See below, para.26-128.
- ^{610.} This is the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341, below, para.26-122.
- ^{611.} [2008] UKHL 48.
- ^{612.} i.e. the clause will pass any test of fairness or reasonableness that may be imposed by legislation, see above, n.550.

[613.](#) See below, para.26-131.

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(b) - Remoteness

Hadley v Baxendale

26-109

The classic statement of the rules regarding remoteness of damage in contract (which apply when the damages claimed are unliquidated) is to be found in the judgment of the Court of Exchequer in *Hadley v Baxendale*, ⁶¹⁴ as interpreted in later cases. ⁶¹⁵ In *Hadley v Baxendale*, the plaintiffs' mill was brought to a standstill by the breakage of their only crankshaft. The defendant carriers failed to deliver the broken shaft to the manufacturer to be copied at the time they had promised to do, so the replacement shaft arrived later than it should have, and the plaintiffs sued to recover the profits they would have made had the mill been started again without the delay. The court rejected the claim on the ground that the facts known to the defendants were insufficient ⁶¹⁶ to:

“... show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carriers to the third person.” ⁶¹⁷

26-110

The judgment of the court was delivered by Alderson B., who said ⁶¹⁸:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such 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. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. On the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.”

It has become common to describe losses that arise “in the usual course of things” as falling under “the first rule” (or “limb”) of *Hadley v Baxendale*, and those which are recoverable only because they

were contemplated by the parties as falling under the “second rule”. ⁶¹⁹

Modern statement of the rule

26-111

The principles laid down in *Hadley v Baxendale* have been interpreted and restated by the Court of Appeal in 1949 in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* ⁶²⁰ and by the House of Lords in 1967, in *Koufos v C. Czarnikow Ltd (The Heron II)*. ⁶²¹ The combined effect of these cases may be summarised as follows: A type or kind of loss is not too remote a consequence of a breach of contract if, 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. ⁶²² The following paragraphs expound the different aspects of this summary. It must be borne in mind that a loss may not be recoverable merely because it was not too unusual, if in the circumstances it was not reasonable to assume that the defendant was accepting responsibility for it. ⁶²³

Relevant date

26-112

A preliminary point is that the question is what was contemplated by the parties at the time at which the contract was made, not what they may have contemplated at some later date such as the date of breach. ⁶²⁴

What must be contemplated and the degree of probability

26-113

The formulation used by the Court of Appeal in the *Victoria Laundries* case ⁶²⁵ gave rise to the principal issues that arose in *The Heron II*. These were whether the parties must have contemplated the extent of the loss or only the kind, and the degree of probability required, in particular for a kind of loss to fall within the first limb of *Hadley v Baxendale*, i.e. to be “in the usual course of things”.

The Victoria Laundry case

26-114

The three main propositions in the *Victoria Laundry* case were ⁶²⁶:

“(2)

In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach ...

(3)

What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach ...

(4)

For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course ... But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that breach in those special circumstances would be liable to cause more loss."

The Heron II

26-115

In *The Heron II* ⁶²⁷ their Lordships did not agree upon a common formulation, but three of their Lordships ⁶²⁸ gave general approval to these and other ⁶²⁹ propositions in the *Victoria Laundry* case. ⁶³⁰ Somewhat different formulations were adopted by Lords Reid and Upjohn: the former said that Alderson B. in *Hadley v Baxendale*, above:

"... clearly meant that a result which will happen in the great majority ⁶³¹ of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation." ⁶³²

Lord Reid continued:

"The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation." ⁶³³

Lord Upjohn stated:

"... the broad rule as follows: 'What was in the assumed contemplation of both parties acting as reasonable men in the light of the general or special facts (as the case may be) known to both parties in regard to damages as the result of a breach of contract.'" ⁶³⁴

There is no need for the breach itself to be within the contemplation of the parties:

"It is clear that one starts from the assumption that the contract-breaker contemplates, at the date of the making of the contract, the occurrence of the particular breach which he, although at the time he may have no notion of it, is thereafter going to commit." ⁶³⁵

The type or kind of loss ⁶³⁶

26-116

! The reference to “the loss” in the formulations of the test for remoteness of damage is to be interpreted as the type or kind of loss in question. ⁶³⁷ The:

“... party who has suffered damage does not have to show that the contract-breaker ought to have contemplated, as being not unlikely, the precise detail of the damage or the precise manner of its happening. It is enough if he should have contemplated that damage *of that kind* is not unlikely.” ⁶³⁸ !

(There is a similar formulation in the test for remoteness of damage in tort:

“the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.” ⁶³⁹

However, we shall see that in cases of breach of contract the test is applied differently from the way it is applied in tort. ⁶⁴⁰) If the parties ought to have contemplated a particular type of loss (“head of damage”) they need not have contemplated the extent of that loss. ⁶⁴¹ The application of the test for remoteness to a particular set of facts therefore depends largely on the judicial discretion ⁶⁴² to categorise losses into broad categories, ⁶⁴³ without requiring any contemplation of the precise manner in which the loss was caused, or of the precise details of the loss. ⁶⁴⁴ However, when a particular loss is likely to be extensive, it seems that the courts may be inclined to pay more attention to the likelihood of the precise combination of circumstances which caused it to occur. ⁶⁴⁵ Moreover, when loss is extensive, it seems more likely that the court will find it unreasonable to assume that the defendant was accepting responsibility for it, whether or not it the defendant should have contemplated it as “not unlikely” to occur. ⁶⁴⁶

Contemplated loss may operate as a cap on recovery

26-117

In one case, where the defendant contracted to supply a profit-earning chattel, which the plaintiff intended to put to an exceptional use (outside the defendant’s reasonable contemplation), the loss of profits expected under its normally contemplated use placed a ceiling on the damages recoverable by the plaintiff for the delay in delivery. ⁶⁴⁷ A loss of profits from normal use was contemplated as arising from the breach, and the plaintiff had in fact suffered such a loss to an amount beyond that ceiling. ⁶⁴⁸ Similarly, in the *Victoria Laundries* case ⁶⁴⁹ the buyers recovered the sum they would have earned from “normal” laundering and dyeing, though if the boiler had been delivered on time they would presumably have used it for the more profitable Government dyeing contracts.

The degree of probability


26-118

! What was in the contemplation of reasonable men obviously depends on the relevant degree of likelihood ⁶⁵⁰ that a particular kind of loss may occur, and this issue was extensively discussed in *The Heron II*. ⁶⁵¹ Lord Reid used:

“... the words ‘not unlikely’ as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.”⁶⁵²


Although Lord Morris thought it unnecessary to choose any one phrase⁶⁵³ he used “not unlikely to occur”,⁶⁵⁴ with “liable to result” as an alternative⁶⁵⁵; Lord Hodson accepted the latter phrase.⁶⁵⁶ Both Lords Pearce⁶⁵⁷ and Upjohn⁶⁵⁸ adopted the words “a real danger” or “a serious possibility”⁶⁵⁹ which were the phrases used in the House of Lords in 1991.⁶⁶⁰ (Four of their Lordships in *The Heron II* agreed that the colloquialism “on the cards” should not be used.⁶⁶¹) What was made clear is that in contract cases it is not sufficient that the loss was “reasonably foreseeable”, at least if this refers to the low probability that will satisfy the remoteness test in tort cases.⁶⁶² The contractual test requires a higher degree of probability than the test for remoteness in tort.⁶⁶³ One reason for this may be that the remoteness rule in contract aims to encourage the parties to exchange information about unusual losses that might flow from breach. As Lord Reid said in *The Heron II*:


“The modern rule in tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it; and there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party’s attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. In tort, however, there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.”







In tort cases, in contrast, the rule aims to protect the defendant from liability for events of very low probability.⁶⁶⁴ 

Concurrent liability

26-118A

 The difference between the remoteness rule in contract and the remoteness rule in tort has given rise to difficulty in cases of concurrent liability.

“Damage may be of a kind which is reasonably foreseeable (and therefore recoverable in tort) yet highly unusual or unlikely (and therefore irrecoverable in contract).⁶⁶⁵ 

In *Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd*⁶⁶⁶  Lord Denning M.R. said that in the test for remoteness of damage in contract there is a distinction between loss of profit (or only economic loss) cases, and physical damage (or expense) cases⁶⁶⁷ ; but this distinction was not accepted by the other members of the Court of Appeal,⁶⁶⁸  and seemed to lack supporting authority. However, no clear answer emerged from the other judgments. Academic writers suggested that where a claimant was in previous communication with the defendant, the contract rule should apply.⁶⁶⁹  The question has recently been subject to apparently conflicting decisions of the Court of Appeal.⁶⁷⁰  In *Yapp v Foreign and Commonwealth Office*,⁶⁷¹  an employment case, Underhill L.J., with whom the other members of the court agreed, held that whether psychiatric injury was too remote a consequence of a breach of the employer’s duty of care was to be determined by the test applicable

in tort. ⁶⁷² **!** But in *Wellesley Partners LLP v Withers LLP* ⁶⁷³ **!** (in which *Yapp's* case was not cited) the Court accepted the academic arguments and held that in cases of concurrent liability for failure to carry out instructions the contract rule should apply. ⁶⁷⁴ **!** The members of the Court saw this as consistent with the decisions of the House of Lords in the *SAAMCo* case ⁶⁷⁵ **!** and *The Achilles* ⁶⁷⁶ **!** that the extent of liability should be determined by the scope of the defendant's duty and what responsibility the defendant could reasonably be taken to have assumed. ⁶⁷⁷ **!** It may be necessary ⁶⁷⁸ **!** to distinguish the *Wellesley* case and the *Yapp* case on the ground that *Yapp's* case was concerned with a breach of the common law duty of care ⁶⁷⁹ **!** leading to psychiatric injury, whereas the *Wellesley* case involved economic loss, which requires an assumption of responsibility ⁶⁸⁰ **!**; indeed Floyd L.J.'s view was that "the test for recoverability of damage for economic loss should be the same, and should be the contractual one", ⁶⁸¹ **!** while Roth J. referred to tort cases in which liability was based on a voluntary assumption of responsibility and Longmore L.J. to the liability of solicitors for failing to carry out their instructions—both thus seeming to refer also to economic losses for which the defendant had assumed responsibility. In *Wright v Lewis Silkin LLP*, ⁶⁸² **!** another solicitors' negligence case, the Court of Appeal held that it was bound to follow the *Wellesley* case.

Actual and imputed knowledge

26-119

In general, it is necessary to consider the actual knowledge of the defendant (the promisor) only where he would not have been liable without that knowledge; normally the imputed knowledge of the defendant will be at least as great as (if not greater than) his actual knowledge. The test for imputed knowledge has been said by Lord Wright ⁶⁸³ to be:

"... what reasonable business men must be taken to have contemplated as the natural and probable result if the contract was broken. As reasonable business men, each must be taken to understand the ordinary practices and exigencies of the other's trade or business." ⁶⁸⁴

The defendant's knowledge of the type of business conducted by the claimant may be a ground for imputing knowledge, ⁶⁸⁵ but the defendant cannot be expected to know the technical details of the claimant's activity where it involved complicated techniques. ⁶⁸⁶ Again, in contracts for the sale of goods, the defendant is normally taken to have known that the market price and the supply and demand of the market may change. ⁶⁸⁷ The kind of consequence which falls within the imputed knowledge of the defendant will be illustrated by cases throughout the rest of this section, and in particular, by cases on damages in contracts for the sale of goods. ⁶⁸⁸

Unusual events that were contemplated

26-120

The probability of a loss occurring is only a way of deciding whether the parties must have contemplated it. If a loss must have been contemplated—for example, if it was one of the losses that the contract was supposed to guard against—it is submitted that the defendant will be liable for it even if the likelihood of it occurring was very low. ⁶⁸⁹

Loss of a kind that is "not unusual"

26-121

❗ It seemed to follow from the decisions cited that a party who was in breach of contract would be liable for losses that the other party suffered as a result ⁶⁹⁰ if the loss was of a kind that was “not usual”, i.e. arose “in the ordinary course of things”, unless there was an effective clause in the contract that excluded or restricted the defendant’s liability for the relevant loss. ⁶⁹¹ ❗ As the result of the decision of the House of Lords in *The Achilleas*, ⁶⁹² this must be qualified: at least in some circumstances, the defendant may not be liable for loss of a “not unusual kind” because it is not reasonable to think that he was assuming responsibility for it. This is discussed below, after discussion of liability for loss of kinds that were not usual.

Actual knowledge of special circumstances

26-122

The so-called second rule in *Hadley v Baxendale* ⁶⁹³ applies when the loss (the “type or kind of loss” ⁶⁹⁴) flowing from the breach of a particular contract is greater than, or different from what it would have been in normal circumstances. If actual knowledge of the defendant (the promisor) is relied upon to make him liable for exceptional losses resulting from breach of the contract in the special ⁶⁹⁵ circumstances, that knowledge must have existed at or before the making of the contract. ⁶⁹⁶ There is now authority in the House of Lords that the two rules in *Hadley v Baxendale* are not mutually exclusive; indeed, what kinds of loss are within the first rule and what kinds are only recoverable if within the second rule depends on how the relevant breach of contract is characterised and the degree of knowledge of the circumstances that the parties are assumed to have. ⁶⁹⁷ The second rule also covers “heads of damage”, not the quantum or extent of loss; thus, it is unnecessary for the parties to have contemplated the quantum of damages, or the extent of the loss, provided it falls within a contemplated type of loss. ⁶⁹⁸

Express or implied term as to liability not required

26-123

For a long time it was an unsettled point as to whether, when the loss is an unusual one, the remoteness rule will be satisfied if the defendant had bare knowledge of the special circumstances. ⁶⁹⁹ In 1868, Willes J. said ⁷⁰⁰:

“The mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it ... knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not.”

It is submitted, however, that it is unnecessary to hold that the defendant’s acceptance of liability for unusual loss (in the special circumstances made known to him) can be enforced only where there is an express or implied term of the contract to that effect. ⁷⁰¹ Nor does there have to be an “assumption of responsibility” in the sense required for liability for negligent misstatement. ⁷⁰² However, as will be explained in the paragraphs that follow, it seems that the special circumstances must have been brought home to the defendant in such a way that it was reasonable to assume that he was accepting responsibility for loss of the kind that is claimed.

Casual knowledge of unusual risk will not suffice

26-124

The defendant will probably not be liable merely because he had gained knowledge of the unusual risk in a purely casual way. Although in *Hadley v Baxendale* ⁷⁰³ itself, “communication” was said to be the vital factor, it is submitted that a casual communication from a stranger is insufficient. It is essential that there should be communication of the special circumstances by or on behalf of the claimant to the defendant or his agent so as to show that the claimant thought it important that the defendant should know what other matters depended on his fulfilment of the contract; these facts may, in appropriate circumstances, lead to the inference that the defendant, as a reasonable man, was accepting the risk of special loss to the claimant. ⁷⁰⁴

Assumption of responsibility for unusual loss

26-125

The remoteness rule is without doubt satisfied if, on the basis of his knowledge of the special circumstances, the reasonable man in the defendant’s position at the time of contracting would have understood that, by making the promise in those circumstances, he was accepting responsibility for the risk of the type of loss in question. What was less clear is whether, once the defendant had the necessary knowledge, he might still be able to deny liability on the grounds that it was not reasonable to assume that he was accepting responsibility. Many dicta suggest that adequate knowledge suffices, so that the defendant will be liable unless he validly excludes his liability by a term of the contract.

“Where knowledge of special circumstances is relied on, the assumption is that the defendant undertook to bear any special loss which was referable to those special circumstances.” ⁷⁰⁵

However, on occasions liability for losses of an unusual kind has been explained in terms of the defendant assuming responsibility for the loss in question:

“... have the facts in question come to the defendant’s knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach.” ⁷⁰⁶


This might be interpreted as meaning that the defendant would not be liable if, for some reason, it was reasonable for him to think that he was not undertaking responsibility. In previous editions of this work, it was suggested that in relation to liability for special circumstances, mere knowledge that an unusual loss might well follow a breach would not always suffice. There might not be liability if either it was clear from all the circumstances either that the defendant—to the knowledge of the claimant—did not wish to accept the risk of the unusual loss, or that a reasonable man in the place of the defendant would not, despite his knowledge of the special circumstances, have accepted the risk of the unusual loss. ⁷⁰⁷ It now seems clear that these factors are relevant to the question of whether the defendant can reasonably be assumed to have accepted responsibility for the relevant loss. ⁷⁰⁸ It is submitted that when the relevant kind of loss is “not unusual”, the defendant will be treated as having assumed responsibility for it, as will be explained below, except in exceptional circumstances; but that the more unusual the circumstances giving rise to the loss, and the greater the extent of the loss, the less likely it will be that the defendant can reasonably be regarded as having assumed responsibility for it.

⁶⁰⁴. The term “remoteness of damage” has been distinguished from the term “measure of damages”

(or “quantification”), the former referring to the rules as to which types of consequences or losses may be compensated, the latter to the method of assessing in money the compensation for a particular consequence or loss which has been held to be not too remote. In *Wroth v Tyler* [1974] Ch. 30, 60–62 (below, para.26-116) it was held that the parties need not have contemplated the quantum of damage; see also *Vacwell Engineering Co Ltd v B.D.H. Chemicals Ltd* [1971] Q.B. 88, 110; *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 805, 813. It seems that in principle the distinction is between the type or kind of loss (see below, para.26-116) and its amount or the precise way in which it occurred, but we will see that in contract cases the courts have sometimes drawn narrow distinctions between different types of loss of profit (e.g. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, see below, para.26-114) and different ways in which loss of profit might have occurred (e.g. the speeches of Lord Rodger, Lord Walker and Baroness Hale in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61, see below, para.26-128). The distinction between remoteness and quantum is also drawn for the purposes of conflicts of laws: Cheshire and North, *Private International Law*, 5th edn, pp.708–712 (approved in *D’Almeida Araujo v Becker* [1953] 2 Q.B. 329; see now 14th edition by Cheshire, North and Fawcett, pp.96–97). This distinction has not always found favour with the courts in a domestic case: see *Handel (NV) My. J. Smits Import-Export v English Exporters Ltd* [1955] 2 Lloyd’s Rep. 69, 72; affirmed at 317; *Boys v Chaplin* [1968] 2 Q.B. 1, 31; but the distinction has been accepted in a conflict of laws problem: *Boys v Chaplin* [1971] A.C. 356, 378–379, 382–383, 392–393, 394. In *Harding v Wealands* [2006] UKHL 32, [2007] 2 A.C. 1 the assessment of damages in a tort case was held to be a matter of procedure governed by the *lex fori*.

- [614.](#) (1854) 9 Ex. 341. (See comments by Simpson (1975) 91 L.Q.R. 247, 273; Pugsley (1976) 126 New L.J. 420; Danzig (1975) 4 J. Leg. Stud. 249; Harris, Campbell and Halson at pp.92–93.)
- [615.](#) See below, paras 26-111 et seq.
- [616.](#) *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 537–538. (The headnote of *Hadley v Baxendale* (1854) 9 Ex. 341 is misleading.)
- [617.](#) *Hadley v Baxendale* (1854) 9 Ex. 341, 355. See also *Collins v Howard* [1949] 2 All E.R. 324.
- [618.](#) (1854) 9 Ex. 341, 354–355.
- [619.](#) It has been said that in the Sale of Goods Act 1979 s.53(2) represents the first limb of *Hadley v Baxendale* and s.54 the second: *Saipol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm), [2015] 1 Lloyd’s Rep. 26 at [14].
- [620.](#) [1949] 2 K.B. 528. (Some of the propositions in this case were cited with approval in *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406, 440, 445, 450–451.)
- [621.](#) [1969] 1 A.C. 350. The Court of Appeal has further considered these principles in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791. (The two cases cited in the text at the beginning of this paragraph are not limited in their application to loss of profits: [1978] Q.B. 791, 804–805, 805–806, 813. cf. at 802–804.)
- [622.](#) This sentence was quoted with approval by Stuart-Smith L.J. in *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621 (see also at 642–643). cf. the summary of Scarman L.J. in *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] Q.B. 791, 807 (“The court’s task ... is to decide what loss to the plaintiff it is reasonable to suppose would have been in the contemplation of the parties as a serious possibility had they had in mind the breach when they made their contract”). The test is not one of “directness”: *Ogilvie Builders Ltd v Glasgow City DC* (1995) S.L.T. 15. As to the judicial discretion involved in applying the test for remoteness, see Cooke [1978] C.L.J. 288. On the time when the test is applied, see *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 at [35]–[36].
- [623.](#) See below, paras 26-126 et seq. Thus in *Pindell Ltd v AirAsia Berhad (formerly AirAsia SDN BHD)* [2010] EWHC 2516 (Comm) a leased aircraft was redelivered late and the lessor lost a

contract to sell the aircraft. It was held that it was not sufficiently likely that a 20-year-old aircraft would be sold on terms that gave such a short window for delivery for the lessees to be liable for loss of the sale, but in any event this was not a type of loss for which the lessees assumed responsibility (at [87]).

- [624.](#) *Hadley v Baxendale* (1854) 9 Ex. 341, 354; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 539; *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 at [35]–[36].
- [625.](#) *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528.
- [626.](#) [1949] 2 K.B. 528, 539–540 (propositions (1), (5) and (6) are omitted for reasons of space). For the facts in the case, see below, para.26-135.
- [627.](#) [1969] 1 A.C. 350. For the facts see below, para.26-163.
- [628.](#) [1969] 1 A.C. 350, 399 (Lord Morris), 410–411 (Lord Hodson), 414–417 (Lord Pearce). (But Lord Reid, at 388–391, rejected parts of the *Victoria Laundry* [1949] 2 K.B. 528 propositions.)
- [629.](#) See below, para.26-118.
- [630.](#) *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528.
- [631.](#) Lord Hodson [1969] 1 A.C. 350, 411, also adopted the expression used in *Hadley v Baxendale* (1854) 9 Ex. 341: “in the great multitude of cases”: (1854) 9 Ex. 341, 355, 356. On the degree of probability see below, para.26-118.
- [632.](#) [1969] 1 A.C. 350, 384 (see also at 385). Both Lords Reid and Upjohn criticised the words “foreseeable” or “reasonably foreseeable” in the *Victoria Laundry* [1949] 2 K.B. 528 formulations: [1969] 1 A.C. 350, 389, 422–423; Lord Upjohn at 422–423, expressly preferred “contemplate” or “in contemplation” for cases in contract, and these are the words used by Lord Reid at 384–385.
- [633.](#) [1969] 1 A.C. 350, 385.
- [634.](#) [1969] 1 A.C. 350, 424.
- [635.](#) *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All E.R. 1496, 1523 (Court of Appeal: the House of Lords [1972] A.C. 441 reversed the decision on other grounds, without discussing *The Heron II* [1969] 1 A.C. 350); *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 802, 807.
- [636.](#) This paragraph was quoted with approval by Stuart-Smith L.J. in *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621.
- [637.](#) In *The Heron II* [1969] 1 A.C. 350 Lord Reid spoke of “type of damage” (at 385–386), “loss of a kind which” (at 382, 383) and “type of loss” (at 385); while Lord Pearce spoke of “type of consequence” (at 417). See also *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 801, 805, 806, 813.
- [638.](#)  *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All E.R. 1496, 1524; *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621; *Kpohraror v Woolwich Building Society* [1996] 4 All E.R. 119, 126; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61 at [21]; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [74]. See below, para.26-122 for the corresponding formulation in the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341.
- [639.](#) *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] A.C. 388, 426.

640. Below, para.26-118.
641. *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 804, 805, 813; *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621, 642–643; cf. *Wroth v Tyler* [1974] Ch. 30, 60–62 (dealing with the corresponding position under the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341). But cf. the cases on loss of profits, below, para.26-117; Vol.II, paras 44-408–44-410, where the type of profits expected from the normal use of a profit-earning machine is used to place a cap on a claim for loss of a different type of profit caused by the breach of contract; *Vacwell Engineering Co Ltd v B.D.H. Chemicals Ltd* [1971] Q.B. 88; cf. also the limitation on the extent of a valuer's liability to a lender for a negligent over-valuation: *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (below, para.26-168).
642. For recent illustrations, see *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc* (1994) S.L.T. 807 (HL: not contemplated that interruption of electricity supply to a concrete batching plant would result in demolition and rebuilding of a partly-constructed aqueduct); *Kpohraror v Woolwich Building Society* [1996] 4 All E.R. 119 (CA: not contemplated that one day's delay by a bank in meeting a cheque might cause the plaintiff to lose the transaction in question or incur a trading loss in future).
643. As is illustrated by cases in later paragraphs of this chapter, e.g. loss of profits; physical damage to a chattel or building; illness or death of a person; illness or death of an animal; expenses incurred by the claimant in reliance on the contract; personal, subjective loss of amenity; damages and costs paid by the claimant to a third party as a result of the breach of contract leading to the claimant being held liable to the third party. cf. the similar broad interpretation of the "type" or "kind" of loss in the test for remoteness of damage in tort: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] A.C. 388; *Hughes v Lord Advocate* [1963] A.C. 837.
644. *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 811 ("contemplation that a hopper unfit for its purpose of storing food in a condition suitable for feeding pigs, might well lead to illness" of the pigs or their "physical injury" (at 805, 813), but not that it might lead to a specific type of serious illness (at 812, 813)). "Loss of profit" is obviously another "type" of loss: at 802–803, 813; see also below, paras 26-135 et seq. It seems that in contract cases involving loss of profit, a somewhat more precise test is applied than in tort cases. Thus in the *Victoria Laundries case* [1949] 2 K.B. 528, the court distinguished between profit from different activities. This may be explained by the same factors which seem to lead the courts to requiring a higher degree of probability than in contract cases: see below, para.26-118. In *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 at [22]–[23], Lord Hoffmann pointed to the distinction drawn in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528 between loss of laundry profits and loss of profits from especially lucrative dyeing contracts as justifying the approach that the defendant could not be assumed to be taking responsibility for certain kinds of loss. See further below, paras 26-126 et seq.
645. See the speech of Lord Rodger in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 discussed below at para.26-128.
646. See below, paras 26-126 et seq.
647. *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1868) L.R. 3 Q.B. 181.
648. This explanation is supported by the *Victoria Laundry case* [1949] 2 K.B. 528.
649. See above, para.26-114.
650. *Southern Portland Cement Ltd v Cooper* [1974] A.C. 623, 640.
651. [1969] 1 A.C. 350. For how the rules apply to late delivery by carriers, see below, para.26-137.
652. [1969] 1 A.C. 350, 383. (See also his statements at 388: "a very substantial degree of

probability".)

[653.](#) [1969] 1 A.C. 350, 397, 399.

[654.](#) [1969] 1 A.C. 350, 406.

[655.](#) [1969] 1 A.C. 350, 406. "Liable to result" was also one of the phrases accepted in the *Victoria Laundry Case* [1949] 2 K.B. 528, 540.

[656.](#) [1969] 1 A.C. 350, 410–411. (Lord Reid, at 389, rejected this phrase.)

[657.](#) [1969] 1 A.C. 350, 415.

[658.](#) [1969] 1 A.C. 350, 425.


[659.](#) These words were rejected by Lord Reid (at 390), who also rejected "foreseeable as a real possibility" (at 385). *Victoria Laundry* [1949] 2 K.B. 528, 540, also accepted "a real danger" or "a serious possibility". (The latter phrase was used by the Court of Appeal in *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 802, 805, 807.)

[660.](#) *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233, 267.


[661.](#) [1969] 1 A.C. 350, 390, 399, 415, 425. (It was yet another phrase used in *Victoria Laundry* [1949] 2 K.B. 528, 540)


[662.](#) [1969] 1 A.C. 350, 385, 411, 425.


[663.](#) See Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at pp.331–333.


[664.](#)  See Bishop (1983) 12 JLS 241.


[665.](#)  Floyd L.J. in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [86].

[666.](#)  [1978] Q.B. 791.


[667.](#)  See at 804–805 (Orr L.J.) and at 805–806 (Scarman L.J.).

[668.](#)  See at 804–805 (Orr L.J.) and at 805–806 (Scarman L.J.).


[669.](#)  See A Burrows, *Commercial Remedies* (2003), pp.27, 35; McGregor on Damages, 19th edn (2014), para.22–009; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–112.










[670.](#)  See also above, para.1-195A.

[671.](#)  [2014] EWCA Civ 1512.

[672.](#)  See [2014] EWCA Civ 1512 at [119]. Underhill L.J's propositions are summarised in Vol.I, para.26-147.

[673.](#)  [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351, noted Balen [2016] L.M.C.L.Q. 186.

[674.](#)  See [2015] EWCA Civ 1146, [2016] Ch. 529 at [80], [157] and [186].

- [675.](#)  *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (see Vol.I, para.26-168).
- [676.](#)  *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61. See Vol.I, paras 26-126 et seq.
- [677.](#)  See [2015] EWCA Civ 1146 at [74], [152]–[157] and [182]–[187]
- [678.](#)  While in *Yapp's* case the claim for psychiatric injury failed even on the wider tort test and in *Wellesley* the claim for loss of profit succeeded even on the narrower contract test, in each case the applicable test was discussed at length and the discussion cannot be treated as obiter.
- [679.](#)  Underhill L.J. specifically noted that he was not following the approach taken by the academics, remarking that “as regards the common law duty of care owed to employees the position seems to be the opposite” see note 8 to [119] of the judgment.
- [680.](#)  See above, para.1-195A.
- [681.](#)  [2015] EWCA Civ 1146 at [80].
- [682.](#)  [2016] EWCA Civ 1308 at [60]–[61].
- [683.](#) *Monarch S.S. Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196, 224 (examined further in *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc* (1994) S.L.T. 807, (1994) 71 B.L.R. 20 HL).
- [684.](#) See also *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233, 267.
- [685.](#) *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528; cf. *Diamond v Campbell-Jones* [1961] Ch. 22.
- [686.](#) *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc* (1994) S.L.T. 807.
- [687.](#) *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 Q.B. 190, 202. The same holds for contracts for the carriage of goods: below, para.26-137.
- [688.](#) Below, paras 26-135 et seq.
- [689.](#) See *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349 and para.26-134 below.
- [690.](#) And which were not irrecoverable under one of the other limiting rules, such as the doctrine of mitigation: see above, para.26-079.
- [691.](#)  cf. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–106 (“it appeared that there was no basis, so far as remoteness is concerned, for imposing any further limit as to its recoverability”).
- [692.](#) *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61; see above, para.26-107 and below, paras 26-126 et seq.
- [693.](#) (1854) 9 Ex. 341 (above, para.26-110).
- [694.](#) *Wroth v Tyler* [1974] Ch. 30, 61.

695. The facts or circumstances do not have to be “unusual” before the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341 may come into play: see *President of India v Lips Maritime Corp* [1988] A.C. 395, 411, 412.
696. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 539 (Proposition 3, cited above, para.26-114); *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 at [35]-[36]. See also *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 Q.B.D. 670, 676; cf. *Kollman v Watts* [1963] V.L.R. 396 (knowledge acquired after the contract was made). The rules in *Hadley v Baxendale* encourage the efficient exchange of information. There is no need for the promisee to inform the promisor about the usual consequences of a breach of his promise, but if he intends the promisor to be responsible for an unusual type of risk he must inform the promisor of that risk, so that, by making the promise with that knowledge, the promisor is implicitly assuming responsibility for it. (The promisor can then increase the “price” he requires in exchange, or exclude liability.)
697. *Jackson v Bank of Scotland* [2005] UKHL 3 at [46]-[49]. There is no need for a strict delineation between the two rules in *Hadley v Baxendale* (1854) 9 Ex. 341: *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2006] EWHC 3030 (Comm), [2007] 1 Lloyd’s Rep. 19 at [49]; affirmed [2007] EWCA Civ 901, [2007] 2 Lloyd’s Rep. 555, on the same point see at [88] and [95]; reversed [2008] UKHL 48 but on a different ground, see below, para.26-128.
698. *Wroth v Tyler* [1974] Ch. 30, 60–62; cf. *Jackson v Bank of Scotland* [2005] UKHL 3 at [36]. cf. above, para.26-107 n.548. cf. however, the cases on loss of profits, which show that a loss of profits from one use of a chattel may be treated as different from a loss of profits from another use: see below, para.26-135; Vol.II, paras 44-408, 44-410. cf. also *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (below, para.26-168).
699. *Patrick v Russo-British Grain Export Co Ltd* [1927] 2 K.B. 535, 540.
700. *British Columbia, etc., Saw Mill Co Ltd v Nettleship* (1868) L.R. 3 C.P. 499, 509. See also *Horne v Midland Ry* (1873) L.R. 8 C.P. 136, 139, 141, 145, 146–147 (cf. at first instance (1872) L.R. 7 C.P. 583, 591–592); *Elbinger Aktiengesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473, 478; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 538; *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1448.
701. See *Koufos v C. Czarnikow Ltd, The Heron II* [1969] 1 A.C. 350, 421–422 (obiter); *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd’s Rep. 175, 183-184. Such a rule might create difficulties where the contract was required to be in writing, or evidenced by a memorandum in writing: see *Hydraulic Engineering Co Ltd v McHaffie Goslett Co* (1878) 4 Q.B.D. 670.
702. *Transfield Shipping Inc v Mercator Shipping Inc (The “Achilleas”)* [2007] EWCA Civ 901, [2007] 2 Lloyd’s Rep. 555 at [115]. For “assumption of responsibility” in the context of negligent misrepresentation, see above, para.1–148. But see the decision of the House of Lords in *The Achilleas* [2008] UKHL 48, discussed below, paras 26-126 et seq.
703. (1854) 9 Exch. 341, 354 (above, para.26-109).
704. The cases on sub-sales, considered in Vol.II, paras 44-400–44-405, 44-415, 44-424, provide a good illustration of this principle. For other illustrations see *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd’s Rep. 187, 191; the *Victoria Laundry* case [1949] 2 K.B. 528; *Wadsworth v Lydall* [1981] 1 W.L.R. 598 (upheld by House of Lords in *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104, 125–127); *Kemp v Intasun Holidays Ltd* [1987] 2 F.T.L.R. 234.
705. *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377, at [26]. cf. *Muhammad Issa el Sheikh Ahmad v Ali* [1947] A.C. 414, 427 (impecuniosity of one party in the contemplation of the parties: “damages which, on the facts found by the trial judge, might reasonably be expected to be in the contemplation of the parties”).

- [706.](#) Robert Goff J. in the *Satef-Huttenes* case, above, at 183. (At 184, the learned judge spoke of “assuming responsibility for the risk of such loss in the event of” breach.) See also *Seven Seas Properties Ltd v Al-Essa (No.2)* [1993] 1 W.L.R. 1083, 1088.
- [707.](#) 29th edn, para.26-055. cf. *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1448.
- [708.](#) See below, paras 26-126 et seq.

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(c) - Assumption of Responsibility

Assumption of responsibility

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! In the light of the remoteness rules discussed above, the traditional assumption of many contract lawyers ⁷⁰⁹ ! was that the victim of a breach of contract can recover for loss which arose “in the usual course of things”, or were “not unlikely”, ⁷¹⁰ unless the loss was one that he should have avoided by taking reasonable steps ⁷¹¹ or one for which liability was excluded by means of a contractual term. In relation to unusual kinds of loss, liability seemed to depend on whether the defendant had been told of the potential loss in sufficient detail and with sufficient force to bring it home to him that he should take it into account. ⁷¹² Following the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* ⁷¹³ it now seems that a claimant will not recover, even for 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. It is not wholly clear whether this is an aspect of the circumstances in which the parties will be held to have “had in contemplation” unusual kinds of loss, and so part of the remoteness rule, or an additional and separate requirement. ⁷¹⁴

Previous authority on assumption of responsibility

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Before the decision in *The Achilles*, ⁷¹⁵ there had been a number of suggestions in the academic literature that the remoteness rule is best understood not as an external “default” standard to be applied when the parties have not agreed what losses they should nor should not be liable for, but as a reflection of their implied agreement as to the allocation of risks. ⁷¹⁶ Indeed in a previous edition of this work it was said that:

“... it can be said in general terms that the promisor implicitly accepts responsibility for the usual consequences of a breach of the promise in question, while the promisee implicitly accepts the risk of any other consequences.” ⁷¹⁷

Such an analysis might imply that the fact that a particular loss was not unlikely as the result of a breach might not suffice to make the contract-breaker liable were the circumstances such that it was not reasonable to suppose that the defendant was accepting responsibility for the kind of loss in question. This is particularly so when the loss was unusual. It was argued above that mere knowledge of the special circumstances is not enough for this purpose; but conversely there need not be an express or implied term of the contract to the effect that the defendant accepted responsibility. ⁷¹⁸ It is sufficient if, on the basis of his knowledge of the special circumstances, the reasonable man in the

defendant's position at the time of contracting would have understood that, by making the promise in those circumstances, he was assuming responsibility for the risk of the type of loss in question.⁷¹⁹ But in previous editions of this work, it was suggested that in relation to liability for unusual circumstances, mere knowledge that an unusual loss might well follow a breach might not always suffice. There might not be liability if either it was clear from all the circumstances either that the defendant—to the knowledge of the plaintiff—did not wish to accept the risk of the unusual loss, or that a reasonable man in the place of the defendant would not, despite his knowledge of the special circumstances, have accepted the risk of the unusual loss.⁷²⁰ The courts, however, had seemed to have applied a test based on the defendant's knowledge.⁷²¹ As a matter of general law,⁷²² the only departure from this seems to have been an unreported case in the Court of Appeal,⁷²³ which had held that mere knowledge that an unusual kind of loss might result from a breach is not enough if it would be unreasonable to impose liability for the loss or when the duty is limited. Waller L.J. held that to recover the unusual losses in issue in that case, the claimant would have to show not only that the special circumstances had been drawn to the defendant's attention but that the defendant accepted the risk.⁷²⁴ Sir Anthony Evans agreed, saying⁷²⁵:


“Even if the loss was reasonably foreseeable as a consequence of the breach of duty in question (or of contract, for the same principles apply), it may nevertheless be regarded as ‘too remote a consequence’ or as not a consequence at all, and the damages claim is disallowed. In effect, the chain of consequences is cut off as a matter of law, either because it is regarded as unreasonable to impose liability for that consequence of the breach,⁷²⁶ or because the scope of the duty is limited so as to exclude it,⁷²⁷ or because as a matter of commonsense the breach cannot be said to have caused the loss, although it may have provided the opportunity for it to occur.”⁷²⁸

There do not appear to have been other English cases applying a general rule limiting liability to what is reasonable, even for unusual losses provided that they were contemplated by the parties.⁷²⁹ In relation to losses that might occur “in the usual course of things”, in only two types of cases did there appear to be an additional limitation that the defendant must, as a matter of interpretation, be accepting responsibility for the loss. The first type of case is that of valuations provided to lenders, where in *South Australia Asset Management Corp v York Montague Ltd*⁷³⁰ it was held that a valuer who negligently undervalues the property is not liable for the full amount of the lender's loss if there is a subsequent general fall in property prices. The second type of case is of damages for disappointment and the like, when the defendant is liable only if an important purpose of the contract was to provide enjoyment or to guard against the type of loss.⁷³¹

The Achilleas

26-128

⚠ In *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*⁷³² the time-charterer of the ship was due to redeliver her by May 2, 2004 and had given notice that they would redeliver by then. The owners had then fixed the vessel for a new four to six-month hire to another charterer, under which the latest date for delivery to the new charterers was May 8. The first charterers sent the vessel on a last voyage which was expected to be completed in time but the vessel was delayed and was not redelivered until May 11. The new charterers agreed to accept her but, because freight rates had fallen, only at a reduced rate of hire. The owners claimed damages for the difference between the original rate and the reduced rate for the period of the new charter. The charterers argued that they were liable only for the difference between the market rate and the rate under the first charter for the nine days during which the owners were deprived of the use of their ship. Before the arbitrators it was conceded that it was not unlikely that late delivery would result in the loss of a following fixture. The arbitrators all accepted that the general understanding in the industry was that the charterer would be liable only for the lower amount, the difference between the original charter rate and the market rate for the period of the delay. There were a number of dicta which indicated that this would be the limit of liability, and the same thing was stated in various textbooks.⁷³³ One arbitrator concluded that therefore a reasonable person in the charterer's position would not understand that he was accepting liability for the loss of the following fixture, and that the charterers were therefore not liable for it; but

the majority held that as that loss was not unlikely, it was recoverable. On appeal, both Christopher Clarke J. ⁷³⁴ and the Court of Appeal ⁷³⁵ upheld the majority decision; but the House of Lords reversed the decision, though for differing reasons. Lord Rodger decided the case on the ground of remoteness: the loss in question was caused by a combination of the delay in redelivery and a sudden fall in market rates between the time the following fixture was made, and this combination was not sufficiently likely to bring the loss within the rule in *Hadley v Baxendale*. ⁷³⁶ Baroness Hale said that if it was correct to allow the appeal at all, as to which she continued to have doubts, it should be on this ground. ⁷³⁷ Lord Walker seems to have allowed the appeal on similar grounds, ⁷³⁸ but said ⁷³⁹ that he also agreed with the reasoning of Lords Hoffmann and Hope, which was very different. They held that it was not sufficient that a particular kind of loss was “not unlikely” if it was not reasonable to assume that the defendant had undertaken responsibility for it. ⁷⁴⁰ In the circumstances it was not reasonable to assume that the charterers were accepting responsibility for the loss of the following fixture, and so the damages were limited to the difference between the market rate and the charter rate for the period of the delay in redelivery. ⁷⁴¹ 

A majority decision?

26-129

It has been argued that because Lord Walker agreed with two completely different approaches—that of Lords Hoffmann and Hope on the one hand and that of Lord Rodger ⁷⁴² and Baroness Hale on the other—no clear ratio emerges from the case and there is no majority in favour of the “assumption of responsibility test”. ⁷⁴³ It is submitted, however, that Lord Walker was agreeing that both limitations—the remoteness test that the loss must not be of an unusual kind and the test of assumption of responsibility—apply, so that there was a majority in favour of the latter. ⁷⁴⁴

A separate rule?

26-130

It is not wholly clear whether the limitation is an aspect of the remoteness rule or a separate rule. Baroness Hale refers to it as “adding a novel dimension to the way in which the question of remoteness in damage in contract is to be answered”. ⁷⁴⁵ Lord Hope states that:

“Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable.”

This too seems to treat assumption of responsibility as just an aspect of remoteness. In contrast, Lord Hoffmann, after referring to the *South Australia* case ⁷⁴⁶ states that before considering the measure of damages:

“... one must first decide whether the loss for which compensation is sought is of a ‘kind’ or ‘type’ for which the contract breaker ought fairly to be taken to have accepted responsibility.” ⁷⁴⁷

He pointed out that the question in the *South Australia* case was the “scope of the duty”. ⁷⁴⁸ This seems to suggest a separate rule from remoteness. ⁷⁴⁹ In most cases it will make little difference whether the “assumption of responsibility” is seen as part of the remoteness rule or as separate. Possibly it may make a difference in cases of sales of goods. The Sale of Goods Act 1979 s.51(2) provides that for the buyer’s damages:

“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 “assumption of responsibility” is part of the remoteness rule,⁷⁵⁰ it might at first appear that this section would preclude its application in contracts for the sale of goods. However, s.51(2) appears to lay down only a “default rule” which may be excluded by the terms of the contract or the circumstances.⁷⁵¹ Therefore it is hard to see that it matters whether assumption of responsibility is part of remoteness or a separate rule.

A question of law, not of fact

26-131

What may cause more difficulty in practice is that application of the remoteness rule in *Hadley v Baxendale*⁷⁵² depends primarily on questions of fact: was the kind of loss in question one that was substantially likely or “not unlikely” to occur, or was the risk of an unusual loss brought home to the defendant at the time the contract was made in such a way that a reasonable person in his position would have taken it into account. In contrast, whether it was reasonable to assume that the defendant was assuming responsibility for the loss is a question of law.⁷⁵³ Lord Hoffmann treated the question as closely analogous to the rule in the *South Australia* case⁷⁵⁴ on negligent valuers, which is undoubtedly a rule of law. However, this would not be the only situation in which appellate courts have to deal with mixed questions of law and fact.⁷⁵⁵

Factors negating an assumption of responsibility

26-132

The question then is, in what circumstances will a defendant be held not to have assumed responsibility for a loss even if it was “not unusual”, or if its likelihood had been drawn to his attention at the time the contract was made. It is clear that when Lords Hoffmann and Hope in *The Achilles* held that a party will not be liable for losses that are “not unlikely” if it was not reasonable to assume that he was assuming responsibility for the loss, they considered that they were stating a rule of general application, not a special rule for charter-party contracts.⁷⁵⁶ However, it is not easy to identify what facts will lead to the conclusion that there was no assumption of responsibility. Both their Lordships emphasised two general points. One was that the amount of loss, which would be determined by the terms and length of the following fixture, was something over which the charterers had no control; the other, that at the time the contract was made, the loss was completely unpredictable.⁷⁵⁷ (The following fixture was made only shortly before the end of the charter.) Lord Hoffmann also emphasised more particular facts: that (as the arbitrators had found) the general understanding in the shipping market was that liability was restricted to the difference between the market rate and the charter rate for the overrun period,⁷⁵⁸ and that there had been a “uniform series of dicta” to the same effect.⁷⁵⁹ This might suggest that the effect of *The Achilles* will be limited to cases in which there is a similar kind of understanding. He also pointed out that the owners might have avoided loss of the following fixture by refusing to undertake the last voyage.

“If it was clear to the owners that the last voyage was bound to overrun and put the following fixture at risk, it was open to them to refuse to undertake it.”⁷⁶⁰

Although Lord Hoffmann does not say so, the owners might also refuse the last voyage even if it were not illegitimate. This would of course render them liable in damages to the charterer for lost freight, or the cost of arranging another ship, but it would prevent risk to the following fixture. Lord Hope, in contrast, does not refer to these peculiar features of the case. Rather he seems to suggest that it may be unreasonable to assume that a party accepts responsibility for even a loss which is of a kind that is “not unlikely”, if the fact that it is not quantifiable will make it hard for the party to price the risk adequately.⁷⁶¹ The case is thus open to the interpretation that it lays down a rule that may be applied

in any case in which it will be difficult for a party to predict the amount of loss.⁷⁶²

Evaluation

26-133

There may possibly be cases in which a simple application of the remoteness rule, so making the party in breach liable for any loss that was “not unlikely”, will produce inappropriate results, for example by imposing a liability that is disproportionate to the value of the contract or, as in *The Achilleas*, that is simply hard to quantify.⁷⁶³ It is submitted, however, that this will rarely be the case. In *The Heron II*, Lord Reid explained that the rules of remoteness in tort and in contract are different because in contract cases the parties have the opportunity to direct the other party’s attention to unusual risks.⁷⁶⁴ The implication is that if the party has been told of an unusual loss that might result were he to break the contract, he can safeguard his position. Either he can take extra precautions to avoid breach (and charge an appropriately increased price) or he can insist on a clause excluding or restricting his liability. In most cases, therefore, there is no need for the courts to provide additional protection by holding that it was not reasonable to think that the party was assuming responsibility. Contractual liability is of course based on express or implied agreement, and it is argued that the reason a party who has broken the contract should be held liable for losses that were not unusual, or which he had brought home to him might occur, is that (unless it is agreed otherwise) he can be taken to have agreed to compensate them. But it does not follow that liability for likely losses should be limited by a vague criterion such as “assumption of responsibility”. Rather it is submitted that it is better to have a simple rule that the party in breach is liable for all losses that are sufficiently likely to occur in the usual case, or whose likelihood has been brought home to him when the contract was made, unless he has validly excluded or restricted his liability.⁷⁶⁵ It has been cogently argued that there are limits to the extent that it is feasible to determine all issues by reference to an assumption of responsibility. In relation to the extent of liability for losses suffered by the innocent party as the result of a breach, there will seldom be any “factual foundation for making a determination as to whether the defendant implicitly assumed responsibility for the risk in question”.⁷⁶⁶ It is thus to be hoped that the approach adopted by the majority in *The Achilleas* will be applied by the courts only in exceptional circumstances, such as those emphasised by Lord Hoffmann in that case; and this seems to be the trend of the subsequent authorities.⁷⁶⁷

Assumption of responsibility for unlikely losses

26-134

It was submitted earlier that even before *The Achilleas*, it must have been the case that loss which must have been contemplated will not be too remote even if the chance of it occurring was very low.⁷⁶⁸ In *Supershield Ltd v Siemens Building Technologies FE Ltd*⁷⁶⁹ this was explained in terms of assumption of responsibility having “an inclusionary effect”:

“If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances.”

⁶⁰⁴. The term “remoteness of damage” has been distinguished from the term “measure of damages” (or “quantification”), the former referring to the rules as to which types of consequences or losses may be compensated, the latter to the method of assessing in money the compensation for a particular consequence or loss which has been held to be not too remote. In *Wroth v Tyler* [1974] Ch. 30, 60–62 (below, para.26-116) it was held that the parties need not have contemplated the quantum of damage; see also *Vacwell Engineering Co Ltd v B.D.H. Chemicals Ltd* [1971] Q.B. 88, 110; *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978]

Q.B. 791, 805, 813. It seems that in principle the distinction is between the type or kind of loss (see below, para.26-116) and its amount or the precise way in which it occurred, but we will see that in contract cases the courts have sometimes drawn narrow distinctions between different types of loss of profit (e.g. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, see below, para.26-114) and different ways in which loss of profit might have occurred (e.g. the speeches of Lord Rodger, Lord Walker and Baroness Hale in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61, see below, para.26-128). The distinction between remoteness and quantum is also drawn for the purposes of conflicts of laws: Cheshire and North, *Private International Law*, 5th edn, pp.708–712 (approved in *D’Almeida Araujo v Becker* [1953] 2 Q.B. 329; see now 14th edition by Cheshire, North and Fawcett, pp.96–97). This distinction has not always found favour with the courts in a domestic case: see *Handel (NV) My. J. Smits Import-Export v English Exporters Ltd* [1955] 2 Lloyd’s Rep. 69, 72; affirmed at 317; *Boys v Chaplin* [1968] 2 Q.B. 1, 31; but the distinction has been accepted in a conflict of laws problem: *Boys v Chaplin* [1971] A.C. 356, 378–379, 382–383, 392–393, 394. In *Harding v Wealands* [2006] UKHL 32, [2007] 2 A.C. 1 the assessment of damages in a tort case was held to be a matter of procedure governed by the *lex fori*.

709.

! “Where a loss is identified as occurring in the ordinary course of things, there is no basis, as far as remoteness is concerned, for imposing any further limit to its recovery”: Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 20–098 and 20–106, compare 13th edn (2011), para.20-099. See also Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (2004), 95–96.

710.

See above, para.26-118.

711.

The “mitigation” rule: see below, paras 26-079 et seq.

712.

See above, para.26-125.

713.

[2008] UKHL 48, [2009] 1 A.C. 61.

714.

Though Baroness Hale (at [93]) describes the majority decision in *The Achilles* as “adding a novel dimension to the way in which the question of remoteness in damage in contract is to be answered”. See further below, para.26-130.

715.

Transfield Shipping Inc v Mercator Shipping Inc (The Achilles) [2008] UKHL 48, [2009] 1 A.C. 61.

716.

See e.g. Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002), 90; Kramer, “An agreement-centered approach to remoteness and contract damages” in McKendrick and Cohen, *Comparative Remedies for Breach of Contract* (2005). The literature is helpfully surveyed in Robertson (2008) 28 Legal Studies 172.

717.

Chitty on Contracts, 29th edn (2004), para.26–044.

718.

See above, paras 26-122–26-125.

719.

See above, paras 26-125.

720.

29th edn, para.26-055; see now above, para.26-125. cf. *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1448.

721.

See Robertson (2008) 28 Legal Studies 172, 183-188.

722.


Compare the cases on negligent valuations for lenders, below, para.26-168.

723.

Mulvenna v Royal Bank of Scotland [2003] EWCA Civ 1112.

724.

At [26].

- [725.](#) At [33] (footnotes as in the original).
- [726.](#) *The Pegase* [1981] 1 Lloyd's Rep. 175 Robert Goff J.
- [727.](#) *Banque Bruxelles SA v Eagle Star [the South Australia case]* [1997] A.C. 191.
- [728.](#) *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360.
- [729.](#) See Robertson (2008) 28 Legal Studies 172, 183–188.
- [730.](#) [1997] A.C. 191; see below, para.26-168.
- [731.](#) See below, paras 26-140 et seq.
- [732.](#) [2008] UKHL 48, [2009] 1 A.C. 61 (noted at (2009) 125 L.Q.R. 6 (Peel) and 408 (Kramer)). Compare *Pindell Ltd v AirAsia Berhad (formerly AirAsia SDN BHD)* [2010] EWHC 2516 (Comm) (above, para.26-111 n.567): leased aircraft redelivered late and lessor lost contract to sell the aircraft; held, loss not sufficiently likely but in any event not a type of loss for which lessees assumed responsibility (at [87]).
- [733.](#) Examples of the authorities are listed in the speech of Lord Hoffmann at [10].
- [734.](#) [2006] EWHC 3030 (Comm), [2007] 1 Lloyd's Rep. 19.
- [735.](#) [2007] EWCA Civ 901, [2007] 2 Lloyd's Rep. 555.
- [736.](#) (1854) 9 Exch. 341 (above, para.26-109).
- [737.](#) At [93].
- [738.](#) At [83].
- [739.](#) At [87].
- [740.](#) Lord Hoffmann at [21]; Lord Hope at [30].
- [741.](#)  An award of damages for loss beyond the end date of the broken charter was upheld in *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV (The MTM Hong Kong)* [2015] EWHC 2505 (Comm). It appears that no argument on assumption of responsibility had been put to the arbitrators: at [72].
- [742.](#) It should be noted that Lord Rodger did not reject the assumption of responsibility approach; he said merely that he had not found it necessary to explore it (at [63]).
- [743.](#) McGregor on Damages, 19th edn (2014), paras 8-171—8-172 (recognising that the case has been examined and adhered to in the Court of Appeal as well as several first instance decisions). In *ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep. 293 Flaux J. considered that if Lord Hoffmann intended to lay down a new test for the recoverability of damages in contract, he was in a minority (at [17]-[18]). The judge held that even though the arbitrators had not considered *The Achilleas*, their decision was not obviously wrong.
- [744.](#) In *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep. 81 Hamblen J. similarly decided that the arbitrators had not erred in law. He accepted that the majority in *The Achilleas* had supported the rationale of assumption of responsibility (at [39]) but held that assumption of responsibility would be relevant only in exceptional cases, see below, para.26-133.
- [745.](#) At [93].

- [746.](#) *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191, below, para.26-168.
- [747.](#) [2008] UKHL 48 at [15].
- [748.](#) [2008] UKHL 48 at [15], quoting [1997] A.C. 191 at 212.
- [749.](#) In *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep. 81 Hamblen J. said "the decision in *The Achilleas* results in an amalgam of the orthodox and the broader approach" (at [40]).
- [750.](#) In *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349, at [43], the Court of Appeal described assumption of responsibility as a "rationalisation" of the rule in *Hadley v Baxendale*.
- [751.](#) The previous edition of this work (30th edition, para.26-100F) had suggested a different view, which is now thought to be incorrect.
- [752.](#) (1854) 9 Exch. 341 (above, para.26-109).
- [753.](#) Lord Hoffmann in *The Achilleas* [2008] UKHL 48 at [25]; and see Baroness Hale at [93].
- [754.](#) *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191; see above, para.26-127 and below, para.26-168.
- [755.](#) See Halsbury's Laws of England, 5th edn (2009), Vol.II, para.1657.
- [756.](#) Lord Hope at [36].
- [757.](#) Lord Hoffmann at [24]; Lord Hope at [34].
- [758.](#) At [6].
- [759.](#) At [10].
- [760.](#) At [23].
- [761.](#) At [36].
- [762.](#) In *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] B.L.R. 126 the court held that an engineer whose delay had held back completion of a housing development was liable for loss caused by a fall in property prices, even though the decline was outside the defendant's control and the amount of loss was high compared to the fee charged. The court made the point that the change in the market took place over a long period, compared to the sudden drop that had occurred in *The Achilleas* (at [27] and [33]). However Tomlinson L.J. suggested that it may not be right to treat the consequences of extremely volatile market conditions as axiomatically irrecoverable: at [34].
- [763.](#) Possible cases for such limitations are explored in Robertson (2008) Legal Studies 172, 191-195.
- [764.](#) [1969] 1 A.C. 350, 386.
- [765.](#) cf. *Rubenstein v HSBC Bank Plc* [2012] EWCA Civ 1184, [2012] 2 C.L.C. 747 at [123] (Rix L.J.); *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] B.L.R. 126 at [24], see below, n.692.
- [766.](#) Robertson (2008) 28 Legal Studies 172, 196. The author suggests that if limits on liability are needed, other mechanisms might be used: at 191–193. For reasons given above, it is submitted that they will seldom if ever be needed.

[767.](#) In *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep. 81 Hamblen J. held that assumption of responsibility would be relevant only in exceptional cases and quoted the last 19 lines of this paragraph in the previous edition with apparent approval. On the facts (loss of a sub-charter when the owners were late in delivering the vessel) the loss was not "unquantifiable, unpredictable, uncontrollable or disproportionate" (at [73]). See also *Supershiel Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349 ("Hadley v Baxendale remains a standard rule but ... there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties" (at [43])). See also *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [48]; *Pindell Ltd v AirAsia Berhad (formerly AirAsia SDN BHD)* [2010] EWHC 2516 (Comm) at [84]; *Saipol SA v Inerco Trade SA* [2014] EWHC 2211 (Comm), [2015] 1 Lloyd's Rep. 26 at [17]. (In the *AirAsia Berhad* case Tomlinson J. would have been prepared to find that was not a type of loss for which the lessees assumed responsibility ([2010] EWHC 2516 (Comm) at [87]); but the ground for his decision was that it was not sufficiently likely that a 20-year-old aircraft would be sold on terms that gave such a short window for delivery for the lessees to be liable for loss of the sale (at [86])) In *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] B.L.R. 126 at [24], Sir David Keene said that he agreed with Toulson L.J.'s statement in *Supershiel* quoted above but would put it in different words: "If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to determine the answer. Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability."

[768.](#) See above, para.26-120.

[769.](#) [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. 349 at [43].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 26 - Damages

Section 7. - Remoteness of Damage and Assumption of Responsibility ⁶⁰⁴

(d) - Illustrations of Remoteness and Responsibility: Loss of Profits

Seller's liability for loss of profits

26-135

The general principles of remoteness of damage in contract, as qualified by the notion of assumption of responsibility described above, may be illustrated by cases where the claimant has claimed for loss of profits as a result ⁷⁷⁰ of the defendant's breach of contract. ⁷⁷¹ A frequent instance is the delayed delivery of a profit-earning chattel. ⁷⁷² In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* ⁷⁷³ the plaintiffs agreed to buy a large boiler from the defendants, and a date was fixed for delivery. The plaintiffs sued for damages for delay in delivery, and claimed loss of profits in respect of:

(1)

the large number of new customers they could have taken on had the boiler been installed; and

(2)

the amount which they could have earned under special dyeing contracts with the Ministry of Supply.

The defendants knew that the plaintiffs were launderers and that they wanted the boiler for immediate use; the Court of Appeal held that with such knowledge the reasonable man could have foreseen that delay in delivery would lead to some loss of profits, though he would not have foreseen the loss of profits under the special contracts with the Ministry, since these were special circumstances not within the defendant's actual knowledge. ⁷⁷⁴ Hence the plaintiff could not recover all of the actual loss of profits which he had incurred under these contracts, but only the normal loss of business in respect of laundering and dyeing contracts to be reasonably expected. ⁷⁷⁵ (It may be noted that the normal level of profit operated as a cap on the amount that could be recovered. ⁷⁷⁶) Other cases support the principle that loss of profits may be awarded where there has been delayed delivery by a seller of a profit-earning chattel where it was within his reasonable contemplation that the buyer would use it to make profits ⁷⁷⁷; or would have resold it at a profit ⁷⁷⁸; or where the profit-earning chattel which was delivered was defective. ⁷⁷⁹ However, these cases must now be read in the light of the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* ⁷⁸⁰ that a claimant will not recover even losses that were not unlikely to occur in the usual course of things if the defendant cannot reasonably be regarded as assuming responsibility for losses of the particular kind suffered. ⁷⁸¹

Purchaser's intended use of land

26-136

In a contract to sell land or a leasehold interest in land, “special circumstances are necessary to justify imputing to [the] vendor a knowledge that the purchaser intends to use it in any particular manner” so as to entitle the purchaser to recover damages for loss of the profit he would have made from that use. ⁷⁸²

Carrier's liability for loss of profits

26-137

A carrier who fails to deliver goods within the agreed time may also cause loss of business profits to the consignee. ⁷⁸³ The normal measure of damages for delayed delivery is the difference between the market value of the goods on the due date of arrival and their market value on the actual date of delivery. ⁷⁸⁴ But:

“... a carrier commonly knows less than a seller about the purposes for which the buyer or consignee needs the goods, or about other ‘special circumstances’ which may cause exceptional loss if due delivery is withheld.” ⁷⁸⁵

The amount of knowledge imputed to a carrier will therefore be limited in the usual case, and the consignee will be obliged to prove the carrier's actual knowledge of the special circumstances so as to show that the carrier must be taken as a reasonable man to have accepted the risk of unusual loss resulting from breach. In most reported cases, therefore, the carrier has escaped liability for the plaintiff's loss of profits because he lacked sufficient knowledge. ⁷⁸⁶ However, the carrier may be liable where it is shown that, at the time of contracting, he knew of the facts which would lead to special loss if he failed to deliver or was late in delivering, ⁷⁸⁷ e.g. where the carrier knew that no substitutes would be available in the market at the place fixed for delivery, he may be liable for loss of “reasonable” resale profits suffered by the consignee. ⁷⁸⁸ However, liability in such cases may be limited by the recent decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* ⁷⁸⁹ that a claimant will not recover even losses that were not unlikely to occur in the usual course of things if the defendant cannot reasonably be regarded as assuming responsibility for losses of the particular kind suffered. ⁷⁹⁰

Loss of future business

26-138

Subject to the rules on causation and remoteness, the contract-breaker may be liable for the claimant's loss of future profits from “repeat orders” from his previous customers which loss was caused by the particular breach of contract. ⁷⁹¹ When loss of future profits is not too remote, the period of time for which the loss should be assessed is until the question whether any loss has been sustained has become “too speculative to permit the making of any award”. ⁷⁹²

^{604.} The term “remoteness of damage” has been distinguished from the term “measure of damages” (or “quantification”), the former referring to the rules as to which types of consequences or losses may be compensated, the latter to the method of assessing in money the compensation for a particular consequence or loss which has been held to be not too remote. In *Wroth v Tyler* [1974] Ch. 30, 60–62 (below, para.26-116) it was held that the parties need not have contemplated the quantum of damage; see also *Vacwell Engineering Co Ltd v B.D.H. Chemicals Ltd* [1971] Q.B. 88, 110; *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 805, 813. It seems that in principle the distinction is between the type or kind of loss (see below, para.26-116) and its amount or the precise way in which it occurred, but we will see

that in contract cases the courts have sometimes drawn narrow distinctions between different types of loss of profit (e.g. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, see below, para.26-114) and different ways in which loss of profit might have occurred (e.g. the speeches of Lord Rodger, Lord Walker and Baroness Hale in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61, see below, para.26-128). The distinction between remoteness and quantum is also drawn for the purposes of conflicts of laws: Cheshire and North, *Private International Law*, 5th edn, pp.708–712 (approved in *D’Almeida Araujo v Becker* [1953] 2 Q.B. 329; see now 14th edition by Cheshire, North and Fawcett, pp.96–97). This distinction has not always found favour with the courts in a domestic case: see *Handel (NV) My. J. Smits Import-Export v English Exporters Ltd* [1955] 2 Lloyd’s Rep. 69, 72; affirmed at 317; *Boys v Chaplin* [1968] 2 Q.B. 1, 31; but the distinction has been accepted in a conflict of laws problem: *Boys v Chaplin* [1971] A.C. 356, 378–379, 382–383, 392–393, 394. In *Harding v Wealands* [2006] UKHL 32, [2007] 2 A.C. 1 the assessment of damages in a tort case was held to be a matter of procedure governed by the *lex fori*.

- [770.](#) On the question of evaluating contingencies affecting the chance of making a profit, see above, paras 26-069—26-073.
- [771.](#) In *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 802–803, Denning M.R. said that in the test for remoteness of damage in contract there is a distinction between loss of profit (or only economic loss) cases, and physical damage (or expense) cases; but this distinction was not accepted by the other members of the Court of Appeal, and lacks supporting authority: see, per Orr L.J. at 804–805; and, per Scarman L.J. at 805–806.
- [772.](#) *Hadley v Baxendale* (1854) 9 Ex. 341 (above, para.26-109); *Fletcher v Tayleur* (1855) 17 C.B. 21; *Wilson v General Iron Screw Colliery Co Ltd* (1877) 47 L.J.Q.B. 239; *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 Q.B.D. 670; *Saint Lines Ltd v Richardsons Westgarth & Co* [1940] 2 K.B. 99; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528.
- [773.](#) Above. See Vol.II, para.44-408.
- [774.](#) See above, para.26-122. See *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd’s Rep. 418, 438–439.
- [775.](#) 700 If the defendant had been told of the special contracts, and should have realised, as a reasonable man, that he was undertaking responsibility for the loss of higher-than-usual profits in the case of breach, he would have been able to demand a higher price, or to cover himself with an exemption.
- [776.](#) See above, para.26-117.
- [777.](#) *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1868) L.R. 3 Q.B. 181. cf. *Re Trent and Humber Co* (1868) L.R. 4 Ch. App. 112 (delay by a repairer); *Steam Herring Fleet v Richards* (1901) 17 T.L.R. 731.
- [778.](#) See Vol.II, paras 44-400—44-405, 44-415, 44-424.
- [779.](#) *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co* [1978] Q.B. 791, 810, 813; Vol.II, para.44-429. (Loss of “repeat orders” from the buyer’s disappointed customers may also be recovered: see Vol.II, para.44-425.)
- [780.](#) [2008] UKHL 48, [2009] 1 A.C. 61.
- [781.](#) See above, paras 26-126 et seq.
- [782.](#) *Diamond v Campbell-Jones* [1961] Ch. 22; *Cottrill v Steyning and Littlehampton Building Society* [1966] 1 W.L.R. 753; *Malhotra v Choudhury* [1980] Ch. 52. See below, paras

26-165—26-166. cf. *Wright v Dean* [1948] Ch. 687; *G. & K. Ladenbau (UK) Ltd v Crawley & De Reya* [1978] 1 W.L.R. 266 (solicitors who were negligent in checking title, which delayed completion, held liable for interest for delayed receipt of profits on a resale within their reasonable contemplation).

- [783.](#) On damages for delay in the carriage of passengers, see Vol.II, para.36-066.
- [784.](#) e.g. *Koufos v C. Czarnikow Ltd, The Heron II* [1969] 1 A.C. 350; see below, para.26-163. On special conditions of carriage, see Vol.II, Ch.36.
- [785.](#) *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 537. See also *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1049, where Devlin J. expressed the view that knowledge of a sub-contract would be more easily imputed to a seller than to a carrier; *André et Cie SA v J. H. Vantol* [1952] 2 Lloyd's Rep. 282.
- [786.](#) *Hadley v Baxendale* (1854) 9 Ex. 341; *Gee v Lancs & Yorks Ry* (1860) 6 H. & N. 211; *British Columbia, etc., Saw Mill Co Ltd v Nettleship* (1868) L.R. 3 C.P. 499; *Horne v Midland Ry* (1873) L.R. 8 C.P. 131. But the fact that loss of profit under a special contract with a third party is not recoverable, does not prevent the carrier being liable for some damages for delay: *B. Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 K.B. 740 (interest awarded on the value of the goods for the period of the delay).
- [787.](#) *Simpson v L.N.W. Ry* (1876) 1 Q.B.D. 274; *Jameson v Midland Ry* (1884) 50 L.T. 426; *Monte Video Gas and Dry Dock Co Ltd v Clan Line Steamers Ltd* (1921) 37 T.L.R. 866; *S.S. Ardennes (Cargo Owners) v S.S. Ardennes (Owners)* [1951] 1 K.B. 55 (loss of market); *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep. 175. See also *Schulze & Co v G.E. Ry* (1887) 19 Q.B.D. 30; cf. *Ströms Bruks Aktiebolag v John & Peter Hutchison* [1905] A.C. 515.
- [788.](#) *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep. 175.
- [789.](#) [2008] UKHL 48, [2009] 1 A.C. 61.
- [790.](#) See above, paras 26-126 et seq.
- [791.](#) *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 (breach of obligation to maintain confidence). See above, para.26-071; and Vol.II, paras 44-403, 44-425.
- [792.](#) *Jackson v Bank of Scotland* [2005] UKHL 3 at [37].

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Section 8. - Particular Restrictions on Recovery of Damages

Introduction

26-139

Earlier it was pointed out that in a number of cases there are particular restrictions on the recovery of damages. The liability of a valuer for a negligent over-valuation has arisen so far only in connection with land and will be dealt with in the next section, ⁷⁹³ while damages for loss of interest will be treated along with the right to interest on late payments in Section 12. We deal here with damages for non-pecuniary losses such as distress, disappointment or loss of amenity caused by a breach of contract and with damages for legal costs.

⁷⁹³. See below, para.26-168.

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(a) - Non-pecuniary Losses

Non-pecuniary loss in general

26-140

Normally, damages for breach of contract relate to financial loss (including loss of expected financial gains), and in contract no damages will be awarded for injury to the claimant's feelings, or for his mental distress, anguish, annoyance, loss of reputation ⁷⁹⁴ or social discredit caused by the breach of contract ⁷⁹⁵; as where an employee is wrongfully dismissed in a humiliating manner. ⁷⁹⁶ This remains the general principle ⁷⁹⁷: even where it is not unlikely that a breach of an ordinary commercial contract may cause foreseeable anguish and vexation to the claimant, no damages are recoverable for that type of loss. ⁷⁹⁸ However, there is no general rule that only pecuniary losses are recoverable and there are now qualifications even to the principle that damages will not be awarded for disappointment or vexation, so that in quite a number of situations non-pecuniary losses of various kinds may be recovered provided if they were within the contemplation of the parties as not unlikely to result from the breach. The qualifications are explained in the paragraphs that follow.

Pain and suffering, loss of amenity


26-141

If the defendant's breach of contract caused physical injury to the claimant himself, ⁷⁹⁹ or to his property, ⁸⁰⁰ the claimant may recover damages for that injury, provided the test for remoteness is satisfied, in the same way as in an action in tort. Damages for personal injury caused by breach of contract may include compensation for pain and suffering and loss of amenity, as well as loss of earnings, which are normal heads of damages in the assessment of damages in tort for such injuries. ⁸⁰¹ If the remoteness test is satisfied, the claimant's damages for breach of contract may include compensation for loss incurred through the death of a human being, as, e.g. for loss of his wife's services, where the cause of action was independent of the death and the death was merely an item of damage. ⁸⁰²

Inconvenience and discomfort



26-142

⚠ Where the breach of contract causes the claimant physical inconvenience or discomfort, he may recover damages, ⁸⁰³ as where the claimant suffered physical inconvenience and discomfort as the result of living in a defective house, or of vacating rooms while repairs were carried out. ⁸⁰⁴ But the quantum of such damages should be "modest". ⁸⁰⁵ and the Court of Appeal has held that distress and inconvenience caused by disrepair are not freestanding heads of claim, but are symptomatic of interference with the lessee's enjoyment of the premises. ⁸⁰⁶ ⚠ It follows that care should be taken to

ensure that any award for distress and inconvenience does not overlap with an award of loss of the market rental value of the property. ⁸⁰⁷ 

Nervous shock

26-143

 Damages may also be awarded for nervous shock or an anxiety state (an actual breakdown in health) suffered by the claimant, if that was, at the time the contract was made, ⁸⁰⁸ within the contemplation of the parties as a not unlikely consequence of the breach of contract. ⁸⁰⁹ 

Mental distress and disappointment ⁸¹⁰

26-144


As stated above, damages are not as a general rule recoverable for distress or disappointment caused by a breach of contract, even if such consequences were within the contemplation of the parties. However, an exception applies in the enjoyment or “holiday” cases ⁸¹¹: in the case of a failure, in breach of contract, to provide a holiday of the advertised standard or some other form of entertainment or enjoyment, damages may be awarded for the disappointment and mental distress caused by the breach of contract. ⁸¹² The “loss of amenity” recognised by the House of Lords ⁸¹³ may also be viewed as an extension of the “loss of enjoyment” category. A further exception arises where the purpose of the contract was to protect the claimant from annoyance or distress, e.g. where a woman employed solicitors to protect her from being molested by a former friend, who was causing her mental distress; the damages for the solicitors’ failure to obtain protection for her included a sum for the foreseeable annoyance and mental distress which she continued to suffer as a result of their breach of contract. ⁸¹⁴ Damages for breach of contract may be awarded to a mother for the mental distress caused by the loss of the company of her child. ⁸¹⁵

Loss of amenity

26-145

In *Ruxley Electronics and Construction Ltd v Forsyth* ⁸¹⁶ the House of Lords accepted that damages may be awarded for the “loss of amenity” suffered by the claimant where the purpose of the contract was to give him a subjective, even idiosyncratic pleasure or amenity. The defendant, in breach of contract, built a swimming pool whose depth was only six feet in the diving area, instead of the specified seven feet six inches. Despite evidence that a depth of six feet was perfectly safe for diving, and that the market value of the property was not adversely affected by the breach, the Court of Appeal ⁸¹⁷ had allowed the full cost of re-building the pool. Their Lordships reversed this decision ⁸¹⁸ and appeared to support the trial judge’s award (not appealed) of £2,500 as substantial damages for “loss of amenity” because the purpose of the contract was “the provision of a pleasurable amenity”. Two Lords agreed with Lord Mustill’s speech: he upheld the award as representing the loss of the “consumer surplus”, the personal, subjective gain which the claimant expected to receive from full performance—an advantage not measured by any increase in the market value of his property. ⁸¹⁹

26-146

 The House of Lords again used the “loss of amenity” concept to award damages in *Farley v Skinner* ⁸²⁰ where the potential purchaser specifically asked his surveyor whether the property would be seriously affected by aircraft noise. A paragraph in the survey report said it was unlikely that the property would suffer greatly from such noise. In fact, it was close to a navigation beacon around which aircraft could be “stacked” on a spiral course at busy times at the nearby airport. The House of Lords held that it was sufficient for the award of damages that an important object of the contract was to give pleasure, relaxation or peace of mind—it need not be the sole or principal purpose of the

contract to justify the award of damages for “loss of amenity” when the surveyor had failed to exercise reasonable care in making the report on noise. An award of £10,000 damages was upheld, even though the market value of the property, after taking account of the noise, was not less than the price paid by the purchaser. ⁸²¹ **!** It should be noted that the defendant make a specific statement about the amenity in response to a specific inquiry by the claimant. ⁸²²

Employment cases

26-147

! In cases of employment the employer may be in breach of one or both of two duties, the common law duty of care and the implied duty of trust and confidence. As a result, the employee may suffer a loss of reputation, or distress and injured feelings, or may develop a recognised psychiatric illness. Damages for loss of reputation are considered in the next paragraph. The employee will not normally be able to recover damages for distress and injury to feelings. ⁸²³ Damages for a recognisable psychiatric illness are treated differently. ⁸²⁴ In *Yapp v Foreign and Commonwealth Office* ⁸²⁵ the Court of Appeal considered a number of authorities and summarised their effect as follows. In claims for breach of the common law duty of care it is immaterial that the duty arises in contract as well as tort: they are in substance treated as covered by tortious rules (i.e. that the kind of loss must have been

foreseeable). ⁸²⁶ **!** Each case must turn on its own facts, ⁸²⁷ **!** but psychiatric injury will not usually be foreseeable unless there were indications, of which the employer was or should have been aware, of some problem or psychological vulnerability on the part of the employee. ⁸²⁸ This applies both to cases on which the illness has been caused by over-work ⁸²⁹ and cases where the employer has committed a one-off act of unfairness such as the imposition of a disciplinary sanction. ⁸³⁰ If however psychiatric injury was reasonably foreseeable, no issue as to remoteness can arise when such injury eventuates. With claims for breach of the implied duty of trust and confidence or of any other express contractual term, the contractual test of remoteness (that the loss was “not unlikely” ⁸³¹) will be applicable. ⁸³²

Loss of reputation

26-148

! Damages for loss of reputation as such are not normally awarded for breach of contract, since protection of reputation is the role of the tort of defamation. However, where the breach of contract causes a loss of reputation which in turn causes foreseeable financial loss to the claimant, he may recover damages for that financial loss: in *Malik*’s case, ⁸³³ the House of Lords held that where, by conducting a dishonest and corrupt business, the employer had broken his obligation to his employee (under the implied “trust and confidence” term ⁸³⁴) the employee could recover damages for the financial loss suffered by him where his future employment prospects were prejudiced by the stigma of his former employment. ⁸³⁵ **!** But in *Johnson v Unisys Ltd* ⁸³⁶ the House of Lords held that, in the light of the statutory scheme providing compensation for unfair dismissal, the common law should not construct a remedy of damages for the unfair manner of the dismissal. The claimant had recovered the maximum statutory compensation in the industrial tribunal, but later claimed, on the basis of the “trust and confidence” implied term, that the manner of his dismissal had caused his mental breakdown. This case has later been distinguished by the House of Lords, which held that an employee may have a common law claim for financial loss where his employer has acted unfairly towards him prior to, and independently of, his subsequent unfair dismissal. ⁸³⁷ However, it should be noted that in another case the House of Lords held that in his unfair dismissal claim an employee cannot recover compensation for non-economic or non-pecuniary loss, such as distress, humiliation or loss of reputation. ⁸³⁸

26-149

Another line of authority covers cases where the contract gave an opportunity to the claimant to

enhance his reputation as an author ⁸³⁹ or an actor ⁸⁴⁰: damages may be awarded for loss flowing from a failure to provide promised publicity, which loss may include loss to existing reputation. ⁸⁴¹ Subject to remoteness, damages are recoverable where the breach of contract causes loss of commercial reputation involving loss of trade. ⁸⁴²

^{794.} See below, para.26-148.

^{795.} *Addis v Gramophone Co Ltd* [1909] A.C. 488 (as interpreted by *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20). See also *Hamlin v G.N. Ry* [1856] 1 H. & N. 408; *Groom v Crocker* [1939] 1 K.B. 194; *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All E.R. 393 (loss of co-operation of advertisers); *Bailey v Bullock* [1950] 2 All E.R. 1167 (no damages for “annoyance or mental distress”); *Last-Harris v Thompson Bros* [1956] N.Z.L.R. 995; *Hayes v Dodd* [1990] 2 All E.R. 815 CA; *Watts v Morrow* [1991] 1 W.L.R. 1421 CA. Nor are damages recoverable for loss of the society of one’s spouse or child; cf. *Jackson v Watson* [1909] 2 K.B. 193.

^{796.} *Addis v Gramophone Co Ltd* [1909] A.C. 488. The House of Lords later said that “damages for breach of contract may only be awarded for breach of contract, and not for loss caused by the manner of the breach”: *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20, at 51 (per Lord Steyn, interpreting *Addis v Gramophone Co*). In *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503, Lord Nicholls said (at [11]) that if the facts of *Addis* occurred today, the claimant would have a remedy at common law for breach of contract: see para.26-148, below. See also *Bliss v S.E. Thames Regional Health Authority* [1987] I.C.R. 700; *French v Barclays Bank Plc* [1998] I.R.L.R. 646 CA. But cf. the damages when a master wrongfully terminates a contract of apprenticeship: Vol.II, para.40–203. On damages for wrongful, or unfair dismissal, see below, paras 40-200 et seq., paras 40-241 et seq.

^{797.} The House of Lords in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 maintained the *Addis* principle, while accepting the exceptions set out here. The House held that the principle should not be restricted by further “inroads” (cf. at 50 where Lord Cooke of Thorndon doubts the permanence of *Addis* in English law). See also *Johnson v Unisys* [2001] UKHL 13, [2003] 1 A.C. 518 (in particular, per Lord Steyn, at 1082 et seq.); *Farley v Skinner* [2001] UKHL 49, [2002] 2 A.C. 732. On *Johnson v Unisys*, see para.26-148 below.

^{798.} *Hayes v Dodd* [1990] 2 All E.R. 815 CA.




^{799.} *Wren v Holt* [1903] 1 K.B. 610 (defective food sold for human consumption); *Grant v Australian Knitting Mills Ltd* [1936] A.C. 85 (buyer of defective clothing contracted dermatitis); *Summers v Salford Corp* [1943] A.C. 283; *Godley v Perry* [1960] 1 W.L.R. 9.

^{800.} *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31; *Harbutt’s “Plasticine” Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 Q.B. 447 (the decision has been overruled on another point: *Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827); *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791. See also the cases on repair and reinstatement, above, para.26-036.

^{801.} Often there may be concurrent liability in tort for the personal injury or death, but there may be advantages in suing for breach of contract, e.g. in not having to prove the defendant’s negligence.

^{802.} *Jackson v Watson* [1909] 2 K.B. 193. See also *Priest v Last* [1903] 2 K.B. 148.

^{803.} *Burton v Pinkerton* (1867) L.R. 2 Ex. 340, 349–351; *Hobbs v L.S.W. Ry* (1875) L.R. 10 Q.B. 111; *Bailey v Bullock* [1950] 2 All E.R. 1167; *Stedman v Swan’s Tours* (1951) 95 S.J. 727; cf. below, para.26–144. cf. also *Farley v Skinner* [2001] UKHL 49, [2002] 2 A.C. 732 (a serious level of aircraft noise may cause physical inconvenience and discomfort: at [30]–[36], [57]–[60], [85]–[88], [108]. cf. below, paras 26-145—26-148).

- [804.](#) *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297 CA; *Calabar Properties Ltd v Stitcher* [1984] 1 W.L.R. 287; *Watts v Morrow* [1991] 1 W.L.R. 1421, 1439–1443, 1445–1446 CA; *Haysman v Mrs Rogers Films Ltd* [2008] EWHC 2494 (QB) at [29]. Damages may also cover the plaintiff's "mental suffering" directly related to the physical inconvenience: *Watts v Morrow* [1991] 1 W.L.R. 1421, 1445; *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const. L.J. 709 at [326] (Ramsey J.) (affirmed [2012] EWCA Civ 1811).
- [805.](#) *Watts v Morrow* [1991] 1 W.L.R. 1421 (the judge's award of £4,000 was reduced by the Court of Appeal to £750: at 1443, 1445). See also Franklin (1988) 4 Const. L.J. 264.
- [806.](#)  *Earle v Charalambous* [2006] EWCA Civ 1090, [2007] H.L.R. 8 at [32], applied in *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252, [2016] H.L.R. 6 at [31].
- [807.](#)  See *Wallace v Manchester City Council* (1998) 30 H.L.R. 1111, 1121. On recovery of the market rental value see above, para.26-041A.
- [808.](#) See above, para.26-112.
- [809.](#)  *Cook v Swinfen* [1967] 1 W.L.R. 457. See also *Walker v Northumberland CC* [1995] 1 I.C.R. 702 (employee's nervous breakdown caused by excessive workload); *Barber v Somerset CC* [2004] UKHL 13, [2004] 1 W.L.R. 1089 (employee's psychiatric injury caused by work-related stress); *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188, [2017] I.R.L.R. 893 (a case involving apportionment between multiple causes).
- [810.](#) Exemplary damages are not available for breach of contract: above, para.26-044.
- [811.](#) *Jarvis v Swans Tours Ltd* [1973] Q.B. 233; *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; *Jackson v Chrysler Acceptances Ltd* [1978] R.T.R. 474; *Kemp v Intasun Holidays Ltd* [1987] 2 F.T.L.R. 234. For the considerations that should be taken into account when fixing the amount of the award in holiday cases, see *Milner v Carnival Plc* [2010] EWCA Civ 389, [2011] 1 Lloyd's Rep. 374 at [26]–[41].
- [812.](#) cf. *Diesen v Samson* (1971) S.L.T. (Sh.Ct.) 49 (failure of photographer to attend a wedding). cf. also *Archer v Brown* [1985] Q.B. 401, 424–426 (deceit).
- [813.](#) *Ruxley Electronics and Construction Ltd v Forsyth* [1996] A.C. 344; *Farley v Skinner* [2001] UKHLR 49, [2002] 2 A.C. 732. See below, paras 26-145–26-146.
- [814.](#) *Heywood v Wellers* [1976] Q.B. 446. cf. damages for mental distress awarded against a solicitor whose negligence led to his client's wrongful conviction of a crime: *McLeish v Amoo-Gottfried & Co* (1994) 10 Prof. Negligence 102; *McLoughlin v Grovers* [2001] EWCA Civ 1743, [2002] P.I.Q.R. 20 222.
- [815.](#) *Hamilton-Jones v David & Snape (A Firm)* [2003] EWHC 3147 (Ch), [2004] 1 W.L.R. 924 (solicitor's failure allowed father to remove children from the UK).
- [816.](#) [1996] A.C. 344 (see the comments by Poole (1996) 59 M.L.R. 272; and Coote [1997] C.L.J. 537).
- [817.](#) [1994] 1 W.L.R. 650.
- [818.](#) Above, para.26-036.
- [819.](#) Lord Mustill cited the article by Harris, Ogus and Phillips (1979) 95 L.Q.R. 581 (which was also cited in *Farley v Skinner* [1994] 1 W.L.R. 650 at [21]). The *Ruxley Electronics decision* [1996] A.C. 344 decision is discussed in *Att-Gen v Blake* [2001] 1 A.C. 268, 298 (a dissenting speech). At 282, in Lord Nicholl's speech (approved by the majority) he said that: "The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money".

- [820.](#) [2001] UKHL 49, [2002] 2 A.C. 732.
- [821.](#) **!** Awards should be “restrained and modest”: [2001] UKHL 49 at [28]. Causation and quantum must be pleaded: *Abbott v RCI Europe* [2016] EWHC 2602 (Ch) at [116]–[117].
- [822.](#) In earlier cases, in the absence of such specificity, damages have been refused for distress caused by reliance on a survey about the condition of a house: *Watts v Morrow* [1991] 1 W.L.R. 1421 CA; or for breach of a covenant for quiet enjoyment in a tenancy agreement: *Branchett v Beaney* [1992] 3 All E.R. 910 CA. However, damages may be awarded for “mental suffering” directly related to physical inconvenience and discomfort caused by breach of contract: *Watts v Morrow* [1991] 1 W.L.R. 1421, 1440–1445 (see above, para.26–142). In *Farley v Skinner* Lord Scott, with whom Lord Browne-Wilkinson agreed, appears to suggest that whenever a party has not been provided with a contractual benefit to which he was entitled, he is entitled to compensation even if the breach has caused no other loss (at [106]). This has been relied on to suggest that if a party a compromise agreement breaches it by making disparaging comments about the other, the other may recover a modest amount even if she suffered no financial loss: *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) at [256]–[257].
- [823.](#) *Bliss v South East Thames Regional Health Authority* [1985] I.R.L.R. 308.
- [824.](#) *Gogay v Hertfordshire CC* [2000] I.R.L.R. 703 at [62]–[65].
- [825.](#) [2014] EWCA Civ 1512.
- [826.](#) **!** But contrast above, para.26–118A.
- [827.](#) **!** *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] I.C.R. 613; also *Barber v Somerset CC* [2004] UKHL 13, [2004] 1 W.L.R. 1089 and *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6, [2005] I.C.R. 782; *BAE Systems (Operations) Ltd v Konczak* [2017] EWCA Civ 1188 (a case involving apportionment between multiple causes).
- [828.](#) *Hatton v Sutherland* [2002] EWCA Civ 76.
- [829.](#) Such as *Walker v Northumberland CC* [1995] I.C.R. 702.
- [830.](#) *Croft v Broadstairs & St Peter’s Town Council* [2003] EWCA Civ 676; *Bristol City Council v Deadman* [2007] EWCA Civ 822, [2007] I.R.L.R. 888, *Grieves v F T Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 A.C. 281.
- [831.](#) See above, para.26–118.
- [832.](#) *Bristol City Council v Deadman* [2007] EWCA Civ 822, [2007] I.R.L.R. 888. This seems to make it less likely that the claimant will be able recover on the basis of the implied term of trust and confidence than if the claimant can show a breach of the common law duty of care.
- [833.](#) *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20. (See the article by Enonchong, which preceded this decision, (1996) 16 O.J.L.S. 617.)
- [834.](#) See below, paras 40–150—40–153.
- [835.](#) **!** *Malik’s case* [1998] A.C. 20 was applied in *Bank of Credit and Commerce International SA v Ali (No.3)* [2002] EWCA 82, [2002] 3 All E.R. 750 (where it was held that the employees had failed to prove that the stigma had caused them actual financial loss). On when a specific award of stigma damages may be necessary, see *Abbey National Plc v Chagger* [2009] EWCA Civ 1202, [2010] I.C.R. 397 at [97]–[99].
- [836.](#) [2001] UKHL 13, [2003] 1 A.C. 518.

- [837.](#) *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 A.C. 503.
- [838.](#) *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36, [2005] 1 A.C. 226 (interpreting s.123 of the Employment Rights Act 1996). This is so even if the procedures were incorporated as express terms of the employment contract; *Edwards v Chesterfield Royal Hospital NHS Trust* [2011] UKSC 58, [2012] 2 A.C. 22, see below, Vol.II, para.40-203.
- [839.](#) *Tolnay v Criterion Film Productions Ltd* [1936] 2 All E.R. 1625; *Joseph v National Magazine Co Ltd* [1959] Ch. 14.
- [840.](#) *Clayton & Jack Waller Ltd v Oliver* [1930] A.C. 209; *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 K.B. 269.
- [841.](#) *Malik 's case* [1988] A.C. 20 above (overruling on this point *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536).
- [842.](#) *Malik 's case* [1998] A.C. 20 at 115; *Cointax v Myham & Son* [1913] 2 K.B. 220 (below, para.44-425); *G.K.N. Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep. 555 (below, para. 44-425); *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 (see above, para.26-138).

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(b) - Costs

Costs ⁸⁴³

26-150

A party who in an action against the defendant has incurred legal costs for which it has not been awarded costs when those could have been awarded may not be able to recover them. ⁸⁴⁴ The reason is that the court will not investigate the matter a second time. ⁸⁴⁵ If the judge refused to award costs, that is because the claimant did not deserve them. ⁸⁴⁶ If the costs were incurred in an action in a foreign jurisdiction where costs are not awarded to the successful party, they may be recoverable. ⁸⁴⁷

^{843.} See Merrett (2009) 125 L.Q.R. 468.

^{844.} *Carroll v Kynaston* [2010] EWCA Civ 1404.

^{845.} [2010] EWCA Civ 1404 at [30].

^{846.} *Berry v British Transport Commission* [1962] 1 Q.B. 306 at 320, Devlin L.J.

^{847.} *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] 1 W.L.R. 1517; *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 3163 (Comm), [2008] 1 Lloyd's Rep. 16 at [25]. It seems that the rule also does not apply when the costs were incurred in defending a criminal action and are later claimed in a civil one: *Berry v British Transport Commission* [1962] 1 Q.B. 306, as explained in *Carroll v Kynaston* [2010] EWCA Civ 1404 at [30].

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(a) - Introduction

Causation, mitigation and remoteness

26-151

The combined effect of the rules described in earlier sections of this chapter, in particular the rules of causation, ⁸⁴⁹ mitigation ⁸⁵⁰ and remoteness ⁸⁵¹ (including the new restriction that even when a loss is not unusual, it will be too remote if it was not reasonable to assume the defendant was assuming responsibility for it ⁸⁵²) can be illustrated by cases involving a variety of types of contract. However, caution needs to be exercised in seeking to apply cases on one type of contract, such as sale of goods, to other kinds of contract, simply because the factual circumstances may well differ. This may affect whether the innocent party can mitigate his loss and also what will normally be contemplated by the parties.

^{848.} Further illustrations will be found in the various chapters of Vol.II of this work.

^{849.} See above, paras 26-058 et seq. Contributory negligence, also treated in that section, may be relevant in some cases.

^{850.} See above, paras 26-079 et seq.

^{851.} See above, paras 26-107 et seq.

^{852.} Above, paras 26-126 et seq. As yet it is hard to predict when the new approach will make a difference to the outcome of cases.

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(b) - Sale of Goods

Sale of goods

26-152

Many of the best illustrations of the rules for the remoteness of damage and for the assessment of damages will be found in cases on the sale of goods, which are considered in some detail in Vol.II, Ch.44. Although these cases are often based on the provisions of the Sale of Goods Act 1893 (now consolidated in the 1979 Act), the relevant ss.50, 51, 53 and 54 incorporate former common law decisions on the sale of goods ⁸⁵³ so that cases decided on the Act may be useful analogies for determining the measure of damages for breaches of other types of contract which are still governed by common law rules. The cases illustrate, for example, the types of loss which have been found to be within the contemplation of the parties ⁸⁵⁴; the duty to mitigate ⁸⁵⁵ (especially in cases of anticipatory breach ⁸⁵⁶); and the assessment of damages for delay in performance ⁸⁵⁷ and for breaches of terms relating to the quality of the performance. ⁸⁵⁸ For this reason some of the principal features of the cases on sale of goods are described here.

Availability of a market ⁸⁵⁹

26-153

In practice, it may make a significant difference whether there is a ready market in which the innocent party can make a substitute transaction—the buyer to purchase other goods to fill his needs, or the seller to resell goods that the buyer has wrongfully not accepted. If there is a market, the innocent party will normally be expected to use it to mitigate his loss. If for some reason the innocent party is unable to make use of the market (for example, the buyer has re-sold the self-same goods and cannot use other goods to fill the subsale) any additional loss will usually be too remote to be recovered. In addition, where there is a market any subsequent advantageous sale at above market price or purchase at below market price can often be ignored on the ground that the innocent party could have made the subsequent transaction even if there had not been a breach of contract.

Buyer's damages for non-delivery

26-154

So when a seller fails to deliver goods, the buyer's damages are usually assessed by the difference between the contract price and the market price at the date of delivery. Section 51 of the Sale of Goods Act 1979 provides that:

“(3)

Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.”

The fact that the buyer has resold them at a higher price will normally be disregarded on the grounds that the buyer can buy replacement goods in the market to satisfy the sub-buyer. ⁸⁶⁰ It is only when the parties contemplated that the buyer might re-sell the self-same goods, and thus would not be able to substitute other identical goods, that the buyer may recover loss of profit on the resale. ⁸⁶¹ Similarly, if the buyer intended to use the goods for a profit-making activity, he will normally be expected to purchase substitute goods in the market. If, however, the parties contemplated that the buyer would put the goods to immediate use and would not be able to buy substitutes in time, the buyer may recover for loss of profit. ⁸⁶² If there is no market for the relevant goods, or at least no market that it is reasonable to expect the buyer to use, ⁸⁶³ the buyer may be unable to mitigate and the loss suffered in consequence may not be too remote for the buyer to recover.

Resale at below market price

26-155

Where there is an available market for the goods, the fact that before the breach the buyer had resold the goods at less than the market price will normally be disregarded. If the resale was not of the specific goods it is irrelevant because the buyer might have intended to fill it not from the contract goods but from stock or other purchases; even if he did intend to use the contract goods he will have to purchase a substitute in the market. ⁸⁶⁴ If the sale was of the specific goods, the buyer will not be able to purchase and buy a substitute. He will then lose the sub-sale. Should the buyer's damages be limited to the difference between the price he had agreed to pay for the goods and the price at which he had agreed to re-sell them? One possibility is that the buyer will be liable to the sub-buyer for the difference between the sub-sale price and the market price. In that case the buyer's damages should again be the difference between the contract price and the market price. But what if the sub-buyer simply releases the buyer from liability? One view is that this should be ignored. ⁸⁶⁵ However, as mentioned earlier, ⁸⁶⁶ the courts have sometimes taken into account the innocent party's purpose and have refused damages when it appears that he has overall not suffered any loss. Thus Devlin J. has said:

“If, however, a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not.... If it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damages and it is in fact used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value, and say that the sub-sale must be disregarded.” ⁸⁶⁷

This is perhaps more controversial. It may be argued that it is a matter of causation: if the goods had been supplied, the buyer would have used them to supply the sub-sale at the agreed price and therefore all that he has lost is any profit he would have made on the sub-sale. However, it is also arguable that the buyer has suffered a loss simply because he has not received the goods that were promised. This should be measured by the market value; the fact that the buyer has escaped without being made liable to the sub-buyer is his own good fortune. We will see that in cases of late delivery ⁸⁶⁸ and of delivery of defective goods ⁸⁶⁹ the courts have occasionally taken similar facts into account; but the decisions have been criticised. In cases of non-delivery the point remains open.

Re-purchase at below market price

26-156

The disappointed buyer may have been able to purchase substitute goods at below the market price. This will normally also be disregarded, on the basis that it is the buyer's good fortune. ⁸⁷⁰ The buyer could have made the same profit by buying and reselling even if the contract had been performed. The position will be different if the buyer has rejected goods as defective but manages to buy the self-same goods at below the market value: they would not have been available had the contract been performed. ⁸⁷¹

No available market

26-157

If there is no available market for the goods, the buyer's damages may well take sub-sales into account. Firstly, the sub-sale price may be used as best evidence of the value of the goods. ⁸⁷² Secondly, the buyer is less likely to be able to avoid losing profits he would have made from the subsale. Equally, a claim for loss of profits from the intended use of the goods is more likely to succeed.

Delay in delivery


26-158

⚠ If the goods are being purchased for use, late delivery may cause the buyer loss of profit. This may be recoverable if the buyer was not able to avoid it by purchasing a substitute and the resulting loss was not too remote. ⁸⁷³ Where the goods are being bought for resale, and the seller makes a late delivery of goods and the buyer accepts the delivery although the market price has fallen, ⁸⁷⁴ the buyer will normally be entitled to the difference in value between the goods on the date on which delivery was due and the date of actual delivery. ⁸⁷⁵ It is thought that any price at which the goods have been resold by the buyer should be treated as irrelevant, even if the buyer has managed to resell the goods at more than the market price at the date of delivery. This occurred in the Privy Council case of *Wertheim v Chicoutini Pulp Co.* ⁸⁷⁶ At the date on which the goods should have been delivered, the market price was 70s a ton; by the date of actual delivery it had fallen to 42s 6d a ton. However, the buyers had resold the goods at 65s a ton. The Privy Council awarded damages of only 5s a ton, but the decision has been strongly criticised. ⁸⁷⁷ On the facts it seems that the buyer had not re-sold the self-same goods, merely an equivalent amount. Had the goods been delivered on time, the buyer might have been able to make the same amount of profit irrespective of the breach, by buying when the price had fallen to 42s 6d and re-selling at 65s, and in addition they would have been able to re-sell the contract goods at 70s a ton. The decision might be more defensible if the buyers had re-sold the self-same goods. Then, if the goods had been delivered on time, they would probably have passed them to the sub-buyers at the same price which they in fact obtained for them, i.e. 65s a ton. Then it would be arguable that the delay caused them no loss at all. ⁸⁷⁸ ⚠

Delivery of defective goods

26-159

⚠ If the goods delivered are defective but buyer accepts them, the damages will prima facie be the difference between the value the goods should have had and their actual value. ⁸⁷⁹ If there is no available market in which the buyer can obtain a substitute, ⁸⁸⁰ it may be reasonable for the buyer to have the goods repaired and the cost of doing so will be recoverable. ⁸⁸¹ Where the goods were bought for resale, the fact that the buyer loses a profitable resale will be relevant only if the buyer was not able to mitigate his loss and the further loss was not too remote. ⁸⁸² Conversely, it has been held that the buyer's damages should not be reduced because he has succeeded in reselling the defective goods at more than the market price for goods in that condition. ⁸⁸³ However, in *Bence Graphics*

International Ltd v Fasson UK Ltd ⁸⁸⁴ the Court of Appeal held that the buyer's position under a sub-sale should be taken into account. The seller knew that the buyer would sell on to others (after manufacturing the goods into another product); the Court held that the parties contemplated that the measure of damages for defects in the goods should be the extent of the buyer's liability (if any) to those others resulting from the defect; other loss was too remote. The decision in *Slater*'s case was doubted, on the ground that s.53(3) laid down only a prima facie rule, which should not be applied if it would give the buyer "more than his true loss". ⁸⁸⁵ This seems to be a further example of the court concentrating on the end-result rather than the buyer's performance interest. ⁸⁸⁶ It is submitted that the buyers should have recovered the difference in value. First, remoteness is not relevant when the claim is simply for the difference in value between what was contracted for and what was delivered. Secondly, the fact that they were able to pass on the defective goods without incurring liability again seems to be their own good fortune. ⁸⁸⁷ 

Seller's damages for non-acceptance

26-160

Where the buyer wrongly refuses to accept goods for which there is an available market, ⁸⁸⁸ the seller's loss will normally be measured by the difference between the contract price and the market price, ⁸⁸⁹ on the assumption that the seller will make a substitute sale in the market. ⁸⁹⁰ The seller may also recover costs reasonably incurred in storing and reselling the goods, ⁸⁹¹ unless on the facts this loss was too remote; and may also recover damages for loss of use of the money it should have been paid. ⁸⁹² A seller is not likely to suffer other forms of consequential loss. ⁸⁹³

Lost volume

26-161

Reselling the goods even at the same price will not always compensate the seller fully. If the supply of goods exceeds the demand, the seller will have lost a sale: had the buyer accepted the goods, the seller would still have been able to supply the second buyer and thus would have earned two lots of profit. The seller is then entitled to the profit it would have made on the first sale. ⁸⁹⁴

Anticipatory breach

26-162

The measure of damages available when there has been an anticipatory breach by either the buyer or the seller was considered above. ⁸⁹⁵ The innocent party may refuse to accept the repudiation and in that case the damages will normally be measured by the difference between the contract price and the market price at the date the goods should have been delivered or accepted. ⁸⁹⁶ That is also the prima facie measure if the innocent party accepts the repudiation; however, he comes under a duty to mitigate his loss and if he should have mitigated by making a substitute transaction, his damages will be measured by the market price at the date on which he should have made that transaction. ⁸⁹⁷

^{848.} Further illustrations will be found in the various chapters of Vol.II of this work.



^{853.} *Barrow v Arnaud* (1846) 8 Q.B. 595, 609–610.

^{854.} e.g. loss of profits on sub-contracts: Vol.II, para.44-424.

^{855.} Vol.II, para.44-368.

^{856.} Vol.II, paras 44-380, 44-393.

- [857.](#) Vol.II, paras 44-406 et seq.
- [858.](#) Vol.II, paras 44-411 et seq.
- [859.](#) For detailed discussion see Vol.II, paras 44-368 et seq.
- [860.](#) *Williams v Reynolds* (1865) 6 B. & S. 495.
- [861.](#) *Re R and H Hall Ltd and WH Pim (Junior) Arbitration* [1928] All E.R. Rep. 763. See below, para.44-400.
- [862.](#) As in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, above, para.26-135.
- [863.](#) *Lesters Leather and Skin Co v Home and Overseas Brokers Ltd* (1948) 64 T.L.R. 569, see para.26-082 and Vol.II, para.44-389.
- [864.](#) *Williams Bros Ltd v E.T. Agius Ltd* [1914] A.C. 510.
- [865.](#) [1914] A.C. 510, 523 (“The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns”).
- [866.](#) See above, para.26-040.
- [867.](#) *Biggin & Co Ltd v Permanite Ltd* [1951] 1 K.B. 422, 436. (*The actual decision in this case was reversed on another ground: [1951] 2 K.B. 314* (see Vol.II, para.44-433).) See also *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87 (below, paras 44-413, 44-415, where criticism by Treitel is noted); *The Heron II* [1969] 1 A.C. 350, 416; *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm), [2004] 2 Lloyd’s Rep. 243 (see Vol.II, para.44-415 n.2001). cf. *Trans Trust S.P.R.L. v Danubian Trading Co Ltd* [1952] 2 K.B. 297, 306.
- [868.](#) *Wertheim v Chicoutini Pulp Co* [1911] A.C. 301, below, para.26-158.
- [869.](#) *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87, below, para.26-159.
- [870.](#) cf. *Joyner v Weeks* [1891] 2 Q.B. 31, 34; below, Vol.II, para.44-396.
- [871.](#) *R Pagnan Fratelli v Corbisa Industrial Agropacuaria* [1970] 1 W.L.R. 1306; see below, Vol.II, para.44-396.
- [872.](#) See Vol.II, para.44-397.
- [873.](#) cf. above, para.26-154 n.784.
- [874.](#) If the market price has risen, the buyer will normally be expected to avoid losing a profitable sub-sale by purchasing in the market. This will not be possible if the re-sale was of the self-same goods: if that was contemplated by the parties, the seller might be liable for the buyer’s loss of profit, cf. *Re R and H Hall Ltd and WH Pim (Junior) Co’s Arbitration* [1928] All E.R. Rep. 763, above, para.26-154.
- [875.](#) e.g. *Addax Ltd v Arcadia Petroleum Ltd* [2000] 1 Lloyd’s Rep. 493. See below, Vol.II, para.44-406.
- [876.](#) [1911] A.C. 301.
- [877.](#) Especially by Scrutton L.J. in *Slater v Hoyle Smith Ltd* [1920] 2 K.B. 11, 23–24. See below, Vol.II, para.44-407.

- [878.](#)  See Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–049.
- [879.](#) Sale of Goods Act 1979 s.53: see below, Vol.II, para.44-411.
- [880.](#) If the buyer cannot obtain an exact substitute, an issue of “betterment” may arise: see above, para.26-097.
- [881.](#) See above, para.26-036.
- [882.](#) For example, if the seller knew that the buyer would re-sell the self-same goods: cf. *Re R and H Hall Ltd and WH Pim (Junior) Co’s Arbitration* [1928] *All E.R. Rep.* 763, above, para.26-154.
- [883.](#) *Slater v Hoyle Smith Ltd* [1920] 2 *K.B.* 11.
- [884.](#) [1998] *Q.B.* 87. See *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] *EWHC* 525 (Comm), [2004] 2 *Lloyd’s Rep.* 243 (parties contemplated sale of the same goods to the sub-buyer under a specific contract); *Choil Trading SA v Sahara Energy Resources Ltd* [2010] *EWHC* 374 (Comm) at [124]–[139].
- [885.](#) [1998] *Q.B.* 87 at 102 (see below, Vol.II, paras 44-413—44-415).
- [886.](#) See above, paras 26-039—26-041.
- [887.](#)  See the powerful criticism of Treitel (1997) 113 *L.Q.R.* 188, and Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–051. In *OMV Petrom SA v Glencore International AG* [2016] *EWCA Civ* 778, [2016] 2 *Lloyd’s Rep.* 432 Christopher Clarke L.J. seemed to think that the Bence Graphics case could not stand with *Slater v Hoyle Smith Ltd*, but left the matter open (at [45]–[46]).
- [888.](#) On the question of an available market see Vol.II, paras 44-368—44-370.
- [889.](#) Sale of Goods Act 1979 s.50(3).
- [890.](#) See Vol.II, para.44-368. If the property in the goods has passed to the buyer, the seller may alternatively bring an action for the price: s.49(1): see Vol.II, paras 44-359—44-366.
- [891.](#) A form of “incidental” damages: see above, para.26-032.
- [892.](#) See below, para.26-227 and Vol.II, para.44-383.
- [893.](#) Vol.II, para.44-383.
- [894.](#) e.g. *W. L. Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] *Ch.* 177. See above, para.26-096.
- [895.](#) See paras 26-092 and 26-103.
- [896.](#) See Vol.II, paras 44-381 and 44-394.
- [897.](#) See Vol.II, paras 44-380 and 44-393.

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(c) - Carriage of Goods

Carriage of goods

26-163

If by default of the carrier the goods which he has contracted to deliver are lost or destroyed in transit the normal measure of damages is the market value of the original goods at the time when and place where they ought to have been delivered, less the freight payable under the contract upon safe delivery of the goods. ⁸⁹⁸ The price in a forward sale made by the consignee is usually irrelevant, ⁸⁹⁹ but it may be relevant if there is no market for such goods at the place of delivery. ⁹⁰⁰ Where the carrier delays in delivering the goods, the normal ⁹⁰¹ measure of damages is the difference between the market value of the goods at their destination on the date they ought to have been delivered, and the market value at the actual date of delivery ⁹⁰²; the same rule now applies to carriage of goods by sea. ⁹⁰³ The carrier's liability for loss of profits has already been discussed. ⁹⁰⁴ Occasionally the carrier may be liable for expenses incurred by the claimant in acquiring the nearest substitute when equivalent goods were not available in the market, and the claimant acted reasonably in incurring the expenses. ⁹⁰⁵

26-164

If the defendant carries the goods to the wrong place, or completely fails to carry them at all, the claimant may either:

(a)

engage substitute transport at the market rate and recover from the carrier the difference between that and the contractual rate, together with any difference between the market price of the goods at the actual time of delivery and the agreed time of delivery ⁹⁰⁶; or

(b)

purchase substitute goods at the agreed place of delivery, and recover from the carrier the difference between the cost of the substituted goods, and the total of the value of the original goods at the place of loading, freight and insurance (or at the wrong place of delivery, as the case may be). ⁹⁰⁷

Where the owner of the goods fails to supply the goods for the agreed carriage, but the carrier ought reasonably to have obtained substitute cargo, the normal measure of damages is the difference between the agreed rate of freight, and the market rate (deducting in each case the cost of earning the freight). ⁹⁰⁸

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- [848.](#) Further illustrations will be found in the various chapters of Vol.II of this work.
- [898.](#) *Rodocanachi v Milburn* (1886) 18 Q.B.D. 67, 76. Even where the claimant has only a limited interest in the goods, he may recover their full value: *Crouch v L.N.W. Ry* (1849) 2 C. & K. 789. (See Vol.II, para.33-133.)
- [899.](#) *Rodocanachi v Milburn* (1886) 18 Q.B.D. 67. See also *Slater v Hoyle and Smith* [1920] 2 K.B. 11 (but on this case see now *Bence Graphics International Ltd v Fasson UK Ltd* [1998] Q.B. 87, which is discussed above, para.26-159); *The Arpad* [1934] P. 189.
- [900.](#) *O'Hanlan v G.W. Ry* (1865) 6 B. & S. 484; *The Arpad* [1934] P. 189.
- [901.](#) "Where there is a market it must be assumed to be in the contemplation of the parties as a grave danger that the goods may be sold on arrival so that if there is a delay one of the consequences may be loss of market": *Koufos v C. Czarnikow Ltd, The Heron II* [1969] 1 A.C. 350, 427.
- [902.](#) *Wilson v Lancs & Yorks Ry* (1861) 9 C.B.(N.S.) 632; *Collard v S.E. Ry* (1861) 7 H. & N. 79; *Schulze v G.E. Ry* (1887) 19 Q.B.D. 30; *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1046.
- [903.](#) *Koufos v C. Czarnikow Ltd* [1969] 1 A.C. 350 HL, holding that the rule in *The Parana* (1877) 2 P.D. 118 was obsolete.
- [904.](#) See above, para.26-137.
- [905.](#) *Millen v Brash* (1882) 10 Q.B.D. 142; cf. *Romulus Films v William Dempster* [1952] 2 Lloyd's Rep. 535. Other expenses recoverable include the cost of searching for the missing goods: *Hales v L.N.W. Ry* (1863) 4 B. & S. 66; *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1046.
- [906.](#) *Monarch S.S. Co v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196. The claimant must act reasonably in his choice of one of the alternatives (a) or (b): at 217-218, 220; where neither alternative is possible, see *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] A.C. 227.
- [907.](#) *Stroms Bruk Aktiebolag v Hutchison* [1905] A.C. 515 (no substitute transport was available); *Nissho Co v Livanos* (1941) 57 T.L.R. 400. Consequential loss is also recoverable: *Heindal A/S v Questier* (1949) 82 Ll.L. Rep. 452 (perishable goods). For a recent application of the principles stated in this paragraph see *Pacific Interlink Sdn Bhd v Owner of the Asia Star (The Asia Star)* [2009] SGHC 91, [2009] 2 Lloyd's Rep. 387.
- [908.](#) *Smith v M'Guire* (1858) 3 H. & N. 554; *Aitken Lilburn v Ernsthausen* [1894] 1 Q.B. 773; *Wallems Rederij A/S v Muller* [1927] 2 K.B. 99, 105.

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Contracts for the sale or lease of land ⁹¹⁰

26-165

Full details of the damages recoverable for breaches of contracts relating to the sale or lease of land (including breaches of the covenants in a conveyance or lease) should be sought elsewhere. ⁹¹¹ In respect of contracts made after September 27, 1989 the restrictive rule in *Bain v Fothergill* ⁹¹² (which limited the vendor's liability) no longer applies. ⁹¹³ Thus, a vendor who breaks his contract by failing to convey the land to the purchaser is liable to damages for the purchaser's loss of bargain and must pay damages calculated in accordance with the ordinary rules, viz the market value of the property at the fixed time for completion (or at a later time so long as it was reasonable ⁹¹⁴ for the purchaser to continue to seek performance ⁹¹⁵), less the contract price. ⁹¹⁶ The purchaser may claim the loss of profit he intended to make from a particular use of the land (e.g. by converting a building into flats and offices) only if the vendor had actual or imputed knowledge of special circumstances showing that the purchaser intended to use the land in that way. ⁹¹⁷

26-166

If the vendor or lessor delays in completion, the normal measure of damages is the value of the use of the land for the period of delay, viz usually its rental value. ⁹¹⁸ Where the purchaser of land fails to complete, the normal measure of damages is the contract price less the market price at the time fixed for completion, ⁹¹⁹ plus any consequential expenses or loss. ⁹²⁰ Where the vendor reasonably tried to obtain performance by the purchaser, damages were assessed as at the later time when it was reasonable for him to give up seeking performance. ⁹²¹

Valuer-surveyor's report to a purchaser

26-167

Where, in breach of contract, the defendant surveyor negligently failed to report defects in the property purchased by the claimant in reliance on the report, the claimant's damages ⁹²² should be assessed at the difference between the price paid by him and the market value of the property in its actual (defective) condition at the time of the purchase. ⁹²³ Since the surveyor did not contractually warrant that the property was in the condition which he reported, he is not liable to pay the difference between its hypothetical value in the reported condition and its market value in its actual condition. ⁹²⁴ The diminution in value measure does not depend on whether or not the claimant would have bought the property had the surveyor's report been carefully made. ⁹²⁵ But if, on learning of the defects which should have been reported, the claimant had immediately moved out and sold, he might have been able to recover (in addition to the diminution in value measure) his wasted costs. ⁹²⁶ However, the purchaser may be able to claim damages for "loss of amenity" from his surveyor if an important object of the contract was the enjoyment of that particular amenity, but which, as a result of the surveyor's breach of contract, was not obtained by the purchaser. ⁹²⁷

Valuer-surveyor's report to a lender

26-168

⚠ In the *South Australia* case ⁹²⁸ the House of Lords imposed a limit ⁹²⁹ ⚠ on the extent of damages payable by a valuer who negligently over-values the intended security and the security turns out to be inadequate through a combination of this and a fall in the value of the property. The lender's "ultimate loss" (viz the difference between: (i) the capital of the actual loan; and (ii) the net proceeds of realising the security, plus any repayments by the borrower) is caused by, and is not too remote a consequence of, the negligence ⁹³⁰ ⚠ but the lender's damages for his capital loss may not exceed the extent of the initial deficiency in the supposed value of the security, viz the difference between the amount of the defendant's negligent over-valuation and what would have been a proper ⁹³¹ valuation at the time of the loan. ⁹³² Within this limit, however, the lender may recover his ultimate loss of capital even though it is due to a fall in the market value of the security since the loan was made. ⁹³³ ⚠ In addition to his claim for loss of capital, the lender may claim: (1) his reasonable expenses of realising the security; and (2) interest (see next paragraph).

The lender's claim for interest

26-169

In order to decide when interest on the damages should begin, the court must fix the date when the lender first suffers "loss". In a case in which a security has been overvalued, the lender's cause of action may not arise until the security is realised and the difference emerges between its value and the outstanding debt. However, it may be clear long before that date that the security has been overvalued and is inadequate; and if the borrower ceases to pay interest on the loan, the lender is not obliged to wait to bring an action until the security has been realised. According to the *Nykredit* case, ⁹³⁴ the lender first suffers "loss" when the amount of the loan (plus interest) exceeds "the value of the rights acquired, namely the borrower's covenant and the true value of the over-valued property". ⁹³⁵ (This case creates the strange possibility of a fluctuating "loss" because it could be wiped out if the security later increased in value and reinstated if its value fell thereafter. ⁹³⁶) The rate of interest should be fixed by the court ⁹³⁷ as compensation for the loss of the use of the capital lent to the borrower. ⁹³⁸

Analogous application of the *South Australia* case

26-170



The formula placing a limit on the damages used in the *South Australia* case, above, has been applied by analogy where the negligence of a solicitor resulted in the lender believing it had more adequate security than it in fact had. The solicitor failed to tell the lender of facts which would have led it to doubt the valuation on which it was relying and so to obtain a second valuation: if this showed that the first was an overvaluation the solicitor would be liable only to the extent of the difference between the proper valuation and the overvaluation. ⁹³⁹


Assessing the "proper" valuation of property

26-171

Where the court must fix the "proper" valuation of a property there is normally a range of valuations which might have been made by reasonably careful valuers; the court must choose the figure which it considers to be the most likely outcome of careful assessment: the defendant is not given the benefit of damages being assessed by reference to the highest figure which might have been given without negligence. ⁹⁴⁰

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- [848.](#) Further illustrations will be found in the various chapters of Vol.II of this work.
- [909.](#) On damages for defective building work, see above, para.26-036.
- [910.](#) The usual remedy of a purchaser under such a contract is specific performance: see below, para.27-007.
- [911.](#) See McGregor on Damages, 19th edn (2014), Chs 25 and 26, and the standard textbooks on real property.
- [912.](#) (1874) *L.R. 7 H.L. 158*. The rule provided that where a vendor of land was unable to complete the contract through a defect in his title, no damages could be recovered (in the absence of fraud, misrepresentation, bad faith or default on the part of the vendor) for the loss of the purchaser's bargain. The exceptions to the rule were developed in a line of authorities, which are no longer cited in this work.
- [913.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.3. (The Law Commission had proposed the abolition of the rule: Report No.166.)
- [914.](#) *Malhotra v Choudhury* [1980] *Ch. 52, 77, 81* (some unnecessary delay by the plaintiff led to the date for assessment being fixed one year before the hearing).
- [915.](#) cf. *Johnson v Agnew* [1980] *A.C. 367, 401* (see below, paras 27-083—27-090: breach by purchaser). cf. *Suleman v Shahsavari* [1988] *1 W.L.R. 1181*. In some cases decided before *Johnson v Agnew*, damages were assessed as at dates later than those originally fixed for completion (*Wroth v Tyler* [1974] *Ch. 30* (as at the date of hearing); *Grant v Dawkins* [1973] *1 W.L.R. 1406*; *Malhotra v Choudhury* [1980] *Ch. 52*), but the reasoning in these cases cannot now be supported, except to the extent that it is consistent with that in *Johnson v Agnew*.
- [916.](#) *Godwin v Francis* (1870) *L.R. 2 C.P. 295*; *Engel v Fitch* (1869) *L.R. 4 Q.B. 659*; *Re Daniel* [1917] *2 Ch. 405*; *Diamond v Campbell-Jones* [1961] *Ch. 22*; *Chitholie v Nash & Co* (1973) *229 E.G. 786* (damages for breach of warranty of authority by vendor's agents). An express term in the contract of sale may regulate the rights of the parties in the event of the vendor's title proving to be defective: see the Law Society's General Conditions of Sale (condition 16(1)); and the National Conditions of Sale (condition 10(1)).
- [917.](#) *Diamond v Campbell-Jones* [1961] *Ch. 22*; a similar rule applies to claims by a purchaser for losses arising under a sub-contract: *Seven Seas Properties Ltd v Al-Essa (No.2)* [1993] *1 W.L.R. 1083*; and to expenses incurred by the purchaser: *Lloyd v Stanbury* [1971] *1 W.L.R. 535, 546–547* (above, para.26-030). The purchaser's claim has sometimes been permitted on the basis that the defendant did have adequate knowledge of the claimant's purposes: *Cottrill v Steyning and Littlehampton Building Society* [1966] *1 W.L.R. 753*; *Malhotra v Choudhury* [1980] *Ch. 52, 80–81*. In each case the defendant's knowledge seems to have been precise and so the "assumption of responsibility" test (see above, para.26-128) would probably be satisfied.
- [918.](#) *Royal Bristol Permanent Building Society v Bomash* (1887) *35 Ch. D. 390*. See also *Jones v Gardiner* [1902] *1 Ch. 191*; *Phillips v Lamdin* [1949] *2 K.B. 33*. As to a lessor's delay, see *Jaques v Millar* (1877) *6 Ch. D. 153* (loss of profits allowed to lessee where lessor knew of his intended trade on the premises).
- [919.](#) *Laird v Pim* (1841) *7 M. & W. 474*. A resale price may be evidence of the market price: *Noble v Edwards* (1877) *5 Ch. D. 378* (reversed on another point: *5 Ch. D. 392*); *York Glass Co v Jubb* (1926) *134 L.T. 36*.
- [920.](#) *York Glass Co v Jubb* (1926) *134 L.T. 36, 40*. (The measure is similar where a lessee refuses to proceed with a contract to take a lease: *Marshall v Macintosh* (1898) *78 L.T. 750*; cf. *Oldershaw v Holt* (1840) *12 A. & E. 590*.)

921. *Johnson v Agnew* [1980] A.C. 367, 401 (below, paras 27-088—27-089). See also *Suleman v Shahsavari* [1988] 1 W.L.R. 1181.
922. In addition, the claimant may be able to recover damages for physical inconvenience: see above, para.26-142; or for “loss of amenity”: see above, paras 26-145—26-146.
923. *Watts v Morrow* [1991] 1 W.L.R. 1421 CA, following *Phillips v Ward* [1956] 1 W.L.R. 471, and *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297. See also *Gardner v Marsh & Parsons* [1997] 1 W.L.R. 489 (the fact that five years after the purchase the landlord, a third party, remedied the defect at his expense was held to be too remote to be taken into account in assessing the purchaser’s damages against a surveyor). (In these cases the courts refused to assess damages at the cost of repairs; see above, paras 26-036 et seq.) In *Watts v Morrow*, the court left open the question as to *when* the market value should be ascertained: [1991] 1 W.L.R. 1421, 1437–1438. In *Dent v Davis Blank Furniss* [2001] Lloyd’s Rep. P.N. 534 where a solicitor failed to advise the purchaser that part of the property was registered as common land, the judge applied the diminution in value test, not at the time of purchase but at the later date when the purchaser succeeded in partially mitigating his loss.
924. *Watts v Morrow* [1991] 1 W.L.R. 1421, 1430, 1435. The relevant statement in the headnote is inaccurate; see also *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297, 1301–1302, 1304.
925. *Watts v Morrow* [1991] 1 W.L.R. 1421, 1437–1438. The “excessive price” measure used in a purchaser’s claim is not affected by the decision of the House of Lords in the *South Australia case* [1997] A.C. 191 (see below, para.26-168) where a lender’s claim is based on a negligent overvaluation of the proposed security; *Patel v Hooper & Jackson* [1999] 1 W.L.R. 1792, 1801. The excessive price provides the measure of the purchaser’s damages, whereas the initial deficiency in the value of the security provides only a limitation on the lender’s damages. (The issue of a cap might arise were the purchaser to seek to recover damages caused by a subsequent fall in the market value of the property, on the basis that had he been given an accurate survey he would never have purchased the property.) The excessive price measure has not been used when it would give the purchaser more than his actual loss because he was able to make a favourable arrangement with his financier: *Devine v Jefferys* [2001] P.N.L.R. 16.
926. *Watts* [1991] 1 W.L.R. 1421, 1445. cf. the “no transaction” measure of damages used in *Hayes v Dodd* [1990] 2 All E.R. 815 CA (above, para.26-031).
927. *Farley v Skinner* [2001] UKHL 49, [2002] 2 A.C. 732 (see above, para.26-146).
928. *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (also known as the *B.B.L. or Banque Bruxelles* case). Lord Hoffmann, who gave the only speech, dealt almost exclusively with the scope of the valuer’s limited duty of care under the tort of negligence, but he also said that the same result would follow from an implied term in the contract: at 211, 212. The High Court of Australia has not followed the *South Australia* case: *Kenny Good Pty Ltd v MGICA (1992) Ltd* [2000] Lloyd’s Rep. P.N. 25.
929.  See however the “advice cases” recognised by the House of Lords in the *South Australia case* [1997] A.C. 191 and discussed by the Supreme Court in *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2017] 2 W.L.R. 1029, above, para.26-031
930.  *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627 HL, 1631, 1638. The *Nykredit* case and *Platform Home Loans Ltd v Oyston Shipways Ltd* [2000] 2 A.C. 190, explain the decision in the *South Australia case* [1997] A.C. 191. Although the lender may suffer a form of loss when it makes the loan, it will normally be appropriate to calculate the lender’s loss at the date of trial when the amount of loss may have crystallised: *Nykredit case* [1997] 1 W.L.R. 1627, 1633; *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359, [2016] P.N.L.R. 21 at [33].
931. See below, para.26-171.

932. The “amount of the loss ...[is] limited to the extent of the overvaluation”: the *Nykredit case* [1997] 1 W.L.R. 1627, 1632. The limitation on damages laid down in the *South Australia* case covers both categories previously recognised by *Swingcastle Ltd v Alastair Gibson* [1991] 2 A.C. 223, viz where, given a proper report, the lender: (1) would have lent nothing at all on the proposed security; and (2) would have lent a smaller sum. On the relevance of a mortgage indemnity guarantee policy for the benefit of the lender, see *Arab Bank Plc v John D. Wood Commercial Ltd* [2000] 1 W.L.R. 857 CA.
933.  As in *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 itself: see *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 at [45]–[46], where Lord Sumption defends the SAAMCo limit as “a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant’s negligence the information was wrong and (ii) loss flowing from the decision to enter into the transaction at all”, even if it may be “mathematically imprecise”.
934. [1997] 1 W.L.R. 1627.
935. [1997] 1 W.L.R. 1627, 1631. This “loss” could be suffered by the lender “from the inception of the loan transaction” (at 1632), or before the security is realised: “Realisation of the security does not create the lender’s loss, nor does it convert a potential loss into an actual loss. Rather it crystallises the amount of a present loss ...” (at 1633).
936. In the *Nykredit case* [1997] 1 W.L.R. 1627, 1631, Lord Nicholls spoke of the lender “currently” having no cause of action.
937. *Swingcastle Ltd v Alastair Gibson* [1991] 2 A.C. 223. (The House of Lords, however, envisaged the possibility that the lender could produce evidence as to how he would otherwise have used the money; at 239.)
938. The lender cannot recover the contractual (often penal) rate of interest undertaken by the borrower in the loan agreement, because to allow this would be to make the valuer a guarantor of the agreement between the lender and borrower: [1991] 2 A.C. 223.
939. *Colin Bishop*, one of the *Bristol and West Building Society* cases reported in [1997] 4 All E.R. 582. Similarly, if the lender obtains a valid title to only half the intended security, the damages should be limited to half of the initial value of the security: *Cooke and Borsay*, another of these cases. For another application of the SAAMCo principle, see *Gabriel v Little* [2013] EWCA Civ 1513.
940. The *South Australia case* [1997] A.C. 191 (following the Privy Council in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 W.L.R. 1438 (a contractual duty to take reasonable care in making a forecast of likely profits)).

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Effect on value of business or on profits

26-172

Where the defendant's breach has affected the claimant's business, the court may have to select the most appropriate way to measure the loss: by the effect on the value of the business or by the effect on its profits. In cases in which as a consequence of the breach the claimant has subsequently abandoned the business, the court should use the difference between the actual value of the business and the value it would have had if the defendant had not committed the wrong. To calculate the profit would involve not only the hypothesis that no wrong had been committed but also other hypotheses about what would have happened. ⁹⁴¹ It is submitted that the same approach is appropriate when the claimant has abandoned the business for other reasons or has sold it; in the first situation loss of operating profits will be equally hypothetical, and in the second the difference in value represents the claimant's real loss. In contrast, where the claimant continued to operate its business despite the defendant's wrongful termination of a franchise to use the defendant's business system, name and format, it was held to be more appropriate to measure the loss by the reduction in operating profit. ⁹⁴²

Management costs

26-173

Where defective performance of a contract causes disruption to a business, for example because its staff have to spend time dealing with the ensuing problems, the reasonable costs can be recovered. In *Aerospace Publishing Ltd v Thames Water Utilities Ltd* ⁹⁴³ Wilson L.J. reviewed a number of authorities and said:

"I consider that the authorities establish the following propositions. (a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time." ⁹⁴⁴

Loss of good will

26-174

Where breach of a contract has caused the victim's business loss of good will, a Scottish court has measured the loss using a method of taking "portfolio" of customers and comparing the actual profits achieved from the those customers to those which were likely to have been achieved in the absence of a breach. ⁹⁴⁵

⁸⁴⁸. Further illustrations will be found in the various chapters of Vol.II of this work.

⁹⁴¹. *Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637 at [179]–[180]. (The claimant had leased but then surrendered two "tied pubs": the ties were held to be invalid under European competition law and the claimant was awarded damages. The case was reversed on other grounds, [2006] UKHL 38, [2007] 1 A.C. 333.) The Court of Appeal approved the earlier case of *UYB v British Railways Board* Unreported 1999).

⁹⁴². *MMP GmbH (formerly Antal International Network GmbH) v Antal International Network Ltd* [2011] EWHC 1120 (Comm) at [81]–[89]. As the claimants has failed to provide evidence of reduced profits, they were awarded only nominal damages.

⁹⁴³. [2007] EWCA Civ 3, [2007] Bus. L.R. 726 at [86]. See also *Al Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB), [2009] 1 All E.R. 346, especially at [22]–[23]; *4Eng Ltd v Harper* [2008] EWHC 915 (Ch), [2009] Ch. 91 at [40]; and *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [147]; *Azzurri Communications Ltd v International Telecommunications Equipment Ltd* [2013] EWPC 17 at [86]–[88].

⁹⁴⁴. This is a further example of using a proxy measure when the actual loss is hard to determine: see above, para.26-015.

⁹⁴⁵. *Tullis Russell Papermakers Ltd v Inveresk Ltd* [2010] CSOH 148, noted [2011] L.M.C.L.Q. 166.

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(f) - Contracts to Pay or Lend Money

Contracts to pay money

26-175

Most contracts contain a promise to pay money as part of the bargain between the parties. Although the agreed sum itself may be recoverable as a debt, ⁹⁴⁶ it was for many years uncertain whether at common law the creditor could claim for any other loss resulting from the debtor's failure to pay the agreed sum at the fixed time. ⁹⁴⁷ Except in the few cases where interest was recoverable at common law, ⁹⁴⁸ the rule was believed to be that only nominal damages were recoverable for failure to pay money. ⁹⁴⁹ The House of Lords had confirmed that at common law interest cannot be awarded by way of *general* damages simply because payment of a debt had been delayed, ⁹⁵⁰ though it approved the decision of the Court of Appeal ⁹⁵¹ that, if the test for remoteness based on knowledge of special circumstances is satisfied (the second rule in *Hadley v Baxendale*), ⁹⁵² special damages could be awarded for interest paid and other expenses incurred by the claimant ⁹⁵³ in arranging alternative finance as the result of the defendant's breach of his obligation to pay a sum of money on a given date. ⁹⁵⁴ In earlier cases the defendant had been held liable for substantial damages where he undertook to maintain the claimant's financial credit. ⁹⁵⁵ In 2007, however, in *Sempra Metals Ltd v Commissioners of Inland Revenue*, the House of Lords severely restricted the rule that interest cannot be claimed by way of general damages. ⁹⁵⁶ It now applies only where the claimant has not pleaded or proved a loss resulting from the non-payment. ⁹⁵⁷ Further, there is now a statutory right to interest on commercial debts, ⁹⁵⁸ and the court is empowered by statute ⁹⁵⁹ in its discretion to award interest in an action, whether for debt or for damages.

In actions for the dishonour of bills of exchange and promissory notes, the measure of damages depends on statutory provisions. ⁹⁶⁰

Contracts to lend money

26-176

In an action based on a lender's failure to provide the money promised, the normal measure of damages is the difference between the cost of a substitute loan in the market, and the cost of the contracted loan ⁹⁶¹: hence nominal damages will be usual, except where the claimant can obtain a loan elsewhere only "at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms", ⁹⁶² or where the claimant cannot raise another loan, and so fails to complete his purchase. ⁹⁶³

^{848.} Further illustrations will be found in the various chapters of Vol.II of this work.

- [946.](#) See above, para.26-008.
- [947.](#) *London, Chatham and Dover Ry Co v South Eastern Ry Co* [1893] A.C. 429 (a claim for interest at common law). cf. *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297; and see the criticism of the rule by Jessel M.R. in *Wallis v Smith* (1882) 21 Ch. D. 243, 257. On a contract to pay interest, see Vol.II, paras 39-285 et seq.
- [948.](#) e.g. dishonour of bills of exchange and promissory notes. See below, Vol.II, para.34-117.
- [949.](#) *London, Chatham and Dover Ry Co v South Eastern Ry Co* [1893] A.C. 429.
- [950.](#) *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104 (below, para. 26-227). The High Court of Australia did not follow this rule: *Hungerfords v Walker* (1989) 171 C.L.R. 125.
- [951.](#) *Wadsworth v Lydall* [1981] 1 W.L.R. 598. See the fuller discussion of this case, below, para.26-229.
- [952.](#) (1854) 9 Ex. 341; *The President of India case* [1985] A.C. 104, 125–127.
- [953.](#) A currency loss arising from late payment has been held to fall within this principle: *President of India v Lips Maritime Corp* [1988] A.C. 395, 410–412, following *International Minerals and Chemical Corp v Karl O. Helm A.G.* [1986] 1 Lloyd's Rep. 81. See also below, paras 30-371 et seq.
- [954.](#) For other cases on recovery of interest, or interest charges paid, see below, paras 26-227 et seq. If the defendant's failure to pay on time entitles the claimant to terminate the contract, he may be entitled to recover general damages for the loss he suffers: *Yeoman Credit Ltd v Waragowski* [1961] 1 W.L.R. 1124; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.
- [955.](#) *Rolin v Steward* (1854) 14 C.B. 595; *Wilson v United Counties Bank* [1920] A.C. 102; cf. *Larios v Bonany y Gurety* (1873) L.R. 5 P.C. 346; *Prehn v Royal Bank of Liverpool* (1870) L.R. 5 Ex. 92.
- [956.](#) [2007] UKHL 34, [2008] 1 A.C. 561.
- [957.](#) See below, para.26-230.
- [958.](#) See below, paras 26-232—26-235.
- [959.](#) See below, paras 26-236—26-244 and Vol.II, para.39-295.
- [960.](#) Bills of Exchange Act 1882 s.57 considered in Vol.II, para.34-117.
- [961.](#) *South African Territories v Wallington* [1898] A.C. 309; *Astor Properties Ltd v Tunbridge Wells Equitable Friendly Society* [1936] 1 All E.R. 531; *Bahamas Sisal Plantation v Griffin* (1897) 14 T.L.R. 139. See Vol.II, para.39-265.
- [962.](#) *South African Territories v Wallington* [1897] 1 Q.B. 692, 696–697; affirmed [1898] A.C. 309.
- [963.](#) *Manchester and Oldham Bank v Cook* (1884) 49 L.T. 674, 678 (the lender knew the purpose for which the loan was required). See also *Astor Properties Ltd v Tunbridge Wells Equitable Friendly Society* [1936] 1 All E.R. 531.

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(g) - Sale of Shares

Shares

26-177

In an action for a seller's failure to transfer shares, the buyer may recover the market price of the shares on the day fixed for completion, less the contract price, since the principles of law governing damages in the sale of goods ⁹⁶⁴ are applied by analogy. ⁹⁶⁵ A buyer who obtains a decree of specific performance for the delivery of shares may also recover damages equal to the dividends declared by the company between the agreed date of delivery and the actual date (and interest thereon). ⁹⁶⁶ Where the buyer refuses to accept the shares, the seller may recover the difference between the contract price and the market price on the day fixed for completion. ⁹⁶⁷

“If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.” ⁹⁶⁸

^{848.} Further illustrations will be found in the various chapters of Vol.II of this work.

^{964.} See above, paras 26-152—26-162 and Vol.II, paras 44-367 et seq., paras 44-406 et seq.

^{965.} *Shaw v Holland* (1846) 15 M. & W. 136. See also *Tempest v Kilher* (1845) 3 C.B. 249. cf. *Michael v Hart & Co* [1902] 1 K.B. 482.

^{966.} *Sri Lanka Omnibus Co v Perera* [1952] A.C. 76.

^{967.} *Jamal v Moolla Dawood & Co* [1916] 1 A.C. 175.

^{968.} [1916] 1 A.C. 175, 179.

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(a) - Liquidated Damages or Penalty

Introduction**26-178**

⚠ Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). ⁹⁶⁹ ⚠ The law on this topic has been fundamentally re-written by the decision of the Supreme Court in the cases (heard together) of *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. ⁹⁷⁰ ⚠ A clause is enforceable if it meets the traditional test that it does not extravagantly exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question, ⁹⁷¹ ⚠ but the true test is whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of breach is not extravagant or unconscionable in comparison to that interest. This supersedes a number of decisions suggesting that a clause which provides for an additional payment to be made by a party who is in breach of the contract may also be enforceable, even if it was not strictly speaking a pre-estimate of the likely loss, if it was “commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach”. ⁹⁷² ⚠

Effect of distinction**26-178A**

⚠ If the clause is not void as a penalty, it is enforceable irrespective of the loss actually suffered, whether the actual loss is less or greater. ⁹⁷³ ⚠ Courts of equity held that if the sum fixed was unenforceable as a penalty to ensure that the promise was not broken, the promisee should nevertheless receive by way of damages the sum which would compensate him for his actual loss. ⁹⁷⁴

⚠ The Court of Appeal has held that the strict legal position is that the innocent party can sue on the penal clause, but “it will not be enforced ... beyond the sum which represents [his] actual loss”. ⁹⁷⁵ ⚠ Where there is provision for liquidated damages, the claimant may nevertheless, in appropriate cases, elect to ask for an injunction instead of enforcing the liquidated damages. ⁹⁷⁶ ⚠

Purpose of liquidated damage clauses**26-179**

⚠ The purpose ⁹⁷⁷ ⚠ of the parties in fixing a sum is to facilitate recovery of damages without the difficulty and expense of proving actual damage ⁹⁷⁸ ⚠; or to avoid the risk of under-compensation, where the rules on remoteness of damage might not cover consequential, indirect or idiosyncratic loss ⁹⁷⁹ ⚠; or to give the promisee an assurance that he may safely rely on the fulfilment of the promise ⁹⁸⁰ ⚠; or to deter a party from breaching the contract. ⁹⁸¹ ⚠ Often the parties to a contract fix a sum as liquidated damages in the event of one specific breach, and leave the claimant to sue for unliquidated damages in the ordinary way if other types of breach occur. ⁹⁸² ⚠

“Underliquidated damages”

26-180

⚠ In practice, liquidated damages clauses frequently serve to limit one party's liability. In other words, the parties may agree that in the event of breach, the party in breach will pay a sum which is demonstrably less than a pre-estimate of the likely loss. A clause of this type is sometimes called an “underliquidated damages clause”. This will not prevent it being a valid liquidated damages clause. ⁹⁸³

⚠ These clauses are often the basis of the insurance arrangements to be made by the parties. A clause of this type may operate as a limitation of the party's liability. For that reason it is likely to be construed in the same way as other clauses limiting liability. ⁹⁸⁴ ⚠ It is possible that an underliquidated damages clause is not caught by the Unfair Contract Terms Act 1977 ⁹⁸⁵ ⚠ because it does not merely exclude or restrict one party's liability: the same amount is payable whether the actual loss is greater or less. ⁹⁸⁶ ⚠ However, were such a clause to occur in a consumer contract, it would seem to fall within the Unfair Terms in Consumer Contract Regulations 1999 (if the contract was made before September 30, 2015 and if the term had not been individually negotiated ⁹⁸⁷ ⚠) or (if the contract was made after October 1, 2015) Pt 2 of the Consumer Rights Act 2015. ⁹⁸⁸ ⚠

Similar types of clause

26-181

⚠ In *Cavendish Square Holding BV v Makdessi* ⁹⁸⁹ ⚠ a majority of the Supreme Court held that the penalty clause rules apply to provisions that would prevent a party who breaks the contract from receiving a sum to which it would otherwise be entitled, ⁹⁹⁰ ⚠ and also to provisions that require a party in breach to transfer property to the other party at less than its full value. ⁹⁹¹ ⚠ The Supreme

Court indicated that the penalty rules also apply to deposits ⁹⁹² ⚠ and forfeiture clauses ⁹⁹³ ⚠ but not to sums that are payable on events other than a breach of contract, for example a sum that must be paid if a party exercises a right under the contract. ⁹⁹⁴ ⚠

Reluctance to find clause penal

26-181A

⚠ The rule against penalties has often been seen as anomalous because it applies even to clauses that were negotiated between experienced parties of equal bargaining power. ⁹⁹⁵ ⚠ In *Cavendish*

⚠️ Lords Neuberger and Sumption described it as “an edifice which has not weathered well”. ⁹⁹⁷ ⚠️

The Privy Council ⁹⁹⁸ ⚠️ has cited with approval ⁹⁹⁹ ⚠️ the view of Dickson J. in the Supreme Court of Canada that:

“... the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.” ¹⁰⁰⁰

⚠️

Therefore, where there is no suggestion of oppression, “the court should not be astute to decry a ‘penalty clause’”. ¹⁰⁰¹ ⚠️ The:

“... courts are predisposed ... to uphold [liquidated damages clauses]. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.” ¹⁰⁰² ⚠️

However, as it was put before the doctrine was modified by the *Cavendish Square* case, the correct question is not whether one party secured the clause by the use of unequal bargaining power or oppression, but whether or not the clause is a genuine pre-estimate of the likely loss:

“... whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss.” ¹⁰⁰³ ⚠️

Similarly, in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* the Supreme Court emphasised that where a party has a legitimate interest in securing performance rather than damages, the test of validity is whether the amount payable if the contract is broken is extravagant and unconscionable in comparison to that interest. ¹⁰⁰⁴ ⚠️ A clause may be a penalty even though it was freely negotiated between parties of equal bargaining power. ¹⁰⁰⁵ ⚠️

A question of law



26-181B

⚠️ The question whether a sum stipulated for in a contract is a penalty or liquidated damages is a question of law. ¹⁰⁰⁶ ⚠️


A question of construction

26-181C


⚠️ In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹⁰⁰⁷ ⚠️ a majority stated

that whether a clause is a penalty is a question of construction. From this it follows, Lords Neuberger and Sumption said, that the test must be applied as of the date of the agreement, not when it falls to be enforced; a penalty clause is a species of agreement that is by its nature contrary to public policy. It also follows that the application of the test does not involve a discretion, and if the clause is penal it is wholly unenforceable. These points suggest that the question is one that other courts have preferred to call one of characterisation rather than of interpretation or construction. ¹⁰⁰⁸  However, construction in the normal sense may also be relevant. Though it is usually accepted that the words used by the parties are not determinative, ¹⁰⁰⁹  if the parties' intention was to compensate rather than to deter, it seems that the validity of the clause should be judged by whether it is extravagant by comparison to a "genuine pre-estimate" test, disregarding any interest that might have justified a deterrent.


969.

 A valid agreed damages clause is probably not subject to the Unfair Contract Terms Act 1977 (see Vol.I, paras 15-062 et seq.), even if it is set at a figure below the likely loss, see below, para.26-180. cf. however, the Unfair Terms in Consumer Contracts Regulations 1999 and Consumer Rights Act 2015 (below, para.26-180).


970.

 [2015] UKSC 67, [2016] A.C. 1172, noted by Conte (2016) 132 L.Q.R. 382 and Morgan [2016] C.L.J. 11. In what follows the decisions will frequently be referred to as "*Cavendish Square*" and "*ParkingEye*".


971.

 See the test laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, below, para.26-182. It is presumed that a party has a legitimate interest in recovering its likely loss: *Cavendish Square* [2015] UKSC 67 at [32]. cf. a performance bond, which is *not* an estimate of the damage which might be caused by a breach of contract: *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1996] 4 All E.R. 563; *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep. 424 CA.


972.

 *Lordvale Finance Plc v Bank of Zambia* [1996] Q.B. 752, 762–764; *United International Pictures v Cine Bes Filmcilik ve Yapimcilik AS* [2003] EWCA Civ 1669 at [15]; *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436 at [30]; *General Trading Co (Holdings) Ltd v Richmond Corp Ltd* [2008] EWHC 1479 (Comm), [2008] 2 Lloyd's Rep. 475; *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539. See further below, paras 26-193–26-194.


973.

 *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6. This rule does not apply to deposits, though at least a deposit that it is larger than the customary amount may be a penalty: see below, paras 26-216Q and 26-216R.


974.

 Story, *Equitable Jurisprudence*, para.1316. The assessment of damages is according to common law; there is no equitable rule on damages where a clause has been held to be penal: *AMEV-UDC Finance Ltd v Austin* (1986) 60 A.L.J.R. 741.

975.

 *Jobson v Johnson* [1989] 1 W.L.R. 1026, 1040 (see also at 1038, 1039–1042, 1049). (cf. however, the dictum in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 702). ("The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of the primary obligation instead.") In *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172 *Jobson v Johnson* was disapproved on other grounds, see below, para.26-216K. On whether the claimant may recover more than was provided for by the invalid penalty clause, see below, para.26-216L.

976.

 See the cases cited in Vol.I, para.26-007 n.48. Agreed damages clauses do not bar the

remedy of rejection of the goods: Benjamin's Sale of Goods, 9th edn (2014), para.13–037.

977.

! For an economic analysis of agreed damages clauses, see Goetz and Scott (1977) 77 Col. L.R. 554; Rea (1984) 13 J.Leg.Stud. 147. See also Harris, Campbell and Halson, *Remedies in Contract and Tort*, 2nd edn (2002) at Ch.9.

978.

! *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6, 11. Even where the consequences of a breach are precisely ascertainable after the event, a sum reserved by the contract may be intended by the parties as an agreed estimate of damage in order to avoid the expense and difficulty of assessment: *Diestal v Stevenson* [1906] 2 K.B. 345.

979.

! *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1447–1448. See further below, para.26-186.

980.

! The clause may also operate as a limitation on liability: below, para.26-180. The traditional legal test, which was restricted to expected loss, did not permit the promisee to justify the sum fixed as a reasonable incentive to the promisor to perform his promise, nor as a disincentive to the promisor not to commit a *deliberate* breach (see Harris, Campbell and Halson at pp.136–139); but giving an incentive to perform or deterring breach is now accepted as legitimate if the party to whom the sum must be paid has a legitimate interest in securing performance rather than relying on damages. See below, para.26-197.

981.

! *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.

982.

! e.g. *Aktieselskabet Reidar v Arcos Ltd* [1927] 1 K.B. 352.

983.

! *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] A.C. 20; *Tullett Prebon Group Ltd v El-Hajjali* [2008] EWHC 1924 (QB), [2008] I.R.L.R. 760 at [83] (“a significantly smaller stipulated sum than the probable damages would be most unlikely to render a clause a penalty clause, though each case has to be decided on its own individual facts”).

984.

! cf. the rule that the effect of an exemption clause depends on the construction of the contract: *Suisse Atlantique Société d'Armement Maritime v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (see Vol.I, paras 15-025 et seq.).

985.

! See Vol.I, paras 15-066 et seq., and in particular para.15-069.

986.

! See Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 7–055 and 20–140.

987.

! See Vol.II, paras 38-201 et seq.

988.

! See Vol.II, paras 38-334 et seq.

989.

! [2015] UKSC 67, [2016] A.C. 1172.

990.

! See below, para.26-216.

991.

! See below, para.26-216.

992. **!** See below, para.26-216Q.
993. **!** See below, paras 26-216S et seq.
994. **!** See below, paras 26-216C et seq.
995. **!** For an early example see *Betts v Burch* (1859) 4 H & N 506, 509, cited by Lords Neuberger and Sumption in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172 at [8]. See also their judgment at [33].
996. **!** [2015] UKSC 67, [2016] A.C. 1172.
997. **!** The history of the rule in English law is summarised in the judgments of Lords Neuberger and Sumption in the *Cavendish Square* case [2015] UKSC 67 at [4]–[8] and of Mason and Wilson JJ. in the Australian case of *AMEV-UDC Finance Ltd v Austin* (1986) 162 C.L.R. 170 at [27]–[34]. See also A. Simpson, “The Penal Bond with Conditional Defeasance” (1996) 82 L.Q.R. 392; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), especially at pp.213 et seq. and 255 et seq. Lord Hodge gives an account of the history in Scots law at [2015] UKSC 67 at [251]–[253].
998. **!** *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49, 58.
999. **!** The view was also cited with approval in the High Court of Australia: *Esanda Finance Corp Ltd v Plesing* (1989) 166 C.L.R. 131, 140. See also Lord Neuberger and Lord Sumption’s descriptions of the doubts as to the basis of the doctrine, *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [3].
1000. **!** *Elsay v J.G. Collins Insurance Agencies Ltd* (1978) 83 D.L.R. (3d.) 1, 15.
1001. **!** *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1447.
1002. **!** *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] Build. L.R. 271 (TCC) at [48]. See also the *Cavendish Square* case [2015] UKSC 67 at [33].
1003. **!** *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752, 762–764, cited with approval in *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd’s Rep. 436 at [30].
1004. **!** [2015] UKSC 67 at [32]. On the role of unconscionability in this context, see below, para.26-214.
1005. **!** *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539; [2015] UKHL 67, esp. at [257] (Lord Hodge).
1006. **!** *Sainter v Ferguson* (1849) 7 C.B. 716, 727.
1007. **!** [2015] UKSC 67, [2016] A.C. 1172 at [9] (Lords Neuberger and Sumption) and [243] (Lord Hodge). See particularly on the construction point Dawson [2016] L.M.C.L.Q. 207.
1008. **!** See the two-stage process (interpretation of the agreement to ascertain the parties’ rights and obligations, followed by correct characterisation of the agreement) set out by Lord Millett in

Agnew v Inland Revenue Commissioners [2001] UKPC 28, [2008] 2 A.C. 710 at [32].

[1009](#).

⚠ See Lord Dunedin's first proposition in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, 86, quoted below, para.26-182 and n.934.

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(b) - Genuine Pre-estimate of the Likely Loss

Genuine pre-estimate test

26-182

⚠ What has been referred to above as the “traditional” test, which for many years was considered to have been the only test applicable, ¹⁰¹⁰ ⚠ was summed up by Lord Dunedin in delivering his opinion in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* ¹⁰¹¹ ⚠ in the following propositions:

“(1)

Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages ¹⁰¹² ⚠

(2)

The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage. ¹⁰¹³ ⚠

(3)


The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of at the time of the making of the contract, not as at the time of the breach. ¹⁰¹⁴ ⚠

(4)


To assist this task of construction various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conclusive.

¹⁰¹⁵ ⚠ Such are:


(a)

It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach. ¹⁰¹⁶ 

(b)


It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ¹⁰¹⁷ 

(c)

There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.' ¹⁰¹⁸ 

On the other hand:






(d)


It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise preestimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." ¹⁰¹⁹ 


In this case, dealers in tyres had agreed not to resell any tyres bought from the manufacturers to any private customers at less than the manufacturers' current list prices, not to supply them to persons whose supplies the manufacturers had decided to suspend, not to exhibit or export them without the manufacturers' consent, and to pay £5 by way of liquidated damages for every tyre sold or offered in breach of the agreement. It was held that the £5 was not a penalty and thus was recoverable as liquidated damages.

The basis of the decision in the Dunlop case

26-183

 The traditional approach treated Lord Dunedin's second proposition as an exhaustive dichotomy, ¹⁰²⁰  and had thus concentrated on whether the clause was a genuine pre-estimate of the loss that the payee was likely to suffer. A clause would be regarded as in terrorem if it provided for a greater sum, or at least an extravagantly greater sum, than the loss the payee was likely to suffer. ¹⁰²¹  In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹⁰²²  the Supreme Court pointed out that other judges in the Dunlop case had decided the case on a wider basis ¹⁰²³ ; and as the result of the Supreme Court's decision in those cases, a clause may also be justified on the basis that the party who would benefit from it has a legitimate interest in securing performance rather



than damages, and the amount payable or other consequence if the contract is broken is not extravagant and unconscionable in comparison to that interest. ¹⁰²⁴  However, as Lords Neuberger and Sumption said:


“In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin’s four tests would usually be perfectly adequate to determine its validity.” ¹⁰²⁵ 

Thus if the party cannot demonstrate a legitimate interest in securing performance rather than damages, or does not seek to do so, the clause may still be valid under the “genuine pre-estimate” test, and therefore that test is explored in more detail in this section.

An objective approach





26-184

 Asking whether a clause was a genuine pre-estimate of the loss might suggest a subjective approach, so that whether the clause is liquidated damages or a penalty depends on an assessment of what the parties thought they were agreeing on. However, there are clearly objective elements to a test which depends on whether the amount is “extravagant and unconscionable in comparison with the greatest loss” ¹⁰²⁶ ; and it has been held that:

“... the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one.” ¹⁰²⁷ 






A substantial discrepancy

26-185

 In *Murray v Leisureplay Plc* ¹⁰²⁸  the Court of Appeal emphasised that a clause will not be a penalty merely because it is not a precise pre-estimate of the loss. ¹⁰²⁹  Arden L.J. said that a contractual provision does not become a penalty simply because it results in overpayment in particular circumstances: “The parties are allowed a generous margin”. ¹⁰³⁰ 

Pre-estimate of damage

26-186

 The word “damage” must mean “net loss” after taking account of the claimant’s expected ability to mitigate his loss. The comparison is to be made to the loss that the innocent party would be entitled to recover by way of damages, not to the possibly greater actual loss. ¹⁰³¹  If the clause is a genuine pre-estimate of the loss, ¹⁰³²  there is no scope for arguing that the claimant could in fact have mitigated the loss: the purpose of the clause is to make proof of the actual loss unnecessary and irrelevant ¹⁰³³ ; but the mitigation principle must be taken into account in deciding whether or not the clause was a genuine pre-estimate in the first place. ¹⁰³⁴  A genuine pre-estimate may include

loss that would be too remote ¹⁰³⁵ ⚠ unless notice of its possibility had been given to the party in breach at the time the contract was made. ¹⁰³⁶ ⚠ It has been suggested that a party may stipulate for liquidated damages in order to ensure it is compensated for some idiosyncratic loss that might not otherwise be recoverable, such as sentimental value attached to property. ¹⁰³⁷ ⚠ It must be the case that a genuine pre-estimate can include damages for loss of amenity or distress when the purpose of the contract is to provide that amenity or freedom from distress ¹⁰³⁸ ⚠; it seems unlikely that such loss be a legitimate part of a pre-estimate when the loss would not be recoverable by way of unliquidated damages, ¹⁰³⁹ ⚠ but a genuine concern about such loss would presumably give rise to a legitimate interest that could be protected under the alternative basis set out in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. ¹⁰⁴⁰ ⚠ If, as it seems, “hypothetical bargain damages” allowing the innocent party to recover a share of the profit made by the other party through

his breach of contract ¹⁰⁴¹ ⚠ may be recoverable in addition to other damages, ¹⁰⁴² ⚠ presumably a genuine pre-estimate of the loss may include such a figure if, at the time the contract was made, it is likely that the type of breach to which the agreed damages clause applies will lead to the party in breach making a profit from it. The claimant’s chance to bargain with the defendant might constitute a legitimate interest ¹⁰⁴³ ⚠ but it is probably unnecessary for the claimant to show this if the amount agreed falls within a genuine preestimate. On the traditional account of liquidated damages, the fact that the damage is difficult to assess with precision strengthened the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial. ¹⁰⁴⁴ ⚠ It seems that the risk of this kind of difficulty will now be treated as giving the claimant a legitimate interest in deterring breach. ¹⁰⁴⁵ ⚠

Fluctuating sums

26-187

⚠ Although a valid agreed damages clause may specify a graduated scale of sums payable according to the varying extent of the expected loss, ¹⁰⁴⁶ ⚠ a sum which is liable to fluctuate according to extraneous circumstances will not be classified as liquidated damages. ¹⁰⁴⁷ ⚠ In a railway construction contract it was provided that in the event of a breach by the contractor he should forfeit “as and for liquidated damages” certain percentages retained by the government of money payable for work done as a guarantee fund to answer for defective work, and also certain security money lodged with the government. ¹⁰⁴⁸ ⚠ The Judicial Committee held that this was a penalty, since it was not a definite sum, but was:

“... liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract. It is obvious that the amount of retained money ... depended entirely on the progress of those contracts, and that further, as those moneys are primarily liable to make good deficiencies in these contract works, the eventual sum available ... could not in any way be estimated as a fixed sum.” ¹⁰⁴⁹ ⚠

Minimum payment clause

26-188

⚠ A “minimum payment” clause in a hire-purchase or hiring agreement that applies when the hirer is

⚠ will usually be held to fail the genuine preestimate test if it provides for the same total sum to be payable by the hirer irrespective of how long the agreement has been in force. ¹⁰⁵¹ ⚠

Single sum payable upon different breaches

26-189

⚠ The mere fact that the same amount is made payable upon the breach of several undertakings of varying importance is by no means conclusive. ¹⁰⁵² ⚠ It may be that the amount is not disproportionate to the least important of these undertakings, and therefore represents a genuine attempt at an agreed estimate of real damage ¹⁰⁵³ ⚠; or, if the loss is hard to assess, the test seemed to be satisfied if a modest sum was used; but a clause setting a very high amount would not pass muster. Thus in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, ¹⁰⁵⁴ ⚠ the dealers had agreed not to resell any tyres bought from the manufacturers to any private customers at less than the manufacturers' current list prices, not to supply them to persons whose supplies the manufacturers had decided to suspend, not to exhibit or export them without the manufacturers' consent, and to pay £5 by way of liquidated damages for every tyre sold or offered in breach of the agreement. It was held that the £5 was not a penalty and thus was recoverable as liquidated damages. ¹⁰⁵⁵ ⚠ The decision seems to fall within Lord Dunedin's last proposition:

"... the damage caused by each and every one of those events, however varying in importance, may be of such an uncertain nature that it cannot be accurately ascertained"

¹⁰⁵⁶ ⚠

The clause may also be a genuine pre-estimate where the stipulated sum is taken as an average or mean figure of the losses probably incurred in the different events. ¹⁰⁵⁷ ⚠ In *Ford Motor Co v Armstrong*, ¹⁰⁵⁸ ⚠ in contrast, the retailer in a similar case agreed to pay £250 as "the agreed damage which the manufacturer will sustain" upon the breach of any one of several covenants (similar to those in the *Dunlop* case, above), and the Court of Appeal by a majority held that this (in 1915) was a penalty, since it was an arbitrary and substantial sum, and made payable for various breaches differing in kind, some of which might cause only trifling damage. The high amount of the agreed sum in this case showed that it could not be a genuine pre-estimate of loss.

Breach may cause varying loss


26-190








⚠ A different case is where the sum is payable for any breach of a particular term of the contract, but the loss that follows may vary significantly from case to case. This seems to fall within Lord Dunedin's heading 4(a):

"It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach." ¹⁰⁵⁹ ⚠

It is not clear that the converse proposition, that the sum will not be unconscionable if it is no more than the greatest possible loss, follows. Lord Parker said that loss caused by a breach of a non-solicitation covenant might vary according to where or not the solicitation was successful;






nonetheless,

“whatever damage there is must be the same in kind for every possible breach, and the fact that it may vary in amount for each particular breach has never been held to raise any presumption or inference that the sum agreed to be paid is a penalty, at any rate in cases where the parties have referred to it as agreed or liquidated damages.” ¹⁰⁶⁰ 

That might be taken to suggest that provided the sum stipulated is not extravagant and unconscionable in relation to the greatest loss that might follow, it will not be a penalty even though the loss might well be much less and therefore the sum could not strictly be described as a genuine pre-estimate of the likely loss. ¹⁰⁶¹  On occasion Lord Dunedin’s statement has been applied literally, ¹⁰⁶²  and it was repeated by Lord Hodge in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis*. ¹⁰⁶³  However, in the past it has been held a clause may be penal under the “genuine pre-estimate test” even though the sum does not exceed the greatest possible loss. ¹⁰⁶⁴  In *Bridge v Campbell Discount Co Ltd* a clause in a hire-purchase providing for a minimum payment if the hirer defaulted in paying was held to be a penalty because the loss to the finance company would differ according to how long the hirer kept the vehicle. ¹⁰⁶⁵  True, in that case the amount payable under the clause would also vary according to how much of the price the hirer had already paid, so that the two situations are technically distinguishable, but it is thought that the result in the *Bridge* case would have been the same if the clause had simply stated a fixed sum that the hirer must pay however much he had paid already. So it is better to treat Lord Dunedin’s and Lord Parker’s statements quoted above as no more than a presumption to be used when the genuine pre-estimate test is being applied ¹⁰⁶⁶ ; and to note that when the claimant has a legitimate interest in obtaining performance rather than damages, an agreed sum that is not extravagant and unconscionable in relation to the greatest loss that might follow is likely to be treated as valid. ¹⁰⁶⁷ 



Graduated damages

26-191

 In building contracts and other similar contracts the courts have upheld as liquidated damages a system of graduated sums which increase in proportion to the seriousness of the breach, e.g. so much per week for delay in performance, ¹⁰⁶⁸  or so much according to the number of items in question. ¹⁰⁶⁹  If in a building contract there is no such graduation the sum fixed is less likely to be held to be a genuine pre-estimate. ¹⁰⁷⁰  The sum must be graduated so that it changes in the right direction. Depreciation obviously increases over time, so a sum said to be compensation for depreciation is not a genuine preestimate of loss if it *decreases* over time as a hirer pays more instalments. ¹⁰⁷¹ 

Damages following termination by the innocent party under an express term

26-192

 Where the hirer has neither repudiated the hiring (or hire-purchase) agreement, nor committed a “fundamental breach” of it, but the owner terminates it in the exercise of an express power to do so conferred by the agreement, the owner’s damages are limited to loss suffered through any breaches up to the date of the termination. ¹⁰⁷²  This is, in effect, the measure of loss defined by law and the parties are not free to define it otherwise. A clause that provides for a larger sum to be paid, such as a “minimum payment” clause or one providing for recovery of the amount of future payments, even with

deductions for any savings made, ¹⁰⁷³ **!** will (under the genuine pre-estimate test) be void as a penalty. ¹⁰⁷⁴ **!** It should be noted, however, that this principle does not apply where the contract made the broken term into a condition, any breach of which entitled the innocent party to terminate (e.g. a clause making compliance with time “of the essence” ¹⁰⁷⁵ **!**). In this case the innocent party may both terminate the contract and recover damages for the loss of the bargain (viz in respect of all the outstanding obligations of the other party). ¹⁰⁷⁶ **!** A clause that makes the hirer liable for a genuine pre-estimate of the owners’ full loss in such a case will be valid.

^{1010.} **!**In *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 at [22] Lords Neuberger and Sumption described it as having “achieved the status of a quasi-statutory code”.

^{1011.} **!**[1915] A.C. 79, 86–88.

^{1012.} **!**“But no case ... decides that the term used by the parties themselves is to be altogether disregarded, and I should say that, where the parties themselves call the sum made payable a ‘penalty,’ the onus lies on those who seek to show that it is to be payable as liquidated damages”: *Willson v Love* [1896] 1 Q.B. 626, 630. See *Alder v Moore* [1961] 2 Q.B. 57, 65; *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 W.L.R. 34. cf. *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] A.C. 573, 579.

^{1013.} **!***Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6. See also *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600, 622; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 850; *Cameron-Head v Cameron & Co* (1919) S.C. 627; the *Workers Trust* case [1993] A.C. 573. It should be noted that by s.24 of the Agricultural Holdings Act 1986 “notwithstanding any provision in a contract of tenancy of an agricultural holding making the tenant liable to pay a higher rent or other liquidated damages” for breach of covenant, etc. the landlord may not recover for any such breach any sum “in excess of the damage actually suffered”.

^{1014.} **!***Commissioner of Public Works v Hills* [1906] A.C. 368, 376; *Webster v Bosanquet* [1912] A.C. 394. If the contract was varied in a way that will affect the likely loss, the validity of the clause should be judged by the time of the variation: *Unaoil Ltd v Leighton Offshore Pte Ltd* [2014] EWHC 2965 (Comm) at [75].

^{1015.} **!***Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 K.B. 425.

^{1016.} **!***Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6, 17; *Webster v Bosanquet* [1912] A.C. 394; *Cooden Engineering Co Ltd v Stanford* [1953] 1 Q.B. 86; cf. *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600 (below, para.26-216C).

^{1017.} **!***Kemble v Farren* (1829) 6 Bing. 141. See also *Astley v Weldon* (1801) 2 B. & P. 346; *Wallis v Smith* (1882) 21 Ch. D. 243, 256–257. The breach may involve more than a failure to pay: *Thos. P. Gonzales Corp v F. R. Waring (International) Pty Ltd* [1986] 2 Lloyd’s Rep. 160, 163. A discount for prompt payment, however, was held not make the undiscounted sum a penalty; nor was it a penalty where a loan agreement provides for a modest increase in the rate of interest, which operates only from the date of the borrower’s default: *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752 (a 1 per cent increase: if, however, the increase operated retrospectively, it might be a penalty. On this case see further below, paras 26-193–26-194); cf. *Jeancharm Ltd v Barnet Football Club Ltd* [2003] EWCA Civ 58, [2003] 92 Con. L.R. 26 (interest rate for late payment of 5 per cent per week held to be a penalty).

1018.

! Lord *Elphinstone v Monkland Iron & Coal Co Ltd* (1886) 11 App. Cas. 332, 342. See *Kemble v Farren* (1829) 6 Bing. 141, 148; *Magee v Lavell* (1874) L.R. 9 C.P. 107, 115; *Ford Motor Co v Armstrong* (1915) 31 T.L.R. 267 (see below, para.26-189); *Michel Habib Raji Ayoub v Sheikh Suleiman* [1941] 1 All E.R. 507, 510; *Cooden Engineering Co Ltd v Stanford* [1953] 1 Q.B. 86, 98; *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 Q.B. 190, 194. The parties, in such a case, should fix separate sums for the various possible breaches: *Imperial Tobacco Co v Parslay* [1936] 2 All E.R. 515.

1019.

! See *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6, 11; *Webster v Bosanquet* [1912] A.C. 394, 398; *English Hop Growers Ltd v Dering* [1928] 2 K.B. 174; *Imperial Tobacco Co v Parslay* [1936] 2 All E.R. 515, 519; *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49, 60 PC (the impact of delay by one contractor on other contracts). Some of the clauses that were justified under this category in particular, including the *Dunlop* case itself, may now be better viewed as cases of legitimate deterrence: see below, para.26-197.

1020.

! cf. *United International Pictures v Cine Bes Filmcilik ve Yapimcilik AS* [2003] EWCA Civ 1669 at [15].

1021.

! “That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred”. *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752, 762, Colman J.

1022.

! [2015] UKSC 67, [2015] 3 W.L.R. 1373.

1023.

! See below, para.26-197.

1024.

! See below, para.26-197.

1025.

! [2015] UKSC 67 at [32].

1026.

! Lord Dunedin’s proposition (4)(a) above, para.26-182.

1027.

! *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] Build. L.R. 271 (TCC) at [48] (Jackson J.).

1028.

! [2005] EWCA Civ 963, [2005] I.R.L.R. 946.

1029.

! See also Jackson J. in *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] Build. L.R. 271 (TCC) at [48].

1030.

! [2005] EWCA Civ 963 at [43]; see too the judgments of Clarke and Buxton L.JJ. at [105] and [114] respectively. See also *Cleeve Link Ltd v Bryla* [2014] I.R.L.R. 86 EAT.

1031.

! *Lansat Shipping Co Ltd v Glencore Grain BV (The Paragon)* [2009] EWHC 551 (Comm), [2009] 1 Lloyd’s Rep. 658 at [24]. See also para.26-197.

1032.

! Note that under the approach taken in the *Cavendish Square* and *ParkingEye* cases, a clause may be valid even if it is not a genuine pre-estimate of the loss: see below, para.26-197.

1033.

! *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [70]–[71], referring to dicta in *Abrahams v Performing Rights Society Ltd* [1995] I.C.R. 1028,

1040–1041. However, in a contract in which the liquidated damages were only payable while the contract remained on foot, the innocent party was not entitled to ignore a repudiation and keep the contract alive so as to be able to continue to claim liquidated damages, as they would have no legitimate interest in doing so: at [94]–[105]. The Court of Appeal [2016] EWCA Civ 789 agreed (at [43]) though it decided the case on other grounds: see above, para.26-106.

1034.

⚠ *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [113]. If the relevant clause purported to give the innocent party an unfettered right to ignore the repudiation when it had no legitimate interest in doing so, the clause would be a penalty: [2015] EWHC 283 (Comm) at [116] (*aff'd without reference to this point*, [2016] EWCA Civ 789). In *Bunge SA v Nidera BV* [2015] UKSC 43 Lord Sumption said the Default Clause in a GAFTA sale contract differs from the common law paradigm in that the injured party is not required to mitigate by going into the market and buying or selling against the defaulter, but has a discretion whether to do so (at [28]). He did not discuss whether this might amount to a penalty, merely remarking that there is a difference between a clause prescribing a fixed measure of loss (such as a liquidated damages clause) and a clause providing a mechanical formula in place of the more nuanced and fact-sensitive approach of the common law (such as the GAFTA clause) (at [26]). With respect, a formula for measuring damages may also amount to a penalty if it produces results that are much greater than the damages that would be recoverable at common law: *Lombard North Central Plc v Butterworth* [1987] Q.B. 527. In contrast, Lord Toulson (with whom the other members of the Court agreed) did not think the GAFTA formula excluded the duty to mitigate (at [62]). In *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm), [2013] 1 Lloyd's Rep. 648 at [18], Popplewell J. said that the Default Clause did not constitute a penalty clause, applying his dicta in *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB).

1035.

⚠ See Vol.I, paras 26-107—26-134.

1036.

⚠ *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1447–1448 (Diplock L.J.). The agreed sum may take account of loss likely to be suffered which may not fall within the normal remoteness test: *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 W.L.R. 34, 39; *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49, 60–61 (the agreed sum may be justified by knowledge of “special circumstances”).

1037.

⚠ *Goetz & Scott* (1977) Columbia L.R. 554, 572–573.

1038.

⚠ See Vol.I, paras 26-144—26-146.

1039.

⚠ The question whether the parties may give their own meaning to “loss” is mentioned below, para.26-192, text after n.994.

1040.

⚠ [2015] UKSC 67, [2016] A.C. 1172; see below, paras 26-196 et seq.

1041.

⚠ See Vol.I, paras 26-051—26-054.

1042.

⚠ See Vol.I, para.26-053, n.295.

1043.

⚠ See below, para.26-197.

1044.

⚠ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79; *English Hop Growers Ltd v Dering* [1928] 2 K.B. 174; *Imperial Tobacco Co v Parslay* [1936] 2 All E.R. 515; *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, 1447; *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49 (the loss to a governmental body caused by delay in construction was especially difficult to assess).

- [1045.](#) **!** See below, para.26-197.
- [1046.](#) **!** See below, para.26-191, for graduated damages.
- [1047.](#) **!** *Commissioner of Public Works v Hills* [1906] A.C. 368, 376.
- [1048.](#) **!** On the question of the application of the penalty rules to this kind of clause, see below, para.26-216, esp. at n.1118m.
- [1049.](#) **!** *Commissioner of Public Works v Hills* [1906] A.C. 368, 376 (followed in *Jobson v Johnson* [1989] 1 W.L.R. 1026, 1036).
- [1050.](#) **!** Compare the situation where the hirer exercises an option, below, para.26-216C.
- [1051.](#) **!** *Lamdon Trust Ltd v Hurrell* [1955] 1 W.L.R. 391; *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.) See also *Anglo-Auto Finance Co Ltd v James* [1963] 1 W.L.R. 1042; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 Q.B. 54.
- [1052.](#) **!** See r.4(c) in Lord Dunedin's propositions, above, para.26-182. See *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 at [64]–[74].
- [1053.](#) **!** *Wallis v Smith* (1882) 21 Ch. D. 243; *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 K.B. 425; *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79; *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49, 62–63 (Privy Council refers to: "... the error of assuming that, because in some hypothetical situation the loss suffered will be less than the sum quantified in accordance with the liquidated damage provision, that provision must be a penalty"). This suggests that the validity of a clause should be judged by its normal operation: Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.20–131.
- [1054.](#) **!** [1915] A.C. 79.
- [1055.](#) **!** The House of Lords took the view that the £5 did not apply to the second and third obligations (not to sell to prohibited person, and not to exhibit without permission).
- [1056.](#) **!** *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, 95–96. See also *Galsworthy v Strutt* (1848) 1 Ex. 659, 666–667. Again, in some cases of this type the claimant may now be seen as having a legitimate interest in deterring breach, see below, para.26-197.
- [1057.](#) **!** *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, 99; *English Hop Growers Ltd v Dering* [1928] 2 K.B. 174, 182.
- [1058.](#) **!** (1915) 31 T.L.R. 267.
- [1059.](#) **!** *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, 87.
- [1060.](#) **!** [1915] A.C. 79, 98.
- [1061.](#) **!** The cases on covenants in restraint of trade, such as *Crisdee v Bolton* (1827) 3 C. & P. 240;

Price v Green (1847) 16 M. & W. 346, 354; *Reynolds v Bridge* (1856) 6 E. & B. 528, 541, have generally treated the sum payable for a breach as a sum stipulated for the breach of a single obligation, although it "is capable of being broken more than once, or in more ways than one": *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79, 98 (see also at 92–93); *Law v Redditch Local Board* [1892] 1 Q.B. 127, 136.

1062.

! *Cleeve Link Ltd v Bryla* [2014] I.R.L.R. 86 (EAT) (clause upheld when not extravagant in relation to maximum loss, though loss would vary significantly depending on how soon breach occurred).

1063.

! [2015] UKSC 67, [2016] A.C. 1172 at [255].

1064.

! *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 at [73]–[74].

1065.

! [1962] A.C. 600. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.)

1066.

! See *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 at [72], where Christopher Clarke L.J. added that "there may be some tension between" the two speeches.

1067.

! See further below, paras 26-196 et seq.

1068.

! *Clydebank Engineering Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6; *Philips Hong Kong Ltd v Att-Gen of Hong Kong* (1993) 61 Build. L.R. 49, 60 (PC); *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] Build. L.R. 271 (TCC). See also *Law v Redditch Local Board* [1892] 1 Q.B. 127; *Cellulose Acetate Silk Co Ltd v Widnes Foundry* (1925) Ltd [1933] A.C. 20 (above, para.26-180). The party entitled to the benefit of a liquidated damages clause in the event of failure to complete on time cannot take advantage of it if the delay is partly due to his own fault: *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1971) 69 L.G.R. 1, 11, 16. Demurrage under a charterparty is a case of graduated liquidated damages: *President of India v Lips Maritime Corp* [1988] A.C. 395, 422–423.

1069.

! *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App. Cas. 332; *Diestal v Stevenson* [1906] 2 K.B. 345.

1070.

! e.g. *Commissioner of Public Works v Hills* [1906] A.C. 368 (above, para.26-188). See also *Re Newman* (1876) 4 Ch. D. 724.

1071.

! *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600. ("It is a sliding scale of compensation, but a scale that slides in the wrong direction": at 623.) If it slides in the right direction, the clause is more likely to be held valid: *Phonographic Equipment* (1958) Ltd v *Muslu* [1961] 1 W.L.R. 1379. cf. *Lombank Ltd v Excell* [1964] 1 Q.B. 415.

1072.

! *Financings Ltd v Baldock* [1963] 2 Q.B. 104. The principle stated in the text has been regularly followed by the Court of Appeal: *Brady v St Margaret's Trust Ltd* [1963] 2 Q.B. 494; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 Q.B. 54; *Capital Finance Co Ltd v Donati* (1977) 121 S.J. 270; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527. See also the Australian cases cited, below, para.26-216A, n.1118p.

1073.

! In *Lombard North Central Plc v Butterworth* [1987] Q.B. 527 the contract contained a formula under which the owner was entitled to arrears, all future instalments that would have fallen due had and agreement not been terminated less a discount for accelerated payment. It omitted an allowance for the resale value of the repossessed goods. This would have prevented it being a

genuine preestimate of the loss, but it was held that even had it provided for an allowance, the clause would have been a penalty for the reason stated in the text.

[1074.](#)

! *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.

[1075.](#)

! See Vol.I, paras 21-011 et seq.

[1076.](#)

! The *Lombard case* [1987] Q.B. 527. See Treitel [1987] L.M.C.L.Q. 143; Beale (1988) 104 L.Q.R. 355.

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Part 8 - Remedies for Breach of Contract
Chapter 26 - Damages
Section 10. - Liquidated Damages, Deposits and Forfeiture of Sums Paid
(c) - Commercially Justified but not a Deterrent

“Genuine pre-estimate” and “whether imposed in terrorem”


26-193

⚠ Before the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹⁰⁷⁷ ⚠ there were a number of dicta to the effect that a clause that was not a genuine pre-estimate at all might nonetheless be valid if it was “commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach”. ¹⁰⁷⁸ ⚠ In *Makdessi v Cavendish Square Holdings BV* ¹⁰⁷⁹ ⚠ Makdessi had sold shares in his advertising and marketing business to another company, with payment to be made in stages. Ultimately Cavendish was substituted for the original purchaser by a novation agreement and ended up holding 60 per cent of the shares, Makdessi retaining 40 per cent. The purchaser had an option to buy the remaining shares. Makdessi entered various non-competition covenants. Clause 5.1 provided that if Makdessi was in breach of the non-competition clauses, he would not be entitled to further instalments of the price; and clause 5.6 provided that, in the same circumstances, the purchaser could require him to transfer his remaining shares at a price that was much lower than the option price, being based on asset value alone and ignoring any element of good will. Cavendish argued that Makdessi was in breach, refused to pay the outstanding instalments of the price and demanded that he transfer the remaining shares at the reduced value. Makdessi argued that clauses 5.1 and 5.6 were penalty clauses and unenforceable. Christopher Clarke L.J., with whom the other members of the court agreed, distinguished the traditional “genuine pre-estimate” approach from the “new approach” and said that the recent cases:


“... show the court adopting the broader test of whether the clause was extravagant and unconscionable with a predominant function of deterrence; and robustly declining to do so in circumstances where there was a commercial justification for the clause. That this is a reversion to the foundation of the doctrine is apparent from the observations of Lord Halsbury in *Clydebank Engineering* when he asked of the relevant clause:



‘whether it is, what I think gave the jurisdiction to the Courts in both countries to interfere at all in an agreement between the parties, unconscionable and extravagant, and one which no Court ought to allow to be enforced’.” ¹⁰⁸⁰ ⚠

Christopher Clarke L.J. made it clear that in his view, deterrence is not recognised as a commercial justification. ¹⁰⁸¹ ⚠ He then applied the two tests sequentially. ¹⁰⁸² ⚠ The clauses, which would

result in the seller of a business who had broken various undertakings not to compete receiving millions of dollars less in consideration, were held to be neither a genuine pre-estimate of the buyers' likely loss ¹⁰⁸³  nor commercially justified. Although it had been argued that the clauses were part of a commercial bargain, reached after extensive negotiation, as to the price at which shares in the Company were to change hands:




“The underlying rationale of the doctrine of penalties is that the Court will grant relief against the enforcement of provisions for payment (or the loss of rights or the compulsory transfer of property at nil or an undervalue) in the event of breach, where the amount to be paid or lost is out of all proportion to the loss attributable to the breach. If that is so, the provisions are likely to be regarded as penal because their function is to act as a deterrent.

That seems to me the position here. The payment terms of clauses 5.1 and 5.6 do not serve to fulfil some justifiable commercial or economic function such as is exemplified in the cases—a modest extra interest in respect of a defaulting loan; a provision for the payment of the costs of earlier litigation; a generous measure of damages for wrongful dismissal; an allocation of credit risk; or the provision of capital which would be needed if a promised guarantee of a loan was not forthcoming ...” ¹⁰⁸⁴ 


As will be seen in the next section, the Supreme Court ¹⁰⁸⁵  reversed this decision, holding that a clause may be valid even if it clearly has a deterrent function, provided that the party to whom the sum will be paid has a legitimate interest in securing performance rather than damages, and the amount payable or other consequence if the contract is broken is not extravagant and unconscionable in comparison to that interest. ¹⁰⁸⁶ 











“Commercial justifications” and “legitimate interests”

26-194

 It seems likely that the “commercial justifications” given in the cases referred to in this section and listed by Christopher Clarke L.J. in the passage cited in the previous paragraph, would also constitute legitimate interests ¹⁰⁸⁷  within the meaning of the Supreme Court’s new test. ¹⁰⁸⁸  If that is correct, there is no further need to refer to “commercial justification” as a test of whether an agreed damages or similar clause is valid or a penalty.

¹⁰⁷⁷.  [2015] UKSC 67, [2016] A.C. 1172.

¹⁰⁷⁸.  *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752, 762–764; *United International Pictures v Cine Bes Filmcilik ve Yapimcilik AS* [2003] EWCA Civ 1669 at [15]; and *semble*, Arden L.J. in *Murray v Leisureplay Plc* [2005] EWCA Civ 963, [2005] I.R.L.R. 946 (Clarke and Buxton L.JJ. preferred to decide the case on the basis that given the difficulty of forecasting the possible effect on the claimant’s employability and how quickly he would be able to obtain other employment, the sum payable was not, in the words of Lord Dunedin in the *Dunlop* case, “extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach” see [2005] EWCA Civ 963 at [105] and [114]–[115]). See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd’s Rep. 436 at [30]; *General Trading Co (Holdings) Ltd v Richmond Corp Ltd* [2008] EWHC 1479 (Comm), [2008] 2 Lloyd’s Rep. 475.

- [1079.](#)  [2013] EWCA Civ 1539; for an account of the Supreme Court decision in this case, [2015] UKSC 67, see below, para.26-197.
- [1080.](#)  [2013] EWCA Civ 1539 at [104]. The reference is to *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6.
- [1081.](#)  [2013] EWCA Civ 1539 at [125].
- [1082.](#)  [2013] EWCA Civ 1539 at [105]–[117] and [118]–[123].
- [1083.](#)  [2013] EWCA Civ 1539 at [105]–[117].
- [1084.](#)  [2013] EWCA Civ 1539 at [120]–[121].
- [1085.](#)  [2015] UKSC 67, [2016] A.C. 1172.
- [1086.](#)  See below, para.26-197.
- [1087.](#)  On what constitutes a legitimate interest see below, para.26-198.
- [1088.](#)  Lord Hodge said that the broader approach adopted in this group of cases “involves a correct analysis of the law” (at [225]; see also at [246]).

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(d) - Deterrence to Protect a Legitimate Interest

Permissible deterrence in protecting broader interests

26-195

⚠ The first modern decision that a clause requiring a sum that is not a genuine pre-estimate of the loss that will be suffered by the other party, and which is clearly aimed at deterrence, may nonetheless be a valid liquidated damages clause was the decision of the Court of Appeal in *ParkingEye Ltd v Beavis*.¹⁰⁸⁹ ⚠ The claimants operated a car park at a retail park on behalf of the owners. Motorists were allowed to park free of charge for up to two hours after which they should leave, but a “failure to comply” would result in a parking charge of £85. Moore-Bick L.J., with whom the other members of the court agreed, said the claimants would suffer no direct loss if the motorists overstayed the two hours; it had only an indirect commercial interest in that if it did not deliver the service required by the owners of the retail park it might lose its contract and its reputation.¹⁰⁹⁰ ⚠ There was also a social interest,¹⁰⁹¹ ⚠ in that consumers and retailers would benefit from having free parking for limited periods.¹⁰⁹² ⚠ Although it was clear that the principal purpose of the parking charge was to deter motorists from overstaying, a charge designed to protect a combination of indirect commercial interests and social interests might be valid, provided that it was not manifestly excessive. The judge at first instance had taken the correct approach when he held that the charge was neither improper in its purpose nor manifestly excessive in its amount, having regard to the level of charges imposed by local authorities and others for overstaying in public car parks.¹⁰⁹³ ⚠ While in a purely commercial context¹⁰⁹⁴ ⚠ a “dominant purpose of deterrence” had been equated to extravagance and unconscionability, in the context of the case that was not the case.¹⁰⁹⁵ ⚠ An appeal in the *ParkingEye* case was heard by the Supreme Court along with the appeal in the *Makdessi* case¹⁰⁹⁶ ⚠; as will be explained in the next paragraph, the Supreme Court¹⁰⁹⁷ ⚠ rejected the appeal in the *ParkingEye* case, upholding the £85 charge on an even wider ground than had the Court of Appeal.

Penalty doctrine confirmed

26-196

⚠ The appeals from *Makdessi v Cavendish Square Holdings BV*¹⁰⁹⁸ ⚠ and *ParkingEye Ltd v Beavis*¹⁰⁹⁹ ⚠ were heard together by a seven-justice panel of the Supreme Court.¹¹⁰⁰ ⚠ The Court did not accept the argument made by counsel for Cavendish that the rule against penalty clauses should be

⚠ or confined to cases in which the parties did not meet “on an equal playing field” ¹¹⁰² ⚠; although consumers are protected by the statutory power to strike down terms that are unfair, the doctrine serves a useful role in business to business contracts. ¹¹⁰³ ⚠ In particular small businesses might need the protection offered by the doctrine. ¹¹⁰⁴ ⚠ To abolish the doctrine would be inconsistent with the provisional recommendations of the Law Commission and the recommendations of the Scottish Law Commissions, ¹¹⁰⁵ ⚠ and out of line with other jurisdictions both elsewhere in the common law world and in Europe. ¹¹⁰⁶ ⚠

Protecting legitimate interests

26-197

⚠ However, the Supreme Court in *Cavendish Square and ParkingEye* ¹¹⁰⁷ ⚠ was unanimous that the decision in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, ¹¹⁰⁸ ⚠ had been interpreted too narrowly. Lord Dunedin had not intended to lay down a strict code, and the other Lords had not adopted to his reasoning in full. In particular Lord Atkinson had upheld the clause requiring payment of £5 for every tyre sold at less than the list price not because it was hard to estimate the loss from the particular breach but because Dunlop had a broader interest to protect, namely its system of price maintenance. ¹¹⁰⁹ ⚠ As Lord Mance put it ¹¹¹⁰ ⚠:

“It is clear ... that a concern can protect a system which it operates across its whole business by imposing an undertaking on all its counterparties to respect the system, coupled with a provision requiring payment of an agreed sum in the event of any breach of such undertaking. The impossibility of measuring loss from any particular breach is a reason for upholding, not for striking down, such a provision. The qualification and safeguard is that the agreed sum must not have been extravagant, unconscionable or incommensurate with any possible interest in the maintenance of the system, this being for the party in breach to show.”

A clause may be valid even if it does not represent a genuine pre-estimate of the loss, and even though it is aimed at deterring a party from breaking the contract, provided that the other party can show a legitimate commercial interest in deterring the breach rather than simply being entitled to damages ¹¹¹¹ ⚠ and that the clause is not extravagant or unconscionable in proportion to that interest. Lords Neuberger and Sumption said:

“The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin’s four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter’s primary obligations.”

¹¹¹² ⚠

Cavendish had a legitimate interest in preserving the good will for which it was paying such a large amount ¹¹¹³ ⚠; it would be hard to prove the loss flowing from any breach of the non-competition

covenants; the seller's loyalty was critical and indivisible ¹¹¹⁴ ! and therefore it was legitimate to deter Makdessi from any breach. Likewise, in the *ParkingEye* case there was clearly a legitimate interest in ensuring that motorists did not stay longer than two hours. ¹¹¹⁵ ! Therefore Cavendish's appeal succeeded but Beavis' failed.

"Legitimate interest"

26-198

! In *Makdessi v Cavendish Square Holdings BV* and *ParkingEye Ltd v Beavis* ¹¹¹⁶ ! the Supreme Court held that an agreed damages clause or other type of clause that falls within the scope of the penalty doctrine ¹¹¹⁷ ! will be valid if it is designed to protect a legitimate interest of the innocent party and the amount involved is not extravagant or unconscionable in proportion to that interest. ¹¹¹⁸

! Punishment of the party in breach is not a legitimate purpose. ¹¹¹⁹ ! The Supreme Court decided that when shares in a company that has been purchased will be of little value to the buyer if the seller is not loyal, as in the *Cavendish Square* case, or if a perfectly lawful scheme will not work unless there is an effective deterrent, as in the *ParkingEye* case, and damages will not provide an adequate sanction, there is a legitimate interest in deterrence and a sum that is designed to deter will not be penal, provided that it is not extravagant or unconscionable compared to the relevant legitimate interest. ¹¹²⁰ ! What general factors are relevant to whether the claimant has a legitimate interest for this purpose?

Difficulty of proving loss

26-199

! Lords Neuberger and Sumption referred to a legitimate interest in obtaining performance rather than merely damages ¹¹²¹ !; and, in support of their argument that in fashioning the rules on remedies the law takes into account legitimate interests, referred to the rule that specific performance may be available (subject to other constraints) if the innocent party has "a legitimate interest extending beyond pecuniary compensation for the breach". ¹¹²² ! In each of the cases before the court, it seems that damages would not be adequate compensation, nor be adequate as a deterrent to breach, as it would be hard to prove what loss, if any, flowed from any particular breach. ¹¹²³ ! The same was true in the case of in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, ¹¹²⁴ ! in which a payment of £5 per tyre sold at below the list price was upheld.

Difficulty in detection

26-200

! A related factor is that damages for each individual breach will not be an effective remedy if it will be hard for the claimant to detect breaches by the defendant. ¹¹²⁵ !

Substitute not available

26-201

⚠ The analogy drawn with specific performance indicates that it would also suffice that the contract was for a unique piece of property, so that the claimant would be unable to purchase a substitute. ¹¹²⁶

⚠ The case would presumably be even stronger if the claimant might suffer consequential loss (such as a reduction in trading profits that might have been made using a unique vessel ¹¹²⁷ ⚠) that is again hard to prove or quantify. It is submitted that a party may also have a legitimate interest in deterring the defendant from breaching a contract to provide services if it will be difficult for the claimant to obtain the services from a replacement contractor, even though specific performance of the contract might not be granted for other reasons, such as that because it would involve personal service ¹¹²⁸ ⚠ or because it might require the court to supervise performance. ¹¹²⁹ ⚠

Loss suffered by third party

26-202

⚠ In the *ParkingEye* case, there was an additional reason for damages being inadequate: the loss caused by the motorist overstaying the two hours free parking would be suffered not by ParkingEye Ltd but by the operator of the retail park and by members of the public who wished to use it. It is not only the legitimate interests of the contracting party that count for this purpose. ¹¹³⁰ ⚠ It may be added that this appears to be a form of consequential loss that would not be recoverable under the principles that exceptionally permit a party to a contract to recover damages on the basis that the promisee has not received the benefit that he contracted for, ¹¹³¹ ⚠ nor to be within the cases that have permitted a promisee to recover for loss that is suffered by a third party. ¹¹³² ⚠ In *Beswick v Beswick* ¹¹³³ ⚠ the majority considered that the promisee could recover only nominal damages, while the third party suffered the real loss, and that therefore specific performance was an appropriate remedy. It seems the presence of similar factors will mean that the promisee has a legitimate interest in securing performance rather than relying on the remedy of damages.

Insolvency risk

26-203

⚠ The possible insolvency of either party may also be a relevant factor, at least when it is the claimant's solvency that is at risk. A factor that has sometimes been taken into account in deciding whether to grant specific performance (or, on the facts of the case, an injunction against breach) is that the defendant may not be able to pay any damages. ¹¹³⁴ ⚠ It is not evident that the defendant's inability to pay damages can by itself ¹¹³⁵ ⚠ give the claimant a legitimate interest in deterring breach by imposing liability for "deterrent" liquidated damages, which would mean the defendant paying even greater sums. Conversely, it has been said to be a relevant factor to specific performance that delay is likely to be encountered in securing the actual payment of any damages and that the claimant might become insolvent before they are paid. ¹¹³⁶ ⚠ It is submitted that this may be relevant to an agreed damages clause. The claimant clearly has a legitimate interest in remaining solvent, and if the contract is sufficiently important to the claimant's financial state that non-performance by the defendant coupled with a likely delay in recovering the damages would put the claimant's solvency at serious risk, the claimant seems to have a legitimate interest in performance rather than damages.

Preference for performance

26-204

! Specific performance will not be awarded merely because the claimant would prefer performance to damages, if damages would be (or are likely to be) an adequate remedy. Equally, it is submitted that, despite another analogy which will be considered in the next paragraph, ¹¹³⁷ ! the decision in the *Cavendish Square* case ¹¹³⁸ ! does not mean that a party who simply has a preference for performance (which would presumably include most contracting parties, unless they have come to regret entering the contract) has a legitimate interest in deterring breach sufficient to justify an agreed damages clause that is aimed at deterring breach rather than being a genuine pre-estimate of the loss. To put the point another way, whether the claimant has a legitimate interest in performance rather than damages seems to be an objective test. ¹¹³⁹ ! It is submitted further that the claimant would not be able to overcome this by showing that it had paid a higher price to the defendant than it would have had to pay had the clause not been included in the contract.

Continuing performance after a repudiation

26-205

! Lords Neuberger and Sumption ¹¹⁴⁰ ! also referred to the line of cases, starting with a dictum of Lord Reid in *White & Carter (Councils) Ltd v McGregor*, ¹¹⁴¹ ! to the effect that a party faced with a wrongful repudiation by the other party may, if he is able to continue to perform his part of the contract without the repudiating party's co-operation, ignore the repudiation, perform his part and sue for the agreed price unless he has no legitimate interest in doing so. The Court of Appeal has accepted the "no legitimate interest" restriction as part of the law. ¹¹⁴² ! But in the context of repudiation, the concept of legitimate interest operates not as a reason for allowing an additional remedy but as a restriction on the right to keep the contract in force, a restriction that allows the right to be exercised except in fairly extreme cases. Facts that have been mentioned as possibly justifying an innocent party in continuing to perform and claiming the price despite the repudiation have included that the shipowner faced with a wrongful repudiation by the charterer would, if the owner could not claim the hire, be left with the burden of re-letting the ship rather than the charterer having to find a use for it ¹¹⁴³

!; that the charter hire might have been assigned to a bank as security for a loan ¹¹⁴⁴ !; that if the innocent party had to claim damages from a repudiating party who was in financial difficulties, the defendant's funds might have been directed elsewhere before the damages were paid ¹¹⁴⁵ !; and the fact that an innocent ship owner would be left "in a difficult market where a substitute time charter was impossible, and trading on the spot market very difficult". ¹¹⁴⁶ ! The innocent party has been held to have a legitimate interest in performing "unless maintaining the contract can be described as 'wholly unreasonable', ¹¹⁴⁷ ! 'extremely unreasonable' or, as Popplewell J. put it after surveying the cases, "perhaps, in my words, 'perverse'". ¹¹⁴⁸ ! An arbitrator's decision that the shipowner had no legitimate interest in continuing to claim the hire under a charter because the owner could re-let the ship on the spot market and claim damages from the charter was held to be a misapplication of the law. ¹¹⁴⁹ ! So it is not clear that the analogy of the *White & Carter* cases will provide helpful guidance on the meaning of legitimate interest in the context of the penalty rule. The Supreme Court seemed to regard a legitimate interest in obtaining performance rather than recovering damages as exceptional, ¹¹⁵⁰ ! not as applying unless seeking to obtaining performance would be wholly unreasonable. It is submitted that the fact that the claimant would be faced with having to go into an uncertain market in order to mitigate its loss does not give it a legitimate interest sufficient to support a clause that is aimed at deterring breach rather than being a pre-estimate of loss. However, when the amount of loss is hard to predict the claimant will no doubt still be given a "generous margin" ¹¹⁵¹ ! before the pre-estimate will be treated as extravagant or unconscionable and therefore a penalty.

Analogy to account of profits

26-206

⚠ A further possible analogy, though not mentioned by the Supreme Court in the *Cavendish Square* case, ¹¹⁵² ⚠ are the cases in which a claimant is permitted to recover an account of the profit ¹¹⁵³ ⚠ or, at least damages on the “*Wrotham Park*” basis, ¹¹⁵⁴ ⚠ in other words, a share of the profit that the defendant has made through breaking the contract. An account of profit was awarded in *Att-Gen v Blake* ¹¹⁵⁵ ⚠ after Blake had written and published a book in breach of the confidentiality agreement made by him when he entered the Secret Intelligence Service. The circumstances were said to be “exceptional”, but Lord Nicholls said:

“The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity and, hence, in depriving him of his profit.

It would be difficult, and unwise, to attempt to be more specific ...” ¹¹⁵⁶ ⚠










Presumably the government would equally have had a sufficient legitimate interest to justify a clause requiring ex-employees who broke the confidentiality agreement to pay a sum that was designed to be a deterrent. Later cases have emphasised that for an account of profits to be appropriate the circumstances must be exceptional, and this has been taken to mean that an account of profits will

not normally be appropriate in a commercial case, ¹¹⁵⁷ ⚠ though it is certainly possible. ¹¹⁵⁸ ⚠ To date an account of profits has been awarded in commercial circumstances only in one case at first instance. In *Esso Petroleum Co Ltd v Niad Ltd* ¹¹⁵⁹ ⚠ the defendant had agreed to participate in a “Price Watch” scheme under which participating petrol stations agreed not to sell at above set prices. The defendant broke the agreement by selling at higher prices. The claimants were unable to show what loss this had caused them but it was held that they had a strong interest in performance and an account of profits was ordered. Though Esso’s aim was to prevent dealers from selling petrol at higher prices than permitted by the scheme, rather than to prevent sales at less than a list price, in other respects the facts are quite similar to those of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*, ¹¹⁶⁰ ⚠ and it seems clear that Esso would have had a sufficient legitimate interest to justify a clause requiring dealers who broke the agreement to pay a sum that was designed to be a deterrent, provided the sum set was not extravagant or unconscionable in proportion to Esso’s interest. Moreover, it seems likely that an agreed damages clause that was calculated to take away any profit that the dealer might make by selling at higher than the set price would be proportionate to Esso’s legitimate interest in deterring this kind of breach of contract by dealers. ¹¹⁶¹ ⚠ Beyond this, however, it is hard to gain much guidance from a class of cases that by definition are exceptional.

Analogy to “Wrotham Park” damages






26-207

⚠ In cases in which the claimant has found it impossible or difficult to show that it has suffered a loss as the result of the defendant’s breach of contract, the courts have more often awarded what are often now called “*Wrotham Park*” or “hypothetical bargain” damages, in other words, damages measured by the sum that the claimant could reasonably have demanded as the price of releasing the defendant from its obligation. ¹¹⁶² ⚠ So where the defendant has failed to provide the services

promised but the claimant cannot show a consequential loss, if damages cannot be awarded on the simple difference in value between the services promised and those provided, ¹¹⁶³  an award on the hypothetical bargain basis may be made instead. ¹¹⁶⁴  The facts do not have to be exceptional in the way required if an account of profits is to be ordered, nor is it necessary that to deny *Wrotham Park* damages would produce a manifest injustice; the question is whether an award would be a just response. ¹¹⁶⁵  Some of the factors taken into account in deciding whether to award *Wrotham Park* damages seem relevant to the question of whether the claimant has a legitimate interest in securing performance rather than damages. ¹¹⁶⁶  These include difficulty in showing loss, even if it would be possible for the court to make an award of general damages assessed “in a robust manner”. ¹¹⁶⁷  Although it had been said that “the inability to demonstrate identifiable financial loss of the conventional sort is a pre-condition to the award of such damages”, ¹¹⁶⁸  in *One Step (Support) Ltd v Morris-Garner* the Court of Appeal declined to follow this dictum and held that *Wrotham Park* damages may be awarded when it will be very difficult to prove the loss that has been caused by the breach. ¹¹⁶⁹  It may also be relevant that it would be difficult for the claimant to obtain interim relief. ¹¹⁷⁰  These factors seem to reflect similar ones that were suggested earlier. In any event, it was suggested earlier that loss of a hypothetical bargain is a kind of loss that may form part of a genuine pre-estimate of the loss. ¹¹⁷¹  If that is correct, no further legitimate interest need be shown to justify an agreed damages clause that is designed to deter breach in circumstances in which “*Wrotham Park*” damages might be available.




Capturing any profit from breach

26-208

 A further possible reason for including an agreed damages clause that fixes the sum to be paid at a sum much greater than the pre-estimated loss is that, even though damages will in other respects be an adequate remedy for the claimant’s losses, the claimant considers that the defendant may break the contract in order to make a greater profit and wants to be able to claim the whole of the profit, not just a share of it as under the approach discussed in the last paragraph. If damages would be adequate, ¹¹⁷²  it seems unlikely that the claimant would be treated as having a legitimate interest in capturing the whole of the defendant’s profit. In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* ¹¹⁷³  Lord Hoffmann expressed the concern that in some circumstances an award of specific performance may allow “the plaintiff to enrich himself at the defendant’s expense” by negotiating an excessive price for releasing the defendant from performance; one that “exceeds the value of performance to the plaintiff and approaches the cost of performance to the defendant”. ¹¹⁷⁴  A similar concern would prevent a court holding that a claimant has a legitimate interest in a clause that is designed to capture the whole of, or a large share in, any profit that the defendant might make. ¹¹⁷⁵ 

Part of a legitimate scheme

26-209

 The decision in the *ParkingEye* case ¹¹⁷⁶  may also be explained, without having to show that a breach of the contract would cause the claimant to suffer a loss that would not be compensable (or indeed, any loss at all) on the basis that the charge was an essential part of a lawful scheme. ¹¹⁷⁷ 

Conclusion on legitimate interest

26-210

⚠ It is submitted that a claimant will have a sufficient legitimate interest in obtaining performance rather than damages to justify an agreed damages clause that is intended to deter breach, rather than as a pre-estimate of loss, in the following situations:

- if the claimant would face serious difficulties in proving what loss, if any, flowed from the breach [1178](#) ⚠;
- if the claimant would face serious difficulties in detecting whether there has been a breach [1179](#) ⚠;
- if damages will not be an adequate remedy because, if the defendant fails to perform, the claimant will not be able to obtain substitute goods, other property or services (irrespective of the fact that specific performance of the contract might not be available for other reasons) [1180](#) ⚠;
- if loss will be suffered by a third party rather than by, or in addition to, the claimant [1181](#) ⚠;
- if having to claim damages from the defendant would put the claimant's solvency at risk [1182](#) ⚠;
- if that even though neither the claimant nor a third party will suffer any loss through the defendant's breach but the claimant has an exceptional interest in ensuring that defendant performs such that the court would award an account of profits, as in *Att-Gen v Blake* [1183](#) ⚠; or
- more generally, if deterrence is an essential element of a lawful scheme. [1184](#) ⚠

In contrast, the claimant does not have a legitimate interest in obtaining more than damages, or agreed damages that are substantially more than a genuine preestimate of the likely loss, merely because the claimant would have to incur time and expense in arranging a substitute transaction, or simply would prefer performance to claiming damages [1185](#) ⚠; nor because it hopes to secure a large share of any profit the defendant might make through breaking the contract, when damages would otherwise be an adequate remedy. [1186](#) ⚠

“Not extravagant or unconscionable”

26-211

⚠ Even if the claimant can show that it has a legitimate interest in obtaining actual performance instead of damages in lieu of performance, an agreed damages clause or other clause that is within the penalty clause rules will not be valid if it is extravagant or unconscionable compared to the legitimate interest. Lord Mance’s reference to the sum being “not ... incommensurate” ¹¹⁸⁷ ⚠ and Lord Hodge’s to whether it is “wholly disproportionate” ¹¹⁸⁸ ⚠ to the interest to be protected are helpful to show what is meant.

Proportionate

26-212

⚠ “Not extravagant or unconscionable compared to the legitimate interest”, and “not incommensurate” or “not disproportionate”, appears to mean that a sum agreed to be payable upon breach must not be substantially more than is required in order to deter the defendant from breach.

How is this to be determined? Since the decision in *ParkingEye Ltd v Beavis*, ¹¹⁸⁹ ⚠ there have been anecdotal reports ¹¹⁹⁰ ⚠ of parking companies charging motorists who overstay the period of “free parking” as much as £300. Is that unconscionable or disproportionate? It does not seem to matter that the loss may vary from breach to breach. Though there is no necessary connection between deterrence and the amount of the loss caused by a breach, a motorist who overstays by ten minutes presumably causes less loss to the landowner and less inconvenience to the public, and is therefore less of a threat to the claimant’s “legitimate interests” than one who overstays by six hours, but there is no suggestion in the case that the agreed sum needs to be graduated according to the length of the overstay in order to avoid being classed as a penalty. ¹¹⁹¹ ⚠ Some motorists will be more attentive than others to notices setting out charges for overstay and other breaches of the rules, and some will be deterred more readily than others. Will a charge remain “proportionate” unless it is higher than is needed to make even the most inattentive motorist sufficiently aware of the charges to “stop and think” and to deter even the most thoughtless or perverse? This was not discussed in the *ParkingEye* case. Rather, there were references to proportionality in another sense, their Lordships pointing out that the £85 charge was not much greater than the fine for overstay in many car parks operated by local authorities, and the latter do not usually allow a period of free parking. ¹¹⁹² ⚠ The difficulty of deciding what is not unconscionable or wholly disproportionate seems greater still when the breaches that will trigger the agreed damages or other clause ¹¹⁹³ ⚠ may be quite various in nature. A seller of a business might breach a non-competition covenant by no more than continuing to make a few small transactions with no intent to compete further, which would probably pose no real threat to the buyer of the business; yet in the *Cavendish Square* case it was not treated as disproportionate to impose a price reduction of millions of dollars for any breach of the covenants. The Supreme Court’s decision in *Cavendish Square* case may suggest that deterrent sums will only be disproportionate if they are excessive even for the “worst case scenario”. However, it is submitted that the decision may be explained on the basis that the parties were of equal bargaining power and would not have agreed on a more draconian clause than was reasonably necessary to protect the buyer’s interests. ¹¹⁹⁴ ⚠ Had the parties been less equal, the “not extravagant or unconscionable” test might have been applied in a less generous way. If the sum is payable for any one of many different possible breaches, some of which may be comparatively minor, it is likely to be disproportionate. ¹¹⁹⁵ ⚠

“Not ... extravagant”

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⚠ The word “extravagant” can be taken to mean that disproportion will not be judged harshly; as in “pre-estimate” cases, ¹¹⁹⁶ ⚠ the parties will be allowed “a generous margin of error”. But otherwise it seems “usually to amount to the same thing” as “unconscionable”. ¹¹⁹⁷ ⚠

“Not ... unconscionable”

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⚠ It is not clear whether the word “unconscionable”, which recurs in all the judgments, was intended to have any independent effect. Lord Toulson clearly thought “unconscionable” added nothing to “extravagant”, ¹¹⁹⁸ ⚠ but Lord Hodge twice refers to it as a separate requirement. ¹¹⁹⁹ ⚠ Lords Neuberger and Sumption said ¹²⁰⁰ ⚠

“the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.”

Lord Mance also said that ¹²⁰¹ ⚠

“... the extent to which the parties were negotiating at arm’s length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor.”

These statements do not appear to mean that there is a separate requirement of procedural fairness. It seems more likely that all Lords Neuberger, Sumption and Mance meant was that if the parties meet on more-or-less equal terms, the nonbreaching party is less likely to get away with a provision that is disproportionate to what it needs if there is no effective bargaining pressure from the other party. This may well be one reason ¹²⁰² ⚠ why the court did not question whether the provisions in the *Cavendish Square* case were proportionate to the buyer’s legitimate interest. ¹²⁰³ ⚠

¹⁰⁸⁹. ⚠[2015] EWCA Civ 402.

¹⁰⁹⁰. ⚠[2015] EWCA Civ 402 at [25].

¹⁰⁹¹. ⚠[2015] EWCA Civ 402 at [27].

¹⁰⁹². ⚠[2015] EWCA Civ 402 at [30].

¹⁰⁹³. ⚠[2015] EWCA Civ 402 at [26].

¹⁰⁹⁴. ⚠Or, as Sir Timothy Lloyd put it, “where the transaction between the contracting parties can be assessed in monetary terms, as can the effects of a breach of the contract by one party or the other” (at [44]). To prohibit this provision would “fail to take account of the nature of the contract,

with its gratuitous but valuable benefit of two hours' free parking, and of the entirely legitimate reason for limiting that facility to a two hour period" (at [49]).

[1095.](#)

❗[2015] EWCA Civ 402 at [27]. The Court also held that the term was not unfair under the Unfair Terms in Consumer Contracts Regulations 1999: see below, para.38-251A.

[1096.](#)

❗See above, para.26-193.

[1097.](#)

❗*Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.

[1098.](#)

❗[2013] EWCA Civ 1539; for the facts, see the account of the Court of Appeal decision in this case, above, para.26-193.

[1099.](#)

❗[2015] EWCA Civ 402; for the facts, see above, para.26-195.

[1100.](#)

❗*Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172, noted by Conte (2016) 132 L.Q.R. 382, Morgan [2016] C.L.J. 11, Fisher [2016] L.M.C.L.Q. 169 and Dawson [2016] L.M.C.L.Q. 207.

[1101.](#)

❗See [2015] UKSC 67 at [36], [162] (Lord Mance), [218] and [256] (Lord Hodge).

[1102.](#)

❗See Lord Hodge [2015] UKSC 67 at [256] and [267].

[1103.](#)

❗[2015] UKSC 67 at [38], [260].

[1104.](#)

❗Lord Mance [2015] UKSC 67 at [167]; Lord Hodge at [263].

[1105.](#)

❗See Lord Mance [2015] UKSC 67 at [163]; Lord Hodge at [263].

[1106.](#)

❗See [2015] UKSC 67 at [164]–[167] (Lords Neuberger and Sumption) and [264]–[265] (Lord Hodge).

[1107.](#)

❗*Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.

[1108.](#)

❗[1915] A.C. 79.

[1109.](#)

❗[2015] UKSC 67 at [22]–[23], [135]–[139], referring to [1915] A.C. 79, 90–93. Lord Mance (at [132]–[134]) also referred to the words of Lord Robertson in *Clydebank Engineering & Shipbuilding Co Ltd v Yzquierdo y Castaneda* [1905] A.C. 6, 19.

[1110.](#)

❗[2015] UKSC 67 at [143].

[1111.](#)

❗[2015] UKSC 67 at [28]; cf. at [248]–[249] (Lord Hodge).

[1112.](#)

❗[2015] UKSC 67 at [32]. cf. Lord Hodge at [255], [275]. As Lord Carnwath and, on this point, Lord Clarke (see at [291]) agreed with Lords Neuberger and Sumption, this statement may be taken as the authoritative statement of the penalty rule. Lord Mance and Lord Hodge, with both of whom Lord Toulson agreed on this issue (see at [292]), each gave slightly different accounts but it is not thought that the differences between the judgments on this issue are substantial.

- [1113.](#) **!**[2015] UKSC 67 at [75].
- [1114.](#) **!**[2015] UKSC 67 at [75]; and see Lord Hodge at [272]. Lord Mance's analysis does not seem essentially different: he said that cl.5.1 should be judged in the light of the general interest being protected: at [179]–[180], and likewise cl.5.6 “must be viewed in nature and impact as a composite whole as well as in context”.
- [1115.](#) **!**[2015] UKSC 67 at [99] (Lords Neuberger and Sumption, with whom Lords Carnwath and, on this point, Clarke, agreed), [184] (Lord Mance) and [285]–[286] (Lord Hodge). Lord Toulson, who considered that the clause in the *ParkingEye* case was unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (see below, para.38-251A), declined to discuss whether it also amounted to a penalty at common law (at [316]).
- [1116.](#) **!**[2015] UKSC 67: see above, para.26-197.
- [1117.](#) **!**See below, paras 26-216 et seq.
- [1118.](#) **!**This test was applied in *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc* [2016] EWHC 782 (Ch) at [142] and in *BHL v Leumi Abi Ltd* [2017] EWHC 1871 (QB) at [44]. In *First Personnel Services Ltd v Halfords Ltd* [2016] EWHC 3220 (Ch) no evidence was given to justify a rate of interest on late payment far above both the usual commercial rate and what was payable under the Late Payment of Commercial Debts (Interest) Act 1998; it was not justified by the creditor's interest in securing punctual payment having regard to its own liability to pay employees (at [163]).
- [1119.](#) **!**See [2015] UKSC 67 at [13] and [30] (Lords Neuberger and Sumption), [148] (Lord Mance), [243] (Lord Hodge).
- [1120.](#) **!**See [2015] UKSC 67 at [99].
- [1121.](#) **!**[2015] UKSC 67 at [28]. In *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch) Timothy Fancourt QC, sitting as a Deputy Judge of the High Court, said the test is whether the claimant has a legitimate interest beyond pecuniary compensation for any loss caused by the particular breach, so as to justify the secondary obligation (at [49]). The interest must in performance of the tenant's obligations, not merely in being able to claim the higher rent that became payable in the event of the tenant failing to comply with one of its obligations (at [52]). On the facts, the term that required the tenant, in the event of any non-trivial breach of its obligations, to pay a substantially higher rent was out of all proportion to the lessor's interest in having the tenant perform every one of its obligations rather than pay compensation for any breaches (at [63]), especially as the increased rent was payable in addition to damages for any loss caused by the breach. The increased rent was payable with retroactive effect from the start of the lease, but even if it had been purely prospective it would have been a penalty (at [65]).
- [1122.](#) **!**[2015] UKSC 67 at [30].
- [1123.](#) **!**cf. Vol.I, para.27-008 (difficulty in quantifying damages may mean damages inadequate).
- [1124.](#) **!**[1915] A.C. 79.
- [1125.](#) **!**See Lord Mance [2015] UKSC 67 at [172].
- [1126.](#) **!**On the “adequacy of damages” test and the availability of a substitute, see Vol.I, paras

27-010 et seq.

[1127.](#)

!cf. Vol.I, para.27-012 n.61.

[1128.](#)

!See Vol.I, paras 27-024 et seq.

[1129.](#)

!See Vol.I, paras 27-030 et seq.

[1130.](#)

![2015] UKSC 67 at [99].

[1131.](#)

!The “broader principle” suggested by Lord Griffiths in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85. Further, even the cost of performance may be recoverable by the promisee only if he would be able and likely to remedy the breach: see Vol.I, para.18-056 and paras 18-063—18-068.

[1132.](#)

!e.g. when the parties contemplated that the property would be transferred to a third party, the ground of the majority decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85: see Vol.I, paras 18-057 et seq.

[1133.](#)

![1968] A.C. 58; see Vol.I, paras 18-022 and 18-051 et seq.

[1134.](#)

!*Evans Marshall & Co v Bertola SA (No.1)* [1973] 1 W.L.R. 349, 367 (Kerr J. at first instance) and 385 (Edmund Davies L.J.)

[1135.](#)

!Insolvency of the defendant is not a ground for refusing specific performance where the remedy is normally available as a matter of course: *AMEC Properties v Planning Research & Systems* [1992] 1 E.G.L.R. 70. See Vol.I, para.27-013.

[1136.](#)

!*Thames Valley Power Ltd v Total Gas and Power Ltd* [2006] 1 Lloyd’s Rep. 441 at [64]; see Vol.I, para.27-016 at n.95.

[1137.](#)

!See below, para.26-205.

[1138.](#)

!*Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.

[1139.](#)

!cf. above, para.26-184.

[1140.](#)

![2015] UKSC 67 at [29].

[1141.](#)

![1962] A.C. 413, 431: see Vol.I, para.26-106.

[1142.](#)



















!See Vol.I, para.26-106.













[1143.](#)

!*Gator Shipping Corp v Trans-Asiatic Oil SA (The Odenfeld)* [1978] 2 Lloyd’s Rep. 357, 374. A similar point was made in respect of a landlord faced with a repudiation of a lease by a tenant: *Reichman v Beveridge* [2006] EWCA Civ 1659 at [31], though in that case the court also held it was reasonable for the landlord to continue to claim the rent given that there was uncertainty over whether English law permits a landlord who has terminated the lease to claim damages for loss of rent (at [28]), an uncertainty that does not arise in relation to contracts in general.

- [1144.](#) **!** *Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No.2)* [1984] 1 All E.R. 129, 137.
- [1145.](#) **!** *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [47].
- [1146.](#) **!** *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [56].
- [1147.](#) **!** *Gator Shipping Corp v Trans-Asiatic Oil Ltd SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357, 373 .
- [1148.](#) **!** *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [44]. In *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250 the innocent party has been held to have no legitimate interest in claiming the hire of a chartered ship until it was returned fully repaired, when the vessel was beyond economic repair; and in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 the court said there would be no legitimate interest in claiming the demurrage in respect of containers that were being detained by a third party with no end in sight, so that the contractual venture had become frustrated (at [43]): see above, para.26-106.
- [1149.](#) **!** *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd's Rep. 61 at [42]. Popplewell J. seemed to doubt the decision of Lloyd J. in *Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No.2)* [1983] 2 Lloyd's Rep. 645, of which Popplewell J. said: "Lloyd J found it impossible to interfere with the decision of the experienced commercial arbitrator who could not be shown to have applied the wrong test when finding that the owners' election to maintain the time charter (which had included 10 months of service, followed by six months of off-hire repairs) for a balance of eight months following premature re-delivery was a commercial absurdity".
- [1150.](#) **!** It is probably for the claimant to show that it has a legitimate interest, whereas in the repudiation situation it is for the party in breach to show that the innocent party has no legitimate interest in performing: *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936 (Comm), [2003] 2 Lloyd's Rep. 693 at [23].
- [1151.](#) **!** cf. above, para.26-185.
- [1152.](#) **!** *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373.
- [1153.](#) **!** See Vol.I, para.26-055.
- [1154.](#) **!** See Vol.I, paras 26-046 et seq.
- [1155.](#) **!** [2001] 1 A.C. 268. See Vol.I, paras 26-055 et seq.
- [1156.](#) **!** [2001] 1 A.C. 268, 285 (per Lord Nicholls). For a more detailed consideration of the relevant facts see Vol.I. para.26-055.
- [1157.](#) **!** See Vol.I. para.26-055.

- [1158.](#) **!** See the discussion in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830.
- [1159.](#) **!** [2001] All E.R. (D) 324 (Nov).
- [1160.](#) **!** [1915] A.C. 79.
- [1161.](#) **!** See further below, para.26-208.
- [1162.](#) **!** See Vol.I, paras 26-051 et seq.
- [1163.](#) **!** See Vol.I, para.26-041.
- [1164.](#) **!** *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB). Hamblen J. pointed out that an award was not “precluded by any of the following factors: (i) that the claimants advanced no claim for an injunction or specific performance, or the fact that there would have been no prospect of such an order being granted; (ii) the fact that damages are not claimed under Lord Cairns’ Act in lieu of an injunction; (iii) the fact that the claim is not based on a breach of a restrictive covenant; and (iv) the fact that the claim is based on breach of contract rather than invasion of property rights” (at [533]). On the facts of the case, the loss assessed on this basis would be same amount as the difference in value (at [559]).
- [1165.](#) **!** *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180 at [122] and [145]–[146].
- [1166.](#) **!** Other facts taken into account do not seem relevant. In *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830 at [36], [44], [54] and [58] the Court of Appeal used some of the factors relevant to the granting of an account of profits as also relevant to their discretion to grant *Wrotham Park* damages, taking into account the fact that the defendant “did do the very thing it had contracted not to do”; that the defendant “knew that it was doing something which it had contracted not to do”; that it was a “deliberate breach”, a “flagrant contravention” of the defendant’s obligation. These factors do not seem relevant to whether or not the claimant had a legitimate interest in deterring the defendant from breach.
- [1167.](#) **!** [2016] EWCA Civ 180 at [123].
- [1168.](#) **!** *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch) at [225].
- [1169.](#) **!** [2016] EWCA Civ 180 at [122] and [145]–[146]. It is submitted that *Wrotham Park* damages may also be awarded when the conventional measure of damages would leave the claimant undercompensated: see Vol.I, para.26-053.
- [1170.](#) **!** cf. Longmore L.J. in *One Step (Support) Ltd v Morris-Garner* [2016] EWCA Civ 180 at [151] (another wrongful competition case, in which the defendant’s furtive conduct deprived claimant of opportunity to obtain interim relief).
- [1171.](#) **!** See above, para.26-186.
- [1172.](#) **!** As opposed to a case like *Esso Petroleum Co Ltd v Niad Ltd* [2001] All E.R. (D) 324 (Nov), discussed above, para.26-206, in which the loss to the petrol supplier would be hard to prove.
- [1173.](#) **!** [1998] A.C. 1.

- [1174.](#)  [1998] A.C. 1, 15, citing Sharpe, *Studies in Contract Law* (1980), 129.
- [1175.](#)  It should be noted that “*Wrotham Park*” damages, though they compensate the innocent party for its loss of opportunity to negotiate a price for releasing the defendant from the relevant contractual obligations, do not have the same effect of allowing the claimant to hold out for a large share of the profit, at least if the damages are fixed at a fairly modest share of the profit. In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 W.L.R. 2370 Lord Walker said that “Damages under this head ... represent ‘such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right]’ (at [48]); the court should consider a hypothetical negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages), both parties to be assumed to act reasonably, so that the fact that one or other would have refused to make a deal is to be ignored. But the fact that the alternative project could not proceed unless the negative rights were bought out can properly be taken into account (at [53]). See Vol.I, paras 26-052—26-054.
- [1176.](#)  *ParkingEye Ltd v Beavis* [2015] UKSC 67, 2016] A.C. 1172.
- [1177.](#)  See [2015] UKSC 67 at [99], [199].
- [1178.](#)  See above, para.26-199.
- [1179.](#)  See above, para.26-200.
- [1180.](#)  See above, para.26-201.
- [1181.](#)  See above, para.26-202.
- [1182.](#)  See above, para.26-203.
- [1183.](#)  See above, para.26-206.
- [1184.](#)  As in the *ParkingEye* case, see above, para.26-197.
- [1185.](#)  See above, para.26-205.
- [1186.](#)  See above, para.26-208.
- [1187.](#)  [2015] UKSC 67 at [143].
- [1188.](#)  [2015] UKSC 67 at [226]–[227], [255].
- [1189.](#)  [2015] UKSC 67.
- [1190.](#)  Information received during seminars on the case at the Judicial College.
- [1191.](#)  Nor, according to the majority, to avoid it being unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 (and now the Consumer Rights Act 2015), but see the dissent on this point by Lord Toulson. This aspect of the case is discussed below, para.38-251A.

- [1192.](#)  [2015] UKSC 67 at [100].
- [1193.](#)  For the kinds of clause that are within the penalty rule, see below, paras 26-215 et seq.
- [1194.](#)  See below, para.26-214.
- [1195.](#)  *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch).
- [1196.](#)  See above, para.26-185.
- [1197.](#)  Lords Neuberger and Sumption [2015] UKSC 67 at [31].
- [1198.](#)  [2015] UKSC 67 at [293].
- [1199.](#)  Lord Hodge does not seem to have been referring to the general doctrine of unconscionable bargains, which normally requires claimants to show they were suffering from an identifiable bargaining weakness: see Vol.I, paras 8-133 and 8-135. The possible application of the doctrine in cases like *Cavendish Square* is considered above, para.8-135.
- [1200.](#)  [2015] UKSC 67 at [35].
- [1201.](#)  [2015] UKSC 67 at [152].
- [1202.](#)  Lords Neuberger and Sumption's approach may also have been affected by their view that the clauses were not subject to the penalty rules at all because they were "primary obligations": see below, para.26-216H.
- [1203.](#)  See above, para.26-212.

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(e) - Scope of the Law of Penalties

Sums payable on and other consequences of breach

26-215

⚠ The penalty rules apply to sums that are payable on breach of contract by the defendant and to a variety of other clauses that will have an adverse consequence for a defendant who is in breach the contract, such as a clause that disentitles a defendant who is in breach from receiving the full amount of the price that would otherwise be paid. ¹²⁰⁴ ⚠ The law on penalties is not applicable to many sums of money payable under a contract. Thus, it is not relevant where the claimant claims an agreed sum (a debt) which is due from the defendant in return for the claimant's performance of his obligations, ¹²⁰⁵ ⚠ or which is due upon the occurrence of an event other than a breach of the defendant's contractual duty owed to the claimant, ¹²⁰⁶ ⚠ though there have been suggestions that some such clauses may be "disguised penalties" that do fall within the rules. ¹²⁰⁷ ⚠ It has also been said that some clauses, though "triggered" by a breach by the defendant, are exempt from the rules because they reflect the "primary obligations" of the defendant, whereas the penalty rules are said to apply only to "secondary obligations". ¹²⁰⁸ ⚠

^{1204.} ⚠ See below, para.26-216.

^{1205.} ⚠ *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413 (above, para.26-104). However, in a contract in which the liquidated damages were only payable while the contract remained on foot, the innocent party was not entitled to ignore a repudiation and keep the contract alive so as to be able to continue to claim liquidated damages, as they would have no legitimate interest in doing so: *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) at [94]–[105]; the Court of Appeal [2016] EWCA Civ 789 agreed that there was no legitimate interest in continuing to perform but because the contractual venture had been frustrated: see above, para.26-106. The contrast between a debt and liquidated damages is drawn by the House of Lords in *President of India v Lips Maritime Corp* [1988] A.C. 395, 422–423, 424.

^{1206.} ⚠ See below, para.26-216C.

^{1207.} ⚠ See below, para.26-216G.

^{1208.} ⚠ See below, para.26-216H.

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(i) - Types of Clause within the Penalty Doctrine

Types of clause within the penalty rules

26-216

⚠ In *Cavendish Square Holding BV v Makdessi* ¹²⁰⁹ ⚠ the Supreme Court held that the penalty clause rules apply not only to agreed damages clauses but also to provisions that would prevent a party who breaks the contract from receiving a sum to which it would otherwise be entitled, ¹²¹⁰ ⚠ and also provisions that require a party in breach to transfer property to the other party at less than its full value. ¹²¹¹ ⚠ The Supreme Court also stated that the penalty rules also apply to deposits and forfeiture clauses; these will be considered in a separate section. ¹²¹² ⚠

Acceleration clauses




26-216A





⚠ An “acceleration” clause is often found in contracts providing for payment by instalments: on default in paying one instalment, all future instalments become immediately payable as one sum. Although the operation of these clauses produces results which may be “penal”, the courts have usually enforced them on the ground that they do not increase the contractbreaker’s overall obligation. ¹²¹³ ⚠ The Court of Appeal has held that it is not a penalty for an acceleration clause in a contract of loan to provide that, upon failure to pay an agreed instalment, the whole capital of the loan becomes immediately due and repayable. ¹²¹⁴ ⚠ But it might be held to be a penalty if it provided that, upon such failure, future interest (viz on payments not yet due) should be payable immediately. ¹²¹⁵ ⚠

Termination for breach of condition


26-216B


⚠ As explained earlier, ¹²¹⁶ ⚠ where the hirer has neither repudiated the hiring (or hire-purchase) agreement, nor committed a “fundamental breach” of it, but the owner terminates it in the exercise of an express power to do so conferred by the agreement, the owner’s damages are limited to loss suffered through any breaches up to the date of the termination. ¹²¹⁷ ⚠ It was noted, however, that this principle does not apply where the contract made the broken term into a condition, any breach of


which entitled the innocent party to terminate (e.g. a clause making compliance with time “of the essence” ¹²¹⁸ ). In this case the innocent party may both terminate the contract and recover damages for the loss of the bargain (viz in respect of all the outstanding obligations of the other party). ¹²¹⁹  A clause that makes the hirer liable for a genuine pre-estimate of the owners’ full loss in such a case will be valid. The Court of Appeal decided that the clause making prompt payment “of the essence” when it would not be so otherwise ¹²²⁰  is not itself subject to the law on penalties. ¹²²¹


 The difference between the two types of clause (viz an express power to terminate, and a clause making time of the essence) is “one of drafting form and wholly without substance”. ¹²²²  The result is that the position of the parties may be changed by a simple, small change in the terminology of the contract which makes every term a “condition” in the sense of a term any breach of which entitles the promisee to terminate. ¹²²³  This follows, however, not from the law on penalties but from the firmly established rule that the parties are free to agree that any term of the contract is a condition. ¹²²⁴ 


^{1209.}  [2015] UKSC 67, [2016] A.C. 1172.


^{1210.}  See [2015] UKSC 67 at [170] (Lord Mance); [226] (Lord Hodge); Lord Toulson agreed with both of them (at [292]). Lords Neuberger and Sumption were prepared to assume this without deciding it (at [73]); they considered that cl.5.1 of the agreement in the *Cavendish Square* case was part of the parties’ primary obligations and therefore altogether outside the penalty rules: see below, para.26-216H. However, Lord Clarke preferred to leave this question open; he must therefore have held that the penalty rules do apply to clauses of this type. In *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] A.C. 689 the House of Lords had considered a clause entitling the contractor to “suspend or withhold” the payment of money due to the subcontractor on any breach of contract. It had been conceded that the clause fell within the doctrine, but a majority of the House appeared to consider that the concession was correct: see [2015] UKSC 67 at [70], [154] and [226].

^{1211.}  See at [170] and [183] (Lord Mance); [230] and [280] (Lord Hodge). On this point Lord Clarke (at [291]) agreed with Lord Hodge and Lord Toulson (at [292]) with both Lord Mance and Lord Hodge.

^{1212.}  See below, paras 26-216N et seq.

^{1213.}  *Protector Endowment Loan Co v Grice* (1880) 5 Q.B.D. 592 (a loan case); *Wallingford v Mutual Society* (1880) 5 App. Cas. 685. See Goode [1982] J. Bus. L. 148; cf. *Wadham Stringer Finance Ltd v Meaney* [1981] 1 W.L.R. 39, 48 (see Vol.II, para.39-272); *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV* [2015] EWHC 150 (Comm) at [67], citing this paragraph as it appeared in the 31st edition; the Court of Appeal, [2016] EWCA Civ 412, did not comment on this point. The High Court of Australia has sometimes upheld acceleration clauses (*IAC (Leasing) Ltd v Humphrey* (1972) 126 C.L.R. 131 (see also Vol.II, para.39-353)) but sometimes not (holding them to be penalties): *O’Dea v Allstates Leasing Systems (WA) Pty Ltd* (1983) 152 C.L.R. 359; *Muir* (1985) 10 Sydney L.R. 503; *AMEV-UDC Finance Ltd v Austin* (1986) 162 C.L.R. 170; cf. *Esanda Finance Corp Ltd v Plessing* (1989) 166 C.L.R. 131.

^{1214.}  *The Angelic Star* [1988] 1 Lloyd’s Rep. 122, 125, 127.

^{1215.}  *The Angelic Star* [1988] 1 Lloyd’s Rep. 122. cf. *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752 (see above, para.26-193).

^{1216.}  See above, para.26-192.

- [1217.](#) **!** *Financings Ltd v Baldock* [1963] 2 Q.B. 104. (A “minimum payment” clause specifying a larger sum will be held to be a penalty: see above, para.26-192.) The principle stated in the text has been regularly followed by the Court of Appeal: *Brady v St Margaret’s Trust Ltd* [1963] 2 Q.B. 494; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 Q.B. 54; *Capital Finance Co Ltd v Donati* (1977) 121 S.J. 270; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527. See also the Australian cases cited, above, para.26-216A, n.1118p.
- [1218.](#) **!** See paras 21-011 et seq.
- [1219.](#) **!** The *Lombard case* [1987] Q.B. 527. See Treitel [1987] L.M.C.L.Q. 143; Beale (1988) 104 L.Q.R. 355.
- [1220.](#) **!** In the *Lombard case* [1987] Q.B. 527, it was held that, according to common law principles, the hirer had not committed a repudiatory breach of the contract: at 543–545. The court nevertheless awarded as damages at common law almost the same sum which it had previously found not to be a genuine pre-estimate of loss (a penalty).
- [1221.](#) **!** The *Lombard case* [1987] Q.B. 527, 536–537.
- [1222.](#) **!** The *Lombard case* [1987] Q.B. 527, 546.
- [1223.](#) **!** Would the law uphold a clause providing expressly that for any breach, however trivial, the damages shall be assessed on the basis that the whole benefit of the contract has been lost by the other party? cf. decisions on mitigation, such as *The Solholt* [1983] 1 Lloyd’s Rep. 605 (Vol.I, para.26-093).
- [1224.](#) **!** See Vol.I, para.13-026.

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(e) - Scope of the Law of Penalties

(ii) - Events other than Breach

Sum payable on event other than breach

26-216C

⚠ In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹²²⁵ ⚠ the Supreme Court endorsed the view that the penalty clause rules apply only to sums payable, and equivalent consequences, ¹²²⁶ ⚠ that follow from a breach of contract. Previous authority was not wholly clear.

In *Campbell Discount Co Ltd v Bridge*, ¹²²⁷ ⚠ a hire-purchase agreement permitted the hirer at his option to terminate the hiring during the period of the agreement, and provided that the hirer should thereupon pay a sum by way of agreed compensation for the depreciation of the chattel; the Court of Appeal held that the owner could recover the agreed sum, since being payable upon an event not constituting a breach of the agreement, it fell outside the scope of the law as to penalties. In the

House of Lords ¹²²⁸ ⚠ the decision was based on a different view of the facts, ¹²²⁹ ⚠ but four of their Lordships expressed obiter their views on the ruling of the Court of Appeal; two agreed that the law as to penalties was inapplicable, but two were prepared to hold that the hirer was entitled to some relief.

The later decision of the House of Lords in the *Export Credits Guarantee* case ¹²³⁰ ⚠ appeared to support the restriction of the scope of the law on penalties to payments ¹²³¹ ⚠ triggered by a breach of contract. The House held that the law did not apply to a clause providing for the contractbreaker (the defendant) to pay a specified sum to the plaintiff upon the happening of a certain event which was *not* the breach of a contractual duty owed by the defendant to the plaintiff. So it could not be a penalty where the defendant had agreed to reimburse the plaintiff the amount paid by the plaintiff to third parties under a guarantee (even where the plaintiff's obligation to meet the guarantee arose on the occasion of the defendant's breach of his contractual duties owed to other parties). ¹²³² ⚠

Although the case concerned a guarantee in a complex commercial arrangement and the plaintiff was claiming only the sum it had actually lost, their Lordships' limitation on the scope of the law on penalties was expressed in such wide terms that it would prevent many other clauses from being subject to that law, for example a sum payable by one party should it exercise an option as to perform at a later date than anticipated (but not required). ¹²³³ ⚠ Although statutory protection is available in

some cases ¹²³⁴ ⚠ the common law position has been thought unsatisfactory; for instance, an honest business hirer, who terminates his hire-purchase agreement when he finds that he cannot keep up the instalments, is in a worse position than the hirer who simply breaks his agreement by failing to pay the instalments. ¹²³⁵ ⚠ The High Court of Australia had not followed the *Export Credits*

Guarantee case, ¹²³⁶ ⚠ holding that a clause may be a penalty:

“if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party.” ¹²³⁷ !

However in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹²³⁸ ! the Supreme Court ¹²³⁹ ! rejected this approach, which in any event they regarded as unworkable, ¹²⁴⁰ ! and said that the penalty rules only come into play when a clause is triggered by a breach. ¹²⁴¹ !

Sums payable on exercise of an option under the contract

26-216D

! Thus the law does not apply where one party to the contract is given an option to choose a particular method of performance, subject to his making a stipulated payment to the other ¹²⁴² !; or where a member of a pooling agreement failed to pay his levy to finance litigation and was excluded from sharing in the proceeds of the litigation. ¹²⁴³ ! It does not apply to an employee's loss of contingent future interests in fund units to which he would have been entitled had his employment continued. ¹²⁴⁴ ! In the Court of Appeal in the *ParkingEye* case it was said that the penalty rules would not apply to an £85 charge for overstaying in an otherwise free parking facility if the arrangement were expressed in terms of a licence to use the car park subject to conditions coupled with an agreement to pay the charge if the conditions are not adhered to. ¹²⁴⁵ !

Reimbursement is not a penalty

26-216E

! If a contract provides that in a certain event a sum of money paid under the contract is to be repaid to the original payer, the reimbursement cannot be a penalty. ¹²⁴⁶ ! So where the defendant received an insurance payment on the basis of his permanent disablement the insurers were able to enforce his undertaking to pay them “a penalty” of the same amount if he took part in a specified sport in future. ¹²⁴⁷ !

Incentive payments

26-216F

! The reverse of an agreed damages clause is an incentive payment such as an extra payment for early completion. The law on penalties does not apply to a clause providing for an *increase* in the price if certain targets in the contract are bettered or if costs are reduced; similarly, the price for a specially-manufactured machine may be graduated according to its efficiency in operation. A Government report has recommended that in building contracts incentive payments should be preferred to agreed damages clauses. ¹²⁴⁸ !

Disguised penalties

26-216G

⚠ Some doubt is thrown on the division between sums payable upon breach and sums payable on other events by the suggestion by some of their Lordships in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹²⁴⁹ ⚠ that certain clauses may amount to “disguised penalties”. This follows a suggestion by Bingham L.J. in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* ¹²⁵⁰ ⚠ that the clause in that case, which required a party who had hired photographic slides to pay a much higher charge if the slides were not returned within a fixed period, might be a “disguised penalty”. ¹²⁵¹ ⚠ It is hard to find any support for such a concept in earlier cases, and it is unclear how a disguised penalty differs from other sums payable if the party exercises an option under the contract. The only possible distinction seems to be that the amount of the payment is out of proportion to the claimant’s interest in obtaining performance—in which case the “disguised penalty” rule would have the effect that the penalty clause rules (including the new “legitimate deterrent rule”) would after all apply to a clause setting a price on an option that the defendant has chosen to exercise.

^{1225.} ⚠ [2015] UKSC 67, [2016] A.C. 1172.

^{1226.} ⚠ See above, para.26-216.

^{1227.} ⚠ [1961] 1 Q.B. 445 (following *Associated Distributors Ltd v Hall* [1938] 2 K.B. 83); see Vol.II, paras 39-349—39-354. The decision is based on the non-statutory law. For statutory regulation of hire-purchase agreements, see Vol.II, paras 39-356 et seq.

^{1228.} ⚠ [1962] A.C. 600.

^{1229.} ⚠ viz that the hirer had committed a breach. The law on penalties applies to a minimum payment clause if the agreement is in fact terminated on the ground of the hirer’s breach: *Cooden Engineering Co Ltd v Stanford* [1953] 1 Q.B. 86; *Lamdon Trust Ltd v Hurrell* [1955] 1 W.L.R. 391. See Vol.II, paras 39-349—39-354.

^{1230.} ⚠ *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 W.L.R. 399. It is unfortunate that the short speech in this case made no attempt to discuss the opinions expressed in the *Campbell Discount* case [1962] A.C. 600. See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd’s Rep. 436 (a condition precedent imposing no obligation).

^{1231.} ⚠ And similar events: see above, para.26-216 and below, paras 26-216N et seq.

^{1232.} ⚠ *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 W.L.R. 399.

^{1233.} ⚠ See also *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV* [2015] EWHC 150 (Comm); [2016] EWCA Civ 412. In *Berg v Blackburn Rovers Football Club & Athletic Plc* [2013] EWHC 1070 (Ch), [2013] I.R.L.R. 537 it was held that the penalty rules did not apply to a payment due when one party to a fixed-term employment contract exercised a right to terminate it early. In *M&J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm), [2008] All E.R. (D) 445 (Feb) it was held that a “take or pay” clause is subject to the penalty rules (though it was held on the facts not to be a penalty). It is submitted that this will depend on the form of the clause. It will not be subject to the penalty rules if the buyer is simply obliged to pay for a minimum quantity with an option whether or not to take delivery of all the goods. On the facts of

the case, however, it was held that the buyer was in breach of an obligation to order a certain quantity (at [41]). See also *E-Nik Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 3027 (Comm) at [25] (clause requiring a customer to pay for a minimum amount of services was treated as being subject to the penalty rules but nonetheless upheld). In *Associated British Ports v Ferryways NV* [2008] EWHC 1265 (Comm), [2008] 2 Lloyd's Rep. 353 (affirmed on other grounds [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595) it was held that the penalty rules did not apply to sums due under a "minimum through-put" clause.

1234.

⚠ In particular under the Unfair Terms in Consumer Contracts Regulations 1999 or Consumer Rights Act 2015 s.62: see below, Vol.II, paras 38-201 et seq. and 38-334 et seq. When the term provides for the forfeiture of a deposit or other sum, see below, paras 26-216N et seq.

1235.

⚠ See the Law Commission's Working Paper No.61 (1975), paras 17–26; *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV* [2015] EWHC 150 (Comm) at [59] (rev'd on other grounds [2016] EWCA Civ 412).

1236.

⚠ *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 W.L.R. 399. It is unfortunate that the short speech in this case made no attempt to discuss the opinions expressed in the *Campbell Discount* case [1962] A.C. 600. See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436 (a condition precedent imposing no obligation); *Jervis v Harris* [1996] Ch. 195, 206–207.

1237.

⚠ *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 C.L.R. 205 at [10].

1238.

⚠ [2015] UKSC 67, [2016] A.C. 1172.

1239.

⚠ Lords Neuberger and Sumption (with whom Lord Carnwath and, seemingly on this point, Lord Clarke agreed) [2015] UKSC 67 at [42]–[43]; Lord Hodge (with whom Lord Toulson agreed) at [241]. Note however the suggestion that a clause may be "a disguised penalty", discussed below, para.26-216G. Lord Mance said that the point concerning clauses that operate on events other than breach was not up for decision but the distinction is "not without rational or logical underpinning": at [130].

1240.

⚠ Lords Neuberger and Sumption [2015] UKSC 67 at [42].

1241.

⚠ If the sum is payable on one of several events, some of which are breaches and others are not, the penalty rule will apply if the event that in fact triggered the payment was a breach, but not otherwise, nor if, as on the facts of the case, it was a breach of a different contract by another party: *Edgeworth Capital (Luxembourg) Sarl v Ramblas Investments BV* [2015] EWHC 150 (Comm) at [60], [69]; the Court of Appeal confirmed that the penalty rule did not apply, [2016] EWCA Civ 412 at [7]. The death or bankruptcy of a party might be another event, not constituting a breach, upon which money is to be paid. cf. *Mount v Oldham Corp* [1973] Q.B. 309 (claim for a term's school fees in lieu of notice withdrawing a pupil).

1242.








⚠ *Fratelli Moretti SpA v Nidera Handelscompagnie BV* [1981] 2 Lloyd's Rep. 47, 53; for another example see *BHL v Leumi Abi Ltd* [2017] EWHC 1871 (QB) at [44].

1243.

⚠ *Nutting v Baldwin* [1995] 1 W.L.R. 201.

1244.

⚠ *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB), citing the Australian case of *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 A.L.J. 292. The provision was in any event commercially justifiable and not penal when read in the light of the contract as a whole: [2012] EWHC 3511 (QB) at [223]–[234].

- [1245.](#)  *ParkingEye Ltd v Beavis* [2015] EWCA Civ 402 at [23].
- [1246.](#)  *Alder v Moore* [1961] 2 Q.B. 57 (approving *Re Apex Supply Co Ltd* [1942] Ch. 108).
- [1247.](#)  *Alder v Moore* [1961] 2 Q.B. 57. Although the defendant had agreed not to take part again in professional football, the majority considered that this was not a case in which the defendant was in breach by so doing but of a condition on the defendant retaining the insurance payment: see at 65 and 77.
- [1248.](#)  Banwell Report (Report of the Committee on Placing and Management of Contracts for Building and Civil Engineering Work) (HMSO, 1964), para.9.22.
- [1249.](#)  [2015] UKSC 67, [2016] A.C. 1172 at [77] (Lords Neuberger and Sumption) and [258] (Lord Hodge).
- [1250.](#)  [1989] Q.B. 433.
- [1251.](#)  [1989] Q.B. 433, 439. The decision rested on the ground that the clause was not incorporated into the contract: see Vol.I, para.13-015.

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(iii) - “Primary Obligations”

Primary obligations

26-216H




⚠ In *Cavendish Square Holding BV v Makdessi* ¹²⁵² ⚠ Lords Neuberger and Sumption (with whom Lord Carnwath agreed) held that the clauses which provided that the seller of the business, if he was in breach of the non-competition covenants, would not receive the outstanding instalments of the price, and would require him to transfer further shares to the buyers at a much reduced value, were not subject to the penalty rules at all. Even if they were triggered by the seller's breach, clause 5.1 bore no relation to damages; it represented the reduced price that the buyer was prepared to pay for the business if it could not count on the loyalty of the seller, and so formed part of the “primary obligations” of the parties. ¹²⁵³ ⚠ The analysis of clause 5.6 was essentially similar: it represented the reduced price that the purchaser was prepared to pay when it could not count on the loyalty of Makdessi. ¹²⁵⁴ ⚠ The law places controls over only the parties' secondary obligations, not their primary obligations, ¹²⁵⁵ ⚠ and both clauses belong among the primary obligations, even if the occasion of their operation was a breach of contract. ¹²⁵⁶ ⚠ In any event, both clauses were justified by the same legitimate interest in matching the price to the value that the seller was providing. ¹²⁵⁷ ⚠ Unlike an agreed damages clause, if the clauses did not stand there is no scale by which the court could make an award. The other members of the Supreme Court either decided the case on the ground that the clauses did not amount to penalties or preferred to leave the matter open. ¹²⁵⁸ ⚠

With respect, it is unclear how a payment (or other obligation that is within the doctrine ¹²⁵⁹ ⚠) that is “triggered” by a breach of contract by the defendant but which is a primary obligation is to be distinguished from an agreed damages clause. The fact that the clause is in the form of a price reduction seems to emphasise form over substance; and while it is true that ex ante there is no alternative scale by which the court could fix appropriate prices, when an agreed damages clause is held to be unenforceable the court makes an ex post assessment of the actual loss suffered by the claimant. It seems that a court could equally assess damages in terms of the reduction in value in the shares caused by a breach by the seller of a non-competition covenant, and the valuation could include an element for the risk that the seller who had been disloyal once may be disloyal again.


“Core” obligations rather than primary obligations

26-216I

⚠ One can understand the reluctance of judges to relieve a party from an obligation, whether it is

correctly analysed as primary or secondary, that was negotiated with the assistance of experts and presumably agreed to in full knowledge of its possible implications, especially one that must have been seen as a central element of the agreement. Possibly a more useful distinction might be based on an approach suggested by Lord Toulson during argument, as a possible substitute for the penalty clause doctrine (which the Court had been invited to abandon ¹²⁶⁰ ). This was to borrow from the Directive on Unfair Terms in Consumer Contracts ¹²⁶¹  and ask whether the provision was a “core term”. ¹²⁶²  “Core” terms are likely to have been considered carefully by each party, even if the parties were not of equal sophistication or bargaining power, and therefore there is less reason to interfere than with more peripheral clauses that may not have been fully taken into account by both parties. The suggestion seems to be that if the change in price is so central to the deal that the party agreeing to it must have had it in mind, it would be exempt from control as a penalty. Lord Toulson did not, however, repeat this suggestion in his judgment.

¹²⁵².  [2015] UKSC 67, [2016] A.C. 1172.


¹²⁵³.  [2015] UKSC 67 at [74]–[75]. Compare *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch), in which an increased rent became payable in the event of any breach of its obligations by the tenant: the court held that the increased rent was a secondary obligation that was capable of being a penalty (at [49]).

¹²⁵⁴.  [2015] UKSC 67 at [81].

¹²⁵⁵.  [2015] UKSC 67 at [14] and [32].

¹²⁵⁶.  [2015] UKSC 67 at [83].


¹²⁵⁷.  [2015] UKSC 67 at [82].

¹²⁵⁸.  Lord Mance said that cl.5.1 had the effect of revising the price payable for the shares but he clearly considered the clause to be subject to the penalty doctrine: see [2015] UKSC 67 at [181]; similarly, though cl.5.6 had the effect of reshaping of the parties’ primary relationship (at [183]), it was valid because it was neither exorbitant or unconscionable (at [185]). Lord Hodge agreed that there were “strong arguments” for regarding each clause as primary obligations to which the doctrine does not apply: at [270] and [280]; but he decided the validity of cl.5.1 by applying the penalty doctrine, and held that cl.5.6 was a secondary obligation, adding that “if all such clauses were treated as primary obligations, there would be considerable scope for abuse”. Lord Toulson agreed with the relevant parts of both Lord Mance’s and Lord Hodge’s judgments. Lord Clarke agreed with Lord Hodge rather than with Lords Neuberger and Sumption on these points: at [291].

¹²⁵⁹.  See above, para.26-216.

¹²⁶⁰.  See above, para.26-196.

¹²⁶¹.  93/13/EC: see Vol.II, paras 38-199 et seq.

¹²⁶².  In other words, it is the main subject matter or concerns the adequacy of the price or other remuneration and is therefore exempt from assessment for fairness provided that it is in plain and intelligible language, see art.4(2).

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“Invoicing back” clauses

26-216J

⚠ The express terms of the contract may not only exclude or limit the innocent party’s right to claim damages for breach of contract, ¹²⁶³ ⚠ but may also provide other provisions intended to apply in the event of a breach. Subject to the law as to penalties, ¹²⁶⁴ ⚠ and to the effect of the Unfair Contract Terms Act 1977 ¹²⁶⁵ ⚠ or (if applicable) the Consumer Rights Act 2015, ¹²⁶⁶ ⚠ the courts will enforce these terms, despite the unexpected results which may occur. In one case, ¹²⁶⁷ ⚠ a clause in a contract for the sale of goods provided that if the sellers made default in shipping, the contract should “be closed by invoicing back the goods” at the closing price fixed by the London Corn Trade Association. The sellers failed to ship, and the Association declared a closing price, which, because of a fall in market price, was lower than the contract price, so that a balance was due in favour of the sellers. Nevertheless, the Court of Appeal enforced the clause, despite the fact that the sellers were the party in default. ¹²⁶⁸ ⚠ An “invoicing back” clause may not be interpreted as the exclusive remedy, ¹²⁶⁹ ⚠ e.g. the clause may not prevent the buyer obtaining damages for his loss of profits, ¹²⁷⁰ ⚠ and judges have interpreted such clauses restrictively. ¹²⁷¹ ⚠ An “invoicing back” clause may also allow a percentage of the market price to be added to, or deducted from, the price, which if reasonable, will be upheld as liquidated damages covering items of loss not covered by the price alone. ¹²⁷² ⚠

^{1263.} ⚠ On exemption clauses, see Vol.I, Ch.15, above.

^{1264.} ⚠ Above, paras 26-178 et seq.

^{1265.} ⚠ See Vol.I, paras 15-066 et seq.

^{1266.} ⚠ See Vol.II, paras 38-334 et seq.

^{1267.} ⚠ *Lancaster v J.F. Turner & Co Ltd [1924] 2 K.B. 222* (Scrutton L.J. dissenting); followed in *J.F.*

Adair & Co Ltd v Birnbaum [1939] 2 K.B. 149 (and the earlier case noted, 173); *Podar Trading Co Ltd v Tagher* [1949] 2 K.B. 277. cf. *James Laing, Son & Co Ltd v Eastcheap Dried Fruit Co Ltd* [1961] 2 Lloyd's Rep. 277.

[1268.](#)

⚠ Some clauses are drafted differently and avoid this difficulty, e.g. the clause may apply only to the defaulting buyer, and only if the market price has fallen: *Alexandria Cotton and Trading Co (Sudan) Ltd v Cotton Co of Ethiopia Ltd* [1963] 1 Lloyd's Rep. 576.

[1269.](#)

⚠ *Roth, Schmidt & Co v D. Nagase & Co Ltd* (1920) 2 Ll. L. Rep. 36 CA (the clause did not expressly exclude the right to reject the goods or to recover damages upon rejection).

[1270.](#)

⚠ *Re Bourgeois and Wilson Holgate & Co* (1920) 25 Com. Cas. 260 (the Court of Appeal decided in this case that the seller in these circumstances could not enforce the clause against the buyer).

[1271.](#)

⚠ One judge has held that the interpretation of a clause which requires damages to be paid to the defaulting party is contrary to "natural justice": *Cassir, Moore & Co Ltd v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep. 400, 402. See also the qualifications suggested in *Lancaster v J.F. Turner & Co Ltd* [1924] 2 K.B. 222, 231; *J.F. Adair & Co Ltd v Birnbaum* [1939] 2 K.B. 149, 169.

[1272.](#)

⚠ *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 W.L.R. 34.

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(f) - Effect of Clause if a Penalty

Penalty clause is not enforceable

26-216K

⚠ As mentioned earlier, ¹²⁷³ ⚠ if a clause is penal because it passes neither the “genuine pre-estimate” test ¹²⁷⁴ ⚠ nor the “legitimate deterrent test, ¹²⁷⁵ ⚠ the clause will be wholly unenforceable. ¹²⁷⁶ ⚠ The court has no power to re-write the clause in order to make it valid. ¹²⁷⁷ ⚠

Can damages exceed the sum fixed in penal clause?

26-216L

⚠ A clause which is not a genuine pre-estimate, e.g. because it stipulates for more than the likely loss, and which is therefore a penalty, may be ignored if it is for less than the actual damage suffered. Where a charterparty contained the following clause: “[p]enalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight”, it was held that the clause provided a penalty and not a limitation of liability, so that the party complaining of non-performance was entitled to recover damages for his actual loss although it exceeded the estimated amount of freight. ¹²⁷⁸ ⚠ It is unsettled whether this principle applies to penalty clauses in other types of contract, so as to entitle the claimant to ignore the sum stipulated as a penalty (where it was clearly not intended to limit liability) and to sue for damages for a greater amount to compensate him for his actual loss. ¹²⁷⁹ ⚠

^{1273.} ⚠ See above, para.26-178A.

^{1274.} ⚠ See above, para.26-182.

^{1275.} ⚠ See above, para.26-196.

^{1276.} ⚠ *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172 at [9] and at [291], where Lord Clarke expressed his agreement with this part of the Lords Neuberger and Sumption’s judgment.

1277.

❗ [2015] UKSC 67 at [84]–[86], [283] and [292], disapproving *Jobson v Johnson* [1989] 1 W.L.R. 1026 on this point. Lord Mance preferred to leave this point for further argument (at [186]). In *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch) at [66]–[71] Timothy Fancourt QC, sitting as a Deputy Judge of the High Court, expressed the view that it is possible to sever part of a clause that makes the clause penal if the offending part can be removed without adding to or modifying the rest, the remaining terms are supported by consideration, the change does not alter the character of the contract and severance does not conflict with the public policy making the offending part unenforceable. However, the authorities cited in support are cases on restraint of trade and, with respect, it is not clear that severance can be applied to penalty clauses.

1278.

❗ *Wall v Rederiaktiebolaget Luggude* [1915] 3 K.B. 66 (approved by the House of Lords in *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] A.C. 227). But this case may require reconsideration in the light of the *Suisse Atlantique* case [1967] 1 A.C. 361 (where a demurrage clause was held to be an agreed damages clause) and the *Photo Production* case [1980] A.C. 827.





1279.


❗ In *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] A.C. 20, 26, the House left: "... open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it or, in a suitable case, ignoring it and suing for damages". cf. dicta to the effect that the penalty fixes the maximum recoverable: *Wilbeam v Ashton* (1807) 1 Camp. 78; *Elphinstone v Monkland Iron & Coal Co* (1886) L.R. 11 App. Cas. 332, 346; *Elsley v J.G. Collins Insurance Agencies Ltd* (1978) 83 D.L.R. (3d) 1, 14–16; *W.&J. Investments Ltd v Bunting* [1984] 1 N.S.W.L.R. 331, 335–336. See also Hudson (1974) 90 L.Q.R. 31; Gordon (1974) 90 L.Q.R. 296; Hudson (1975) 91 L.Q.R. 25; Barton (1976) 92 L.Q.R. 20; Hudson (1985) 101 L.Q.R. 480; Peel, *Treitel on The Law of Contract*, 14th edn (2016), para.20–140.


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(g) - Consumer Contracts

Sums payable on breach in consumer contracts [1280](#) 


26-216M

 The Unfair Terms in Consumer Contracts Regulations 1999 provided that in a contract between a business and a consumer an “unfair term” that was not individually negotiated was not be binding on the consumer. For consumer contracts made after October 1, 2015, Pt 2 of the Consumer Rights Act 2015 provides that an unfair term [1281](#)  in a consumer contract will not be binding on the consumer. The Regulations and the Act give illustrations of terms which may be regarded as unfair: relevant to clauses fixing damages is “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”. [1282](#)  So a consumer will be able to appeal to this standard, as well as to the common law on penalties; and it has been held that a term may be unfair even though on the facts it did not amount to a penalty at common law. [1283](#) 

[1280.](#)  SI 1999/2083.

[1281.](#)  Whether negotiated or not: s.62. See Vol.II, para.38-358.

[1282.](#)  1999 Regulations Sch.2 para.1(e); 2015 Act Sch.2 Pt 1 para.(6).

[1283.](#)  *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All E.R. (D) 227; see below, Vol.II, para.38-280. For clauses requiring a consumer to make a payment on some event that is not a breach of contract, see above, para.26-216C.

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Section 10. - Liquidated Damages, Deposits and Forfeiture of Sums Paid

(h) - Deposits and Forfeiture of Sums Paid







Deposits and forfeiture of sums paid [1284](#) 

26-216N

 A contract may, instead of fixing a sum to be paid upon breach, provide that a sum already paid shall be forfeited [1285](#)  upon breach by the party who paid it. [1286](#)  Alternatively, a sum may be paid as a deposit, in which case the sum is forfeited if the payer breaks the contract. [1287](#)  If the deposit has not been paid when the contract is terminated, but it was payable, it may be recovered as a debt [1288](#) ; if the contract was repudiated and terminated before the deposit became payable, the innocent party may recover the amount of the deposit by way of damages. [1289](#)  In *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [1290](#)  the Supreme Court said that both deposits and forfeiture clauses are subject to the penalty rules (though it will be submitted that to some extent the rules still differ [1291](#) ). Many deposits and forfeiture provisions will also fall within the Law of Property Act 1925 s.49(2), the Consumer Credit Act 1974 [1292](#)  and the Consumer Rights Act 2015. [1293](#) 

Recovery of prepayments where no provision for forfeiture

26-216O

 If in a contract of sale there is no express requirement that the buyer must pay a deposit or will, in the event of breach, forfeit sums paid, and the seller terminates the contract upon the buyer's default, the buyer may recover any prepayment or instalments paid in part payment of the price, subject to a cross-claim by the seller for damages for the breach of contract. [1294](#)  Thus, in *Dies v British and International Mining and Finance Corp Ltd*, [1295](#)  where a buyer repudiated his contract to purchase goods, he was nevertheless held to be entitled to recover a substantial prepayment (not in the nature of a deposit) made by him, subject to a deduction in respect of the actual damage suffered by the seller through the breach of contract: the court held that if it permitted the whole prepayment to be retained by the seller, it would be permitting the retention of a penalty, not liquidated damages. [1296](#)  This decision has been distinguished by two of their Lordships in the House of Lords [1297](#)  on the ground that it concerned a sale of existing goods where no expenditure was intended to be incurred by the seller in reliance on the advance payment. It has been persuasively argued [1298](#)  that the question should depend on the construction of the clause in the contract requiring the advance

payment: was the right to retain the payment intended to be conditional upon performance by the payee of his obligations, or was it intended to be a security for performance of the payer's obligations?

[1284.](#)

⚠ See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Ch.14; McGregor on Damages, 19th edn (2014), paras 15–096 et seq.; the Law Commission, Working Paper No.61 (1975) (“Penalty Clauses and Forfeiture of Moneys Paid”), paras 50, 65, 66; Smith [2001] C.L.J. 178; cf. *Commissioner of Public Works v Hills* [1906] A.C. 368 (recovery of amount deposited as “security” in a building contract; above, para.26-187).

[1285.](#)

⚠ The payee “forfeits” the sum where he retains it for his own beneficial use, having freed himself of any further obligations under the contract by terminating the contract on account of the payer's breach. It is then up to the payer to challenge the forfeiture if he has any legal ground for doing so.

[1286.](#)

⚠ If the sum is a deposit paid by the buyer (viz a sum intended to be received by the seller as a security for the completion of the purchase by the buyer) it will be assumed that it is intended to be forfeited to the seller if the buyer defaults: *Howe v Smith* (1884) 27 Ch. D. 89, 97–98 (Vol.I, para.29-068); *Stockloser v Johnson* [1954] 1 Q.B. 476, 490 (“or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause)”). The court has power to order the return of a deposit paid under a contract for the sale of land.

[1287.](#)

⚠ *Howe v Smith* (1889) 27 Ch. D. 89. If the payee claims damages from the payer, he must give credit for the amount of the deposit: see the dictum of Fry L.J. at 104 and *Ng v Ashley King (Developments) Ltd* [2010] EWHC 456 (Ch).

[1288.](#)

⚠ See above, Vol.I, paras 24-053 and 26-008.

[1289.](#)

⚠ *Damon Compagnia Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435 (see above, para.24-053); *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon)* [2013] EWCA Civ 1567, [2014] 1 C.L.C. 1. The contrary decision in *Lowe v Hope* [1970] Ch. 94 is no longer good law: see *Hardy v Griffiths* [2014] EWHC 3947 (Ch) at [102].

[1290.](#)

⚠ [2015] UKSC 67, [2016] A.C. 1172.

[1291.](#)

⚠ See below, para.26-216R.

[1292.](#)

⚠ See below, para.26-216AA.

[1293.](#)

⚠ See below, para.26-216AB.

[1294.](#)

⚠ *Palmer v Temple* (1839) 9 A. & E. 508; *Mayson v Clouet* [1924] A.C. 980; *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724; *Stockloser v Johnson* [1954] 1 Q.B. 476, 483, 489–490; Williams, *Vendor and Purchaser*, 4th edn (1936), p.1006.

[1295.](#)

⚠ [1939] 1 K.B. 724 (followed in *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912).

[1296.](#)

⚠ See also *RV Ward Ltd v Bignall* [1967] 1 Q.B. 534 (Vol.II, para.44-358). It has been noted that the *Dies* case was decided on the basis that the buyer's payment of the price was conditional, but that now the case might be decided on the ground that there had been a total failure of

consideration: *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm) at [23]. On either approach, the payment is not recoverable if the contract provides otherwise: [2013] EWHC 214 (Comm) at [18] and [27].

[1297.](#)

⚠ *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, 1142–1143, 1147–1148. (The contract in this case was for work and material supplied in the course of building a ship, and so it was treated as analogous to a building contract: see *Beatson* (1981) 97 L.Q.R. 389, 401–404; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 W.L.R. 574 HL.) The *Dies* [1939] 1 K.B. 724 case was also distinguished in the *Hyundai* case 1134–1136, on the ground that there was a total failure of consideration in *Dies*: see Vol.I, paras 29-057 et seq.

[1298.](#)

⚠ *Beatson* (1981) 97 L.Q.R. 389, 391–401. See also Dixon J. in *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 477 (following termination of the contract “rights are not divested or discharged which have already been *unconditionally* acquired” (italics supplied)); and the *Fibrosa* case [1943] A.C. 32, 65 (“[t]he condition of retaining it [the advance payment] is eventual performance”; cf. at 75).

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(i) - Deposits

Law of Property Act 1925 s.49(2)

26-216P

⚠ Perhaps the most common use of provisions for a deposit is in contracts for the sale of land, which normally fall within Law of Property Act 1925 s.49(2); this may account for the relative paucity of case law on deposits at common law. Section 49(2) provides:

“Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.”

This provision is restricted to contracts for the sale or exchange of any interest in land. ¹²⁹⁹ ⚠ Apart from this provision, the vendor would be obliged to return the deposit only where he was in breach of contract ¹³⁰⁰ ⚠; the statutory discretion conferred on the court by s.49(2) enables the court to make an order where the justice of the case requires it. ¹³⁰¹ ⚠ The scope of application of this section was for a time thought to be narrow. It was said that it:

“... was passed to remove the former hardship which existed where a defendant had a good defence in equity to a claim for specific performance but no defence in law, and, therefore, the deposit was forfeited ... outside that ambit [the jurisdiction] should only be exercised, if at all, sparingly and with caution.” ¹³⁰² ⚠

It now seems to be accepted that “repayment must be ordered in any circumstances which make this the fairest course between the two parties”. ¹³⁰³ ⚠ But an order will not be made in every case in which the purchaser defaults, even if the vendor does not suffer any loss: rather, the case must be somehow exceptional for an order to be made for the return of a standard 10 per cent deposit. ¹³⁰⁴ ⚠ The court’s jurisdiction cannot be excluded by the parties. ¹³⁰⁵ ⚠

Penalty rules and deposits

26-216Q

⚠ If the contract provides for one party to pay a deposit, and a breach of contract by the payor leads the payee justifiably to terminate the contract, then subject to the Law of Property Act 1925 s.49(2)

¹³⁰⁶ ⚠ and what is said in the following paragraphs ¹³⁰⁷ ⚠ the payee may retain the deposit provided that it does not exceed the amount that is customary (in contracts for the sale of land, normally 10 per cent of the purchase price). English courts have traditionally treated such deposits as somewhat different from a sum payable upon breach and have not required the seller to show that the amount is a genuine pre-estimate of the loss. ¹³⁰⁸ ⚠ In *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* the Privy Council said, in general terms, that the law on penalties applies to:

“... a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party.” ¹³⁰⁹ ⚠

In that case a contract for the sale of land required a 25 per cent deposit. The Privy Council held that a larger deposit than the customary 10 per cent would be valid only if the seller could show that it was reasonable to demand one; and in the absence of that the whole deposit was invalid and must be repaid, subject to a cross-claim for any loss suffered by the seller. However, the Privy Council accepted that a customary 10 per cent deposit may be forfeited by the seller on the buyer's default, irrespective of the amount of the seller's loss. In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹³¹⁰ ⚠ the Supreme Court again said that the penalty rules apply to deposits, ¹³¹¹ ⚠ but either explained the right to keep a customary 10 per cent deposit either on the grounds that this is to be seen as “earnest money” that is not subject to the penalty doctrine ¹³¹² ⚠ or, it is thought, on the basis of a legitimate interest of the seller in deterring breach by the buyer. This seems to rest on the fact that each piece of land is treated as unique, so that damages are not considered an adequate remedy. That justifies ordering specific performance ¹³¹³ ⚠ and so it gives the either party a legitimate interest for the purposes of the penalty rules. ¹³¹⁴ ⚠ A deposit in other types of contract, such as a deposit paid when goods are ordered, may not be treated in the same way ¹³¹⁵ ⚠: a seller of goods does not seem to have a legitimate interest in obtaining performance by the buyer rather than damages, ¹³¹⁶ ⚠ at least when the goods are readily re-saleable, so the deposit may be valid only if it meets the genuine pre-estimate test. ¹³¹⁷ ⚠

Damages in addition to forfeiture of deposit

26-216R

⚠ Although in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹³¹⁸ ⚠ the majority of the Supreme Court ¹³¹⁹ ⚠ said that deposits are subject to the penalty rules, it is submitted that this is not so entirely. A valid agreed damages clause gives the claimant a right to the agreed sum, no less but also no more. ¹³²⁰ ⚠ In contrast it is well established that in contracts for a sale of land, a vendor who validly terminates the contract because of a breach by the purchaser may both forfeit the deposit and recover damages, giving due allowance for the amount of the deposit. ¹³²¹

⚠ It is not thought that the Supreme Court intended that this rule should be affected by its decision.

¹²⁹⁹.

⚠ Law of Property Act 1925 s.49(3).

- [1300.](#) **!** *Best v Hamand* (1879) 12 Ch. D. 1; *Re Scott and Alvarez's Contract* [1895] 2 Ch. 603; *Beyfus v Lodge* [1925] Ch. 350; *James Macara Ltd v Barclay* [1945] K.B. 148, 156.
- [1301.](#) **!** *Finkeilkraut v Monohan* [1949] 2 All E.R. 235, 237–238. (cf. *James Macara Ltd v Barclay* [1945] K.B. 148, 156).
- [1302.](#) **!** *Michael Richards Properties Ltd v Corp of Wardens of St Saviour's Parish, Southwark* [1975] 3 All E.R. 416, 424 (Goff J.).
- [1303.](#) **!** *Universal Corp v Five Ways Properties Ltd* [1979] 1 All E.R. 553, 555 (Buckley L.J.). See also *Schindler v Pigault* [1975] 30 P. C.R. 328; *County & Metropolitan Homes Survey Ltd v Topclaim Ltd* [1997] 1 All E.R. 254 (effect of exclusion of Law of Property Act 1925 s.49(2)); *Omar v El-Wakil* [2001] EWCA Civ 1090.
- [1304.](#) **!** See *Omar v El-Wakil* [2001] EWCA Civ 1090, [2002] 2 P. & C.R. 3 at [37], [49] and [55]; *Tennaro Ltd v Majorarch Ltd* [2003] EWHC 2601 (Ch), [2003] 47 E.G. 154 (C.S.) at [84]; *Aribisala v St James Homes (Grosvenor Dock) Ltd* [2008] EWHC 456 (Ch), [2008] All E.R. (D) 201 (Mar); *Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWCA Civ 1227, [2009] 2 P. & C.R. 6, citing the Privy Council case of *Bidaisee v Sampath* [1995] N.P.C. 59; *Cohen v Teseo Properties Ltd* [2014] EWHC 2442 at [57]; *Solid Rock Investments UK Ltd v Reddy* [2016] EWHC 3043 (Ch). In the *Midill* case Carnwath L.J. said that “The critical point ... is that the deposit is ‘an earnest for the performance of the contract’, which can be retained by the seller if the buyer defaults, without any necessary regard to the question of actual loss or its amount”: [2008] EWCA Civ 1227 at [52].
- [1305.](#) **!** *Aribisala v St James Homes (Grosvenor Dock) Ltd* [2007] EWHC 1694 (Ch), [2007] 37 E.G. 234, [2007] 2 P. & C.R. DG25.
- [1306.](#) **!** See above, para.26-216P.
- [1307.](#) **!** Especially para.26-216AB.
- [1308.](#) **!** See *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm) at [34].
- [1309.](#) **!** [1993] A.C. 573, 578. Law of Property Act 1925 s.49(2) did not apply.
- [1310.](#) **!** [2015] UKSC 67, [2016] A.C. 1172.
- [1311.](#) **!** See [2015] UKSC 67 at [16] (Lords Neuberger and Sumption; see also at [35]); [238] (Lord Hodge; this was one of the paragraphs with which Lord Toulson (at [292]) said that he agreed); Lord Mance cited the *Workers Trust* case with apparent approval at [156] but left the application of the penalty rules to deposits open: at [170]). Lord Clarke referred to forfeiture clauses but not specifically to deposits.
- [1312.](#) **!** Lord Hodge [2015] UKSC 67 at [238]. cf. above, para.26-216P n.1118dc.
- [1313.](#) **!** See Vol.I, para.27-007.
- [1314.](#) **!** See above, para.26-198.
- [1315.](#) **!** If the sale is to a consumer, the deposit might be challenged under the Unfair Terms in

Consumer Contract Regulations 1999 or the Consumer Rights Act 2015 s.62, see below, para.26-216AB.

[1316.](#)

! See above, para.26-204.

[1317.](#)

! See above, para.26-182.

[1318.](#)

! [2015] UKSC 67, [2016] A.C. 1172.

[1319.](#)

! Lord Hodge said that the customary 10 per cent deposit was exempt as “earnest money”: see above, para.26-216Q. If this is the correct explanation, the issue discussed in the present paragraph does not arise.

[1320.](#)

! See above, para.26-178.

[1321.](#)

! *Lock v Bell* [1931] 1 Ch. 35. (In that case a separate clause requiring either party to pay the sum of £200 if it failed to perform any part of the contract. This was held to be a penalty clause and the court ordered an inquiry into the damages, if any, suffered by the vendor beyond the amount of the deposit: see [1931] 1 Ch. 35, 46.) See also *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 10.

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(ii) - Forfeiture of Sums Paid

Forfeiture provisions

26-216S

⚠ As noted earlier, a contract may, instead of fixing a sum to be paid upon breach, provide that a sum already paid shall be forfeited ¹³²² ⚠ upon breach by the party who paid it. There has been considerable doubt over whether, or to what extent, the penalty rules apply to provisions of this type and of the relationship between the penalty rules and the court's jurisdiction to give relief against forfeiture. In *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹³²³ ⚠ the Supreme Court said that the penalty rules do apply to forfeiture provisions of this type, and may render the provision invalid. Even if the provision is valid (as a genuine pre-estimate of the innocent party's loss or as a "legitimate deterrent"), in an appropriate case the court may still be able to grant relief against forfeiture. ¹³²⁴ ⚠



Purchase by instalments and pre-payment of price

26-216T


⚠ Traditionally, the courts were willing to grant relief against "forfeiture" clauses in only two situations; and, as will be seen below, ¹³²⁵ ⚠ the relief was of a limited form, which if the payee was entitled to terminate the contract, did not include ordering a return of the sums paid. The first type of case is of landlord and tenant. There has been a long history of equitable relief against forfeiture of leasehold interests, viz where a clause in the lease entitled the landlord to repossess the premises if the tenant failed to pay an instalment of the rent. ¹³²⁶ ⚠ The second situation was where the contract-breaker has been purchasing land by paying the price by instalments: it is clearly established that if, under a contract to purchase land by instalment payments, the purchaser defaults in payment of an instalment of the price, the court has jurisdiction in a proper case to relieve him against a clause providing for forfeiture of the instalments already paid, by granting him an extension of time within which he could pay the instalment now due. ¹³²⁷ ⚠ It is implicit in these cases that payment within the extended period would preserve the purchaser's contractual rights in the same way as payment by the time originally agreed would have done. In what follows it is primarily the second situation that will be addressed, as it is thought that this is what the Supreme Court had in mind. Lords Neuberger and Sumption stated that


“Where a proprietary interest or a ‘proprietary or possessory right’ (such as a patent or a lease) is granted or transferred subject to revocation or determination on breach, the clause providing for determination or revocation is a forfeiture and cannot be a penalty.”






[1328](#) 



Moreover, the first situation is equivalent termination of the contract by the landlord because of the tenant’s breach of contract, and there is no sign that the Supreme Court intended to place any restrictions on the right to terminate, even when the right would not exist at common law and arises only because of an express term of the contract. [1329](#)  The Court’s remarks might apply, however, if the tenant has paid a premium that would not be returnable, so that in effect the tenant ends up paying in advance for occupation rights that he will not be able to exercise. [1330](#) 

26-216U

 It is only relatively recently that the courts began to grant a limited type of relief against forfeiture in a wider range of situations. A condition said to be necessary before equitable relief may be granted is that the forfeiture clause was inserted in order:

“... to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.” [1331](#) 

The wider development began in 1954 with *Stockloser v Johnson* [1332](#) : there was a provision, in a contract to purchase plant and machinery by instalment payments, that upon default by the buyer, the seller might terminate the contract and forfeit the instalments already paid. The majority of the Court of Appeal held that the court has an equitable jurisdiction to relieve against forfeiture of such instalments, even after termination of the contract, if in the actual circumstances of the case the clause was penal and it would be oppressive and unconscionable for the seller to retain all the instalments. In 1983, the House of Lords upheld the jurisdiction to relieve against forfeiture, but limited it to contracts concerning the transfer or creation of proprietary or possessory rights. [1333](#)  Thus it did not apply to the facts of the case before the House, where a shipowner withdrew his ship (chartered under a time charter [1334](#) ) on the ground of the charterer’s failure to make punctual payment of an instalment of hire. Similarly, the House of Lords has refused relief against the forfeiture of “mere contractual licences” to use certain names and trade marks. [1335](#)  But the principle is not limited to real property, so the Privy Council has granted relief in the case of a charge over shares. [1336](#)  The Court of Appeal granted relief (in the form of an extension of time in which a payment could be made by the defendant) in a commercial contract which provided that his failure to pay a sum on time would entitle the plaintiff to claim an assignment of patent rights held by the defendant.

[1337](#)  The House of Lords [1338](#)  has granted relief to the lessee of chattels from their forfeiture: the House held that the court’s power to make an interim order for the sale of chattels (which formed the subject matter of the proceedings) did not prejudice the lessee’s right to seek relief from forfeiture. The proceeds of sale stood in the place of the chattels and relief could be given by an order deciding the proportions in which the parties were entitled to the money; it did not matter that the lessee could not be restored to possession.

Form of relief: additional time to pay

26-216V

⚠ Under this equitable principle, the courts will seldom do more than give the contract-breaker more time in which to pay the sum he had failed to pay on time. This relief has the effect that the contract-breaker does not forfeit the rights which he had under the contract, provided he pays within the time fixed by the court.

Return of payments subject to forfeiture clause

26-216W

⚠ If the contract-breaker is unable to pay, or if the contract has already been terminated, the position is less clear. Traditionally, the courts have been more reluctant ¹³³⁹ ⚠ to allow recovery of money already paid by the contract-breaker (i.e. to grant affirmative relief) ¹³⁴⁰ ⚠ than to deny recovery of a sum (a penalty) agreed to be payable upon breach by the contract-breaker (i.e. to grant negative relief) or to give more time to him to make a payment. In one case, the House of Lords directed the relief at the proceeds of sale where the court had made an interim order for sale pending the outcome of the litigation. ¹³⁴¹ ⚠ On the facts of *Stockloser v Johnson*, above, although the majority of the court were prepared to order that money paid be returned if it would be unconscionable for the seller to keep it, they did not think that the seller's conduct in retaining £4,750 out of the £11,000 price in one contract, and £3,500 out of the £11,000 price on another, was unconscionable, because the buyer had already received substantial benefits in the form of royalties. ¹³⁴² ⚠ In any event, subsequent cases tended to follow the view of the third judge, Romer L.J., that there could be relief only if there had been fraud, sharp practice or unconscionable conduct on the part of the seller. ¹³⁴³ ⚠ In a Privy Council case in 1906, the contract-breaker obtained an order that the deposit he had paid in advance to the innocent party should, despite a forfeiture clause, be repaid to him (subject to his paying damages for the actual loss caused to the innocent party by the breach of contract), ¹³⁴⁴ ⚠ but this case has not to date been followed in England. ¹³⁴⁵ ⚠ In *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* Eder J. held that it was unnecessary to resolve that debate because counsel accepted that in the circumstances the court did have jurisdiction to grant relief against forfeiture and that such jurisdiction went beyond simply giving the buyer more time to pay. ¹³⁴⁶ ⚠ However, as the goods were of no use to the seller and their value was very uncertain, the court refused to order repayment of the sums already paid or that sums due before the date of termination should cease to be payable. ¹³⁴⁷ ⚠

Provision for forfeiture may be a penalty

26-216X

⚠ The Supreme Court has now expressed at least the provisional view that a clause providing for the forfeiture of sums already paid is subject to the penalty rules ¹³⁴⁸ ⚠; and similarly ¹³⁴⁹ ⚠ a clause requiring the contract-breaker, upon breach, to re-transfer some property to the innocent party. ¹³⁵⁰ ⚠ Thus if the provision does not pass either the genuine pre-estimate test ¹³⁵¹ ⚠ or the legitimate deterrent test, ¹³⁵² ⚠ the sum that was to be forfeited will be subject to the normal rules on the repayment of sums already paid and the requirement to transfer the property at a reduced price will be unenforceable. ¹³⁵³ ⚠

Relief against forfeiture may also be given

26-216Y

! In the *Cavendish Square* case ¹³⁵⁴ ! Lords Mance and Hodge said ¹³⁵⁵ ! that even if the clause providing for the forfeiture of sums already paid is not void as a penalty from the outset, if the party who will be prejudiced by the clause defaults, the court may grant relief against forfeiture. The Supreme Court seemed to envisage this relief normally taking the form of giving the defaulting party extra time in which to pay, ¹³⁵⁶ ! but Lord Hodge at least indicated that it might also involve the purchaser recovering the payments made. ¹³⁵⁷ !

Forfeiture of leases and relief against termination clauses

26-216Z

! As stated earlier, ¹³⁵⁸ ! a common situation in which relief against forfeiture may be given is where a lease entitles the landlord to repossess the premises because the tenant has failed to pay an instalment of the rent. It is not thought that the Supreme Court's statements in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* ¹³⁵⁹ ! that forfeiture provisions are subject to the penalty rules were intended to address this situation. The tenant will normally not suffer the same "double loss"—loss of both their property rights and the money they have so far paid—as in, for example, cases in which the contract-breaker has been purchasing land by paying the price by instalments and the agreement provides that if he defaults in a payment, he will lose both the land and the sums he has paid. ¹³⁶⁰ ! A similar situation occurs when a contract may provide that it may be terminated because of a default that at common law would not be sufficiently serious to justify termination. Although some such clauses have been held to confer only a right to terminate and not the further right to damages for non-performance, ¹³⁶¹ ! it has been held that the penalty rules are not relevant to this situation. ¹³⁶² ! There is nothing in the *Cavendish Square* case to indicate that the Supreme Court intended to change this position.

^{1322.} !The payee "forfeits" the sum where he retains it for his own beneficial use, having freed himself of any further obligations under the contract by terminating the contract on account of the payer's breach. It is then up to the payer to challenge the forfeiture if he has any legal ground for doing so.

^{1323.} ![2015] UKSC 67, [2016] A.C. 1172.

^{1324.} !Lord Mance [2015] UKSC 67 at [160].

^{1325.} !Below, paras 26-216V—26-216W.

^{1326.} !See also the Law of Property Act 1925 s.146. See also n.1118ed, below.

^{1327.} !*Re Dagenham (Thames) Dock Co (1972-73) L.R. 8 Ch. App. 1022; Kilmer v British Columbia Orchard Lands Ltd [1913] A.C. 319; Steedman v Drinkle [1916] 1 A.C. 275; Mussen v Van Diemen's Land Co [1938] Ch. 253; Starside Properties Ltd v Mustapha [1974] 1 W.L.R. 816.* (Time was not made "of the essence" in this contract: cf. above, para.26-216B.) The Privy Council has refused to extend this principle: *Union Eagle Ltd v Golden Achievement Ltd [1997] A.C. 514* (see the comments by Heydon (1997) 113 L.Q.R. 385; and Stevens (1998) 61 M.L.R.

255). See Lang (1984) 100 L.Q.R. 427; Harpum [1984] C.L.J. 134.

1328.

! [2015] UKSC 67 at [17]; relief against forfeiture is available (at [17]), though relief against forfeiture of leases may now be governed exclusively by the Law of Property Act 1925 s.146 (at [10], referring to *Official Custodian for Charities v Parway Estates Departments Ltd* [1985] Ch. 151).

1329.

! See above, para.26-216B.

1330.

! See below, para.26-216Z, n.1118fg.

1331.

! *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 723. (The case concerned the right to forfeit (re-enter upon) leasehold property for failure to repair fences and to maintain works for the protection of adjoining property.)

1332.

! [1954] 1 Q.B. 476. (See also Vol.II, para.39-343.)

1333.

! *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694 (followed in *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514 PC, failure by 10 minutes to pay balance of purchase price on time, when time was “of the essence”: see Heydon (1997) 113 L.Q.R. 385; Stevens (1998) 61 M.L.R. 255). See also *The Laconia* [1977] A.C. 850, 869–870, 873–874, 878, 887; cf. the High Court of Australia in *Legione v Hateley* (1983) 46 A.L.R. 1; *Ciavarella v Balmer* (1983) 153 C.L.R. 438; and in *Stern v McArthur* (1988) 165 C.L.R. 489.

1334.

! A charter by demise would have given the charterer a possessory interest in the ship.

1335.

! *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776 (followed in *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd* [1991] R.P.C. 265). But it is not a purely contractual right where a hirer is entitled to indefinite possession of chattels so long as he makes hire payments: hence relief against forfeiture is available: *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 A.C. 368 at [29]. In *General Motors UK Ltd v Manchester Ship Canal Co Ltd* [2016] EWHC 2960 (Ch) relief was given in respect of a right to discharge surface water into a canal.

1336.

! *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2.

1337.

! *BICC Plc v Burndy Corp* [1985] Ch. 232, 251–252. (The line drawn between this and the *Sport Internationaal* case [1984] 1 W.L.R. 776 is not justifiable in commercial terms.)

1338.

! *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13.

1339.

! *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724 (sale of goods); *Stockloser v Johnson* [1954] 1 Q.B. 476, 483, 489–490; *Mayson v Clouet* [1924] A.C. 980 (sale of land); *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473.

1340.

! cf. above, para.26-216Q.

1341.

! *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13.

1342.

! [1954] 1 Q.B. 476, 484, 492.

- [1343.](#) **!** See *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473.
- [1344.](#) **!** *Commissioner of Public Works v Hills* [1906] A.C. 368 (above, para.26-187).
- [1345.](#) **!** Though the penalty rules were assumed to apply to a sum paid by way of deposit in *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 K.B. 425 (held not penal).
- [1346.](#) **!** [2013] EWHC 214 (Comm) at [38].
- [1347.](#) **!** [2013] EWHC 214 (Comm) at [41].
- [1348.](#) **!** *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172. Lord Mance said that it is “both logical and correct in principle under the current law” that a clause may both be subject to the penalty doctrine and the power of the court to give relief for forfeiture (at [160]) but said the application of the penalty doctrine to deposits and the forfeiture of money paid must await decision in due course (at [170]). Lord Hodge said that the court should determine whether a forfeiture clause was a penalty: at [227]. Lord Toulson agreed with what Lord Mance had said at [160] and with the relevant paragraphs of Lord Hodge’s judgment; Lord Clarke was inclined to agree with them also. Lords Neuberger and Sumption said they could see the force in the arguments of Lords Mance and Hodge: at [18].
- [1349.](#) **!** Lord Mance at [160]–[161], Lord Hodge at [230], [233]. Lords Neuberger and Sumption said there is no reason in principle “why an obligation to transfer assets (either for nothing or at an undervalue) should not be capable of constituting a penalty” (at [16]). At [84] they said that it was not necessary to decide whether it was open to the purchaser in *Jobson v Johnson* to argue that the obligation to transfer back shares he had received was a penalty: it may be subject only to the forfeiture rules but not the penalty rules, referring back to [18] of their judgment.
- [1350.](#) **!** As in *Jobson v Johnson* [1989] 1 W.L.R. 1026. The order made in that case was disapproved: see below, para.26-216K.
- [1351.](#) **!** See above, para.26-182.
- [1352.](#) **!** See above, para.26-196.
- [1353.](#) **!** See above, para.26-216.
- [1354.](#) **!** *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] A.C. 1172.
- [1355.](#) **!** *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67 at [160] (Lord Mance) and [227], [230] (Lord Hodge): Lord Toulson agreed, Lord Clarke was inclined to agree (see at [291]). Lords Neuberger and Sumption saw force in the argument but preferred not to express a view.
- [1356.](#) **!** See Lord Mance [2015] UKSC 67 at [160], quoting the Privy Council in *Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No.4)* [2013] UKPC 25, [2015] 2 W.L.R. 875 at [13] (“relief in equity will only be granted on the basis of conditions requiring performance, albeit late, of the contract in accordance with its terms as to principal, interest and costs”). This would not preclude relief in the form granted in *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 A.C. 368, see above, para.26-216U.

[1357.](#)

⚠ [2015] UKSC 67 at [229].

[1358.](#)

⚠ See above, para.26-216T.

[1359.](#)

⚠ [2015] UKSC 67, [2016] A.C. 1172.

[1360.](#)

⚠ See above, para.26-216T. Possibly the penalty rule will apply if the tenant has paid a substantial premium in advance and will lose the benefit of that as well as losing the premises, but this suggestion is speculative.

[1361.](#)

⚠ See above, para.26-216T.

[1362.](#)

⚠ See above, para.26-216B.

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The Consumer Credit Act 1974

26-216AA

⚠ Some of the problems created by contractual provisions requiring payments on the occurrence of specified events will be governed by the Consumer Credit Act 1974. ¹³⁶³ ⚠ For instance, s.100(1) provides that where a debtor under a regulated hire-purchase (or a regulated conditional sale) agreement ¹³⁶⁴ ⚠ has prematurely terminated the agreement, he shall be liable to pay the difference between the sums already paid or payable by him and onehalf of the total price; but by s.100(3) the court may order payment of a smaller sum if that would be equal to the loss sustained by the creditor. ¹³⁶⁵ ⚠ The court is also empowered to intervene if it determines that the relationship between the creditor and the debtor is "unfair". ¹³⁶⁶ ⚠ It may determine that the relationship is unfair because of one or more of the following:

- (a)
any of the terms of the agreement or of any related agreement;
- (b)
the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
- (c)
any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement). ¹³⁶⁷ ⚠

The court may, for example, require the creditor, or any associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety, reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement, or alter the terms of the agreement or of any related agreement.

¹³⁶⁸ ⚠ The Act will therefore cover many of the situations which arise in practice, and the common law and equitable rules will not need to be applied. Thus, it is uncertain how far the principle

⚠ agreements that fall within the Act so as to permit the court to grant relief to a hirer against a clause providing for the forfeiture of instalments already paid or for a “minimum payment” by the hirer upon his termination of the agreement. ¹³⁷¹ ⚠ When a hire-purchase agreement is terminated by the owner upon the hirer’s default, the common law as to penalties ¹³⁷² ⚠ and the provisions of the Act will often protect the hirer against clauses requiring further payments, e.g. for “depreciation”; the common law rules apply to similar clauses in hiring agreements. ¹³⁷³ ⚠ The question whether a depreciation clause is a penalty or not depends on the construction of the clause in the light of all the circumstances surrounding the particular agreement. ¹³⁷⁴ ⚠

Unfair Terms in Consumer Contracts Regulations 1999 and Consumer Rights Act 2015 ¹³⁷⁵ ⚠

26-216AB

⚠ The Unfair Terms in Consumer Contracts Regulations 1999 provided that in a contract between a business and a consumer an “unfair term” will not be binding on the consumer. ¹³⁷⁶ ⚠ For contracts made after October 1, 2015, the Consumer Rights Act 2015 replaces the Regulations. The Regulations and the Act give illustrations of terms which will, prima facie, be regarded as unfair: relevant to clauses fixing damages is “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”. ¹³⁷⁷ ⚠ This does not in so many words cover the case of a deposit or provision for forfeiture, but there seems no doubt that such a term may be declared to be unfair in an appropriate case.

^{1363.} ⚠ See Vol.II, paras 33-085 et seq. deal with hiring agreements, while paras 39-005 et seq. deal with the other agreements within the scope of the Act.

^{1364.} ⚠ Definitions of these agreements are examined in Vol.II, paras 39-356 et seq.

^{1365.} ⚠ See Vol.II, paras 39-368—39-369; cf. the similar power conferred on the court by s.132 in the case of a regulated consumer hire agreement.

^{1366.} ⚠ Consumer Credit Act 1974 ss.140A–140C, inserted by Consumer Credit Act 2006 ss.19–22. These provisions replace ss.137–140 on “extortionate credit bargains”, which are repealed by s.70 and Sch.4 of the 2006 Act. See further Vol.II, paras 39-212 et seq.

^{1367.} ⚠ s.140A(1).

^{1368.} ⚠ s.140B(1). These powers can be exercised in relation to any credit agreement where the debtor is an individual (as defined in s.189(1), as amended: see Vol.II, paras 39-016 et seq.) or any related agreement (as defined in s.140C(4)). The fact that the agreement is an exempt, and not a regulated, agreement is immaterial, except that no order can be made in connection with a credit agreement which is an exempt agreement by virtue of s.16(6C). These provisions came into force on April 6, 2007 (SI 2007/123 (c.6)).

^{1369.} ⚠ *Campbell Discount Co Ltd v Bridge* [1961] 1 Q.B. 445 CA (on appeal, the case was decided on another point: [1962] A.C. 600); see Vol.II, paras 39-349—39-353; *Diamond* (1956) 19 M.L.R. 498 and (1958) 21 M.L.R. 199; *Prince* (1957) 20 M.L.R. 620.

^{1370.} ⚠ *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473; *Barton Thompson & Co Ltd v Stapling*

Machines Co [1966] Ch. 499.

[1371.](#)

! See the proposals for reform in the Law Commission's Working Paper No.61, *Penalty Clauses and Forfeiture of Moneys Paid* (1975).

[1372.](#)

! *Bridge v Campbell Discount Co Ltd [1962] A.C. 600*, upholding the decision of the Court of Appeal in *Cooden Engineering Co Ltd v Stanford [1953] 1 Q.B. 86*; *Anglo Auto Finance Co Ltd v James [1963] 1 W.L.R. 1042, 1049*.

[1373.](#)

! *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428*.

[1374.](#)

! *Lombank Ltd v Excell [1964] 1 Q.B. 415* (interpreting *Phonographic Equipment (1958) Ltd v Muslu [1961] 1 W.L.R. 1379*).

[1375.](#)

! SI 1999/2083.

[1376.](#)

! See Vol.II, paras 38-201 et seq.

[1377.](#)

! cf. Vol.II, para.38-280.

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Chapter 26 - Damages

Section 11. - The Tax Element in Damages

The tax element in damages ¹³⁷⁸

26-217

In *British Transport Commission v Gourley*, ¹³⁷⁹ a decision on the assessment of damages for loss of earnings following personal injuries caused by negligence, the House of Lords held that income tax (including the higher rates) must be taken into account in assessing damages for either actual or prospective loss of earnings. The main principle to be applied is that damages are to compensate the claimant only in respect of what he has lost, and in view of the incidence of taxation, he has in such a case lost only his net earnings. The rule in *Gourley's* case (above) will apply only where two conditions are satisfied ¹³⁸⁰: (1) the money, for the loss of which damages are awarded, would have been subject to tax as income ¹³⁸¹; and (2) the damages awarded to the claimant are not subject to tax ¹³⁸² in his hands. ¹³⁸³ If these conditions are satisfied, the rule in *Gourley's* case will apply to the assessment of damages in contract. ¹³⁸⁴ Conversely, tax credits obtained by the claimants, which had the practical effect of reducing the purchase price, should be taken into account if they were "part and parcel" of the scheme. ¹³⁸⁵

Taxation on damages for wrongful dismissal ¹³⁸⁶

26-218

By Income Tax (Earnings and Pensions) Act 2003 ss.401(1) and 403(1), ¹³⁸⁷ any payments made on a person's retirement or removal from any office or employment are taxable ¹³⁸⁸; the terms of the Act are wide enough to cover damages awarded for loss of earnings in an action for wrongful dismissal, although it was no doubt primarily intended to apply to agreed compensation for loss of office. ¹³⁸⁹ Tax is not chargeable on the first £30,000 of any such payment ¹³⁹⁰; and the excess over £30,000 is subject to income tax in the normal way. ¹³⁹¹ It has not been held (as might have been expected) that since the taxation rules covered the situation, the rule in *Gourley's* case was ousted: instead the Court of Appeal has held that the rule in *Gourley's* case continues to apply to the assessment of damages for wrongful dismissal where the damages are under the exempted amount (at that time, £5,000). ¹³⁹² Although the court discussed the position where both the lost earnings and the damages are taxable, ¹³⁹³ the position where damages for wrongful dismissal exceed the exempted amount was not finally decided. At first instance it was later held that in this event notional tax should be deducted as if the total award was only for the exempted amount ¹³⁹⁴; on the facts of the particular case, the exempted amount of £5,000 represented future earnings of £5,850 over the remaining years of the contract of employment (discounted on the basis of the cost of an annuity) and the tax to be deducted was calculated on this gross sum, after the other income of the plaintiff was taken into account to calculate the rate of tax. A second solution adopted in Scotland ¹³⁹⁵ was to assess the damages as if the whole award was subject to the *Gourley* principle, and then to add to that sum a further amount which would be sufficient to cover the tax payable by the plaintiff on the excess over the exempted amount (at that time, £5,000). This is the more precise method, since it will meet the claimant's exact loss ¹³⁹⁶; but it suffers from the disadvantage that the addition to the award of the amount of tax may cause the amount of tax payable to be increased. The second method has been adopted at first instance in England, ¹³⁹⁷ and it is submitted that it is the better method. ¹³⁹⁸

Method of calculating tax

26-219

Where the damages are calculated in respect of a number of years, the *Gourley* calculation will spread the payments and the relevant tax over the same number of years. ¹³⁹⁹ The House of Lords ¹⁴⁰⁰ has emphasised that the courts cannot make an elaborate assessment of the claimant's tax liability, but should act on broad lines. The rate of tax to be considered is the effective rate of tax applicable to the claimant's earnings, and not the standard rate of tax ¹⁴⁰¹; moreover, the relevant rates of tax are those in force at the time of the court's judgment. ¹⁴⁰² If the claimant's rate of tax depends partly on unearned income, the court may pay comparatively little regard to the unearned income in fixing the deduction for tax on his prospective earned income from the defendants, since the claimant is able to dispose of his private capital at any time, e.g. by settlements, covenants or gifts. ¹⁴⁰³

Loss of part of earnings

26-220

Where the claimant's claim for loss of earnings represents only part of his earnings for the relevant tax year, the lost earnings are treated as the top slice of the claimant's notional total income for that year. In *Lyndale Fashion Manufacturers v Rich* ¹⁴⁰⁴ the plaintiff was awarded a sum as damages for loss of commission following the wrongful termination of his appointment as a salesman. The Court of Appeal held that the amount of tax to be deducted under the *Gourley* principle was to be calculated by treating the gross sum for loss of commission as the top slice of the plaintiff's notional income for the relevant year. (The notional total comprised his actual receipts in that year and the gross amount of the damages.) This top slice would therefore attract to itself all the additional tax applicable to the notional total income for that year. ¹⁴⁰⁵ It was also held that any expenses which would have been incurred in earning the lost commission should be set against the assumed additional income. The defendant is entitled to reasonable particulars of the claimant's taxable income from other sources, and of his tax assessments and allowances, since these particulars are directly relevant to the assessment of the claimant's net loss of earnings ¹⁴⁰⁶; elaborate particulars, however, might increase costs, and are unnecessary, since:

“... particulars should be limited to what is really reasonably necessary to enable the party seeking them to know what case he has to meet.” ¹⁴⁰⁷

Foreign tax laws

26-221

Foreign tax laws are to be treated in the same way as United Kingdom tax laws in this connection: if the claimant in a claim for loss of earnings is subject to foreign fiscal laws under which no tax is payable on the damages it would seem that the rule in *Gourley's* case (above) would apply. ¹⁴⁰⁸

National insurance contributions; tax rebates

26-222

On the basis of the approach adopted in *Gourley's* case, it has been held that in the assessment of damages for wrongful dismissal, a deduction should be made for the employee's national insurance contributions which the employer would have been obliged to deduct from the employee's wages ¹⁴⁰⁹; an income tax rebate received in respect of a period of unemployment should also be taken into

account to reduce damages for loss of earnings during that period. ¹⁴¹⁰

Instances where the *Gourley* principle is irrelevant

26-223

If a sum awarded as damages for loss of profit would be subject to tax in the hands of the claimant, the tax element should be ignored in assessing damages, even though the tax likely to be levied on the damages may be less than that which would have been levied on the income (if it had been received). ¹⁴¹¹ The general principle is that if the sum paid as damages would have been taxable as income if it had been paid by the defendant without dispute, then the damages themselves are subject to income tax. ¹⁴¹² Thus, in a claim against a vendor for breach of a contract to sell land, the purchaser, a dealer in real estate, was held entitled to a sum equal to the gross amount of his profit (namely, the difference between the purchase price and the market value of the land at the date of the breach) since any damages recovered by the claimant would attract tax as part of the profits of his business. ¹⁴¹³ Damages in respect of goods which constitute the claimant's trading stock are treated as a taxable revenue receipt. ¹⁴¹⁴ If the goods would have represented a capital asset in the claimant's hands, and the damages are in respect of their capital value, the first condition in *Gourley* is not satisfied; but where the claimant recovers damages for loss of use of such goods (or for interest on their value ¹⁴¹⁵) the damages will be treated as a trading receipt in the calculation of his trading profits. ¹⁴¹⁶ Other awards held to be taxable in the hands of the recipient were for loss of rent from a tenant who failed to comply with a valid notice to quit ¹⁴¹⁷; and for damages received by a Lloyd's Name from his agent. ¹⁴¹⁸

Salvage services

26-224

There are conflicting decisions of two judges at first instance on the question whether liability to tax is a relevant factor in assessing an award for salvage services. ¹⁴¹⁹ It is submitted that the better view is that ¹⁴²⁰ the rule in *Gourley*'s case (above) is only applicable to diminish an award for damages for loss of personal earnings where the damages are not subject to tax, and thus not applicable to increase the assessment of a salvage award merely because the profit of the salvor is taxable. ¹⁴²¹

Where both the lost earnings (or profits) and the damages are taxable

26-225

The Court of Appeal ¹⁴²² has upheld the practice that in cases where both the lost earnings or profits and the damages to be awarded would be taxable, the incidence of taxation should be ignored. The tax on the damages is left to be set off against the tax on the lost earnings or profits; "rough justice is done and a great expenditure of time and costs is saved by ignoring the tax on both sides" ¹⁴²³ even though the actual amounts of tax, if calculated precisely, might differ widely. ¹⁴²⁴ However, one judge has considered the incidence of taxation on both sides, in a commercial case where failure to do so would have given the plaintiff substantially more than his actual loss. ¹⁴²⁵ In some instances the court has divided the award of damages into two separate elements, one being taxable while the other is not. ¹⁴²⁶

Capital gains tax

26-226

Capital gains tax is charged upon gains accruing to a person on the disposal of assets. ¹⁴²⁷ The list of types of property subject to capital gains tax includes: "21(1)(a) options, debts and incorporeal property generally" (which is wide enough to cover rights of action ¹⁴²⁸); and:

“22(1)(a) [C]apital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset.”

Many instances of the receipt of damages in contract will therefore be liable to capital gains tax ¹⁴²⁹ and so the *Gourley* principle will not apply. ¹⁴³⁰ There is a wider ground, for it seems that whenever the asset lost by the claimant would have been subject to capital gains tax, the damages recovered by him in respect of its value will also be subject to the tax. ¹⁴³¹ However, the Act provides ¹⁴³² that:

“... sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains”,

for the purposes of the taxation of capital gains. This provision exempts many heads of damages in tort from the new tax but it is conceivable that the words “any wrong ... suffered by an individual ... in his profession or vocation” could apply to some damages in contract, unless it is held that no breach of contract is a “wrong” in this context. ¹⁴³³

^{1378.} Whiteman and Sherry on Income Tax, 4th edn (2010), paras 24.01 et seq.; Simon's Taxes, paras E4.831-E4.836. See the Seventh Report of the Law Reform Committee, Effect of Tax Liability on Damages, 1958, Cmnd.501; Stevenson and Orr [1956] B.T.R. 1; Dworkin [1967] B.T.R. 315, 373.

^{1379.} [1956] A.C. 185.

^{1380.} The defendant must show that the second condition is satisfied: *Stoke-on-Trent City Council v Wood Mitchell & Co Ltd* [1980] 1 W.L.R. 254. (This was not a contract case.) Then the onus of proof is on the claimant to prove his damage, and thus to show that the first condition is inapplicable: *Hall v Pearlberg* [1956] 1 W.L.R. 244.

^{1381.} Thus where the claimant is deprived of a capital asset and his damages represent its capital value, no question of income tax arises unless he also claims for loss of profits: cf. *Hall v Pearlberg* [1956] 1 W.L.R. 244; *Sykes v Midland Bank Executor and Trustee Co Ltd* [1969] 2 Q.B. 518, 536–537 (reversed on a different ground: [1971] 1 Q.B. 113). See below, para.26-223.

^{1382.} On the position where the damages are subject to capital gains tax (below, para.26-226).

^{1383.} See below, para.26-223. By Income Tax (Trading and Other Income) Act 2005 s.751(1) (replacing s.329 of the Income and Corporation Taxes Act 1988), where the court awards a sum which includes interest on damages in respect of personal injuries or death, that interest is not regarded as income for any income tax purpose. See *Mason v Harman* [1972] R.T.R. 1.

^{1384.} But see the splitting of the award into taxable and non-taxable elements in cases of wrongful dismissal: *Phipps v Orthodox Unit Trusts Ltd* [1958] 1 Q.B. 314 (below, para.26-219); *Parsons v B.N.M. Laboratories Ltd* [1964] 1 Q.B. 95 (below, para.26-218). cf. below, para.26-225 n.1167.

^{1385.} *Capita Alternative Fund Services (Guernsey Ltd) v Drivers Jonas* [2012] EWCA Civ 1417 at [56]–[59]. This was so even if, by virtue of a special “look through” provision, the credits were in fact obtained by the investors rather than by the trust set up for the purpose: at [63].

^{1386.} See Powell (1981) 10 I.L.J. 239; Whiteman and Sherry on Income Tax, paras 14.226-14.233.

^{1387.} Replacing ss.148 and 188 of (and Sch.11 to) the Income and Corporation Taxes Act 1988.

- [1388.](#) There are a number of exemptions: see e.g. s.309 of the 2003 Act. Where an ex-employee takes legal action to recover compensation for loss of employment there was an extra-statutory exemption granted by the Inland Revenue (dated September 2, 1993) exempting his legal costs from ss.401–406: see now s.413A of the 2003 Act (effective for payments after April 6, 2011). See Simon's Taxes, para.E4.827.
- [1389.](#) s.401(1) refers to any payment made "either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of a person's employment".
- [1390.](#) s.403(1).
- [1391.](#) On the question whether the first £30,000 might be subject to capital gains tax, see Whiteman and Sherry on Income Tax, 4th edn (2010), para.14.225.
- [1392.](#) *Parsons v B. N. M. Laboratories Ltd* [1964] 1 Q.B. 95 (on the provision now superseded by the 2003 Act).
- [1393.](#) See below, para.26-225.
- [1394.](#) *Bold v Brough, Nicholson & Hall Ltd* [1964] 1 W.L.R. 201 (followed in *Basnett v J. & A. Jackson Ltd* [1976] I.C.R. 63, 74).
- [1395.](#) *Stewart v Glentagart Ltd* (1963) S.L.T. 119. See Simon's Taxes, para.E4.833; McGregor, *Damages*, 19th edn (2014), para.17–046 (which submits that the 1998 substitution of s.148 (see now ss.401–403 of the 2003 Act) avoided the problem).
- [1396.](#) It is possible under this method for the award to be higher than the claimant's gross loss: *Shove v Downs Surgical* [1984] 1 All E.R. 7.
- [1397.](#) *Shove v Downs Surgical* [1984] 1 All E.R. 7.
- [1398.](#) Whiteman and Sherry, para.14.234 also submits that this method should be followed. (See above, n.1136).
- [1399.](#) *Re Houghton Main Colliery Co Ltd* [1956] 1 W.L.R. 1219.
- [1400.](#) *British Transport Commission v Gourley* [1956] A.C. 185, 203, 207, 215.
- [1401.](#) [1956] A.C. 185, 207.
- [1402.](#) [1956] A.C. 185, 209.
- [1403.](#) *Beach v Reed Corrugated Cases Ltd* [1956] 1 W.L.R. 807 (wrongful dismissal).
- [1404.](#) [1973] 1 W.L.R. 73. (McGregor on Damages, 18th edn (2009), para.14–046, criticises the view taken in this case that the damages would not be taxable in the hands of the plaintiff. In para.14-047 he relies on the decision of the House of Lords in *Deeny v Gooda Walker (No.2)* [1996] 1 W.L.R. 426 (see below, para.26-223 n.1153).)
- [1405.](#) The Court of Appeal did not accept the view taken in *Re Houghton Main Colliery Ltd* [1956] 1 W.L.R. 1219 that the partial loss was not to be treated as any particular part of the claimant's income, so as to attract a higher or lower rate of tax.
- [1406.](#) *Phipps v Orthodox Unit Trusts Ltd* [1958] 1 Q.B. 314 (following *Monk v Redwing Aircraft Co Ltd* [1942] 1 K.B. 182, where the claimant was compelled to give particulars of other employment he had undertaken since his wrongful dismissal).
- [1407.](#) *Phipps v Orthodox Unit Trusts Ltd* [1958] 1 Q.B. 314, 321. [1944]
- [1408.](#) *Julien Praet et Cie SA v H. G. Poland Ltd* [1962] 1 Lloyd's Rep. 566 (where damages for breach

of contract are subject to foreign taxation, the rule in *Gourley's* case does not apply). In *John v James* [1986] S.T.C. 352, a complicated situation created possible tax liabilities in seven foreign countries (as well as the UK) over many years, but the judge calculated damages without making any deductions on account of tax.

- [1409.](#) *Cooper v Firth Brown Ltd* [1963] 1 W.L.R. 418 (Vol.II, para.40-205). In a personal injury tort case, a deduction has also been made from the claimant's lost wages in respect of the contributions he did not have to make to a pension scheme to which he was obliged to belong as one of the terms of his employment: *Dews v National Coal Board* [1988] A.C. 1. (Any diminution in his ultimate pension should be valued separately: at 14–15, 18.)
- [1410.](#) *Hartley v Sandholme Iron Co Ltd* [1975] Q.B. 600 (a tort case). cf. also the question of deducting a redundancy payment from damages for wrongful dismissal: see Vol.II, para.40-206.
- [1411.](#) *Parsons v B.N.M. Laboratories Ltd* [1964] 1 Q.B. 95; *Diamond v Campbell-Jones* [1961] Ch. 22, 37; *Julien Praet et Cie, SA v H. G. Poland Ltd* [1962] 1 Lloyd's Rep. 566. (See, however, the splitting of damages for wrongful dismissal into separate parts—taxable and non-taxable: above, para.26-218.) cf. *Burmah S.S. Co v IRC* (1931) 16 T.C. 67.
- [1412.](#) Whiteman and Sherry on Income Tax, 4th edn (2010), paras 24.01 et seq. See *Deeny v Gooda Walker (No.2)* [1996] 1 W.L.R. 426 (HL, "payments in compensation for what would have been revenue items in the trade": at 437).
- [1413.](#) *Diamond v Campbell-Jones* [1961] Ch. 22. cf. *Lyndale Fashion Manufacturers v Rich* [1973] 1 W.L.R. 73 (where the *Gourley* principle was applied to damages for loss of a salesman's commission; but McGregor 19th edn (2014), at para.17–047, argues that the damages should have been treated as taxable).
- [1414.](#) *Sommerfelds v Freeman* [1967] 1 W.L.R. 489.
- [1415.](#) *Riches v Westminster Bank* [1947] A.C. 390 (interest awarded as damages held to be taxable); *The Norseman* [1957] P. 224 (interest).
- [1416.](#) *Burmah S.S. Co v Inland Revenue Commissioners* (1931) 16 T.C. 67 (a Scots case).
- [1417.](#) *Raja's Commercial College v Gian Singh & Co Ltd* [1977] A.C. 312; cf. *Stoke-on-Trent City Council v Wood Mitchell & Co Ltd* [1980] 1 W.L.R. 254 (loss of profits as part of statutory compensation for compulsory acquisition); *London and Thames Haven Oil Wharves Ltd v Attwooll* [1967] Ch. 772 (loss of trading profits: the dictum of Diplock L.J. in this case was discussed by the HL in *Deeny v Gooda Walker Ltd (No.2)* [1996] 1 W.L.R. 426).
- [1418.](#) *Deeny v Gooda Walker Ltd (No.2)* [1996] 1 W.L.R. 426.
- [1419.](#) *The Telemachus* [1957] P. 47; *The Makedonia* [1958] 1 Q.B. 365; cf. *The Frisia* [1960] 1 Lloyd's Rep. 90, 94, 95, 96. McGregor on Damages, 19th edn (2014), para.17–013 n.36, submits that the decision in *The Telemachus* was wrong. On salvage, see below, para.29-142.
- [1420.](#) *The Makedonia* [1958] 1 Q.B. 365.
- [1421.](#) Hall (1957) 73 L.Q.R. 212, 219–220; (1958) 74 L.Q.R. 168; (1958) 21 M.L.R. 301.
- [1422.](#) *Parsons v B.N.M. Laboratories Ltd* [1964] 1 Q.B. 95 ("[I]t is impossible to maintain that there can be derived from *Gourley's* case any principle requiring taxation to be taken into account in assessing damages in a situation where both the lost earnings or profits and the damages are taxable": at 136). See also *Julien Praet et Cie SA v H. G. Poland Ltd* [1962] 1 Lloyd's Rep. 566.
- [1423.](#) *Parsons v B.N.M. Laboratories Ltd* [1964] 1 Q.B. 95, 135. It was similarly assumed that the damages would be taxable in *Dickinson v Jones Alexander & Co* [1993] 2 F.L.R. 321..
- [1424.](#) Exceptional cases might justify separate assessments of tax: *Parsons v B.N.M. Laboratories*

Ltd [1964] 1 Q.B. 95, 137

- [1425.](#) *Amstrad Plc v Seagate Technology Inc* (1997) 86 *Build. L.R.* 34.
- [1426.](#) *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428 (CA: claim for accounting of profits, some of which would not be taxable in the plaintiff's hands, because of the time period in question). cf. the contrary opinion at first instance in *John v James* [1986] S.T.C. 352. See also above, para.26-218 (where awards of damages for wrongful dismissal are discussed: such awards have been split into taxable and non-taxable parts) and the opinion of Lord Hunter in *Stewart v Glentagart Ltd* (1963) S.L.T. 119.
- [1427.](#) Taxation of Chargeable Gains Act 1992 s.1(1). See Simon's Taxes, paras C1.320, C1.325 and C2.502; Whiteman and Sherry on Capital Gains Tax, 5th edn (2008); Sumption, *Capital Gains Tax* (looseleaf); McGregor, 19th edn (2014), paras 17–063 et seq.
- [1428.](#) cf. Taxation of Chargeable Gains Act 1992 s.51(2). See also *O'Brien v Benson's Hosiery* [1979] S.T.C. 735 (payment by employee for release from a contract of employment was an "asset" for the purposes of capital gains tax).
- [1429.](#) Since the deriving of a capital sum may be a disposal of assets, a seller's damages for the buyer's failure to accept the goods may be subject to capital gains tax.
- [1430.](#) McGregor, 19th edn (2014), paras 17–063—17–066; Whiteman and Sherry, 5th edn (2008), paras 6.33–6.40 and 7.86–7.108. If damages for breach of contract awarded to a buyer or seller amount to a trading receipt in the hands of the recipient and thus liable to income tax, they will not be liable to capital gains tax: s.37 of the 1992 Act.
- [1431.](#) cf. *Zim Properties v Procter* [1985] S.T.C. 90 (criticised by McGregor, 19th edn (2014), paras 17–064—17–066). See also the Extra-Statutory Concession dated December 19, 1988 (see Whiteman and Sherry, para.6.44; Sumption at D.78).
- [1432.](#) s.51(2).
- [1433.](#) Provision is made for the postponement of the capital gains charge in certain circumstances, e.g. if the recipient of damages uses them to repair damaged property: s.23 of the Act. (See also ss.152–154.)

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Section 12. - Interest ¹⁴³⁴

(a) - Introduction

Introduction

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It has always been open to the parties to make express provision in their contract for the payment of interest, which the courts will enforce ¹⁴³⁵ (except in situations covered by specific statutory provision ¹⁴³⁶). The courts were sometimes prepared to infer an agreement to pay interest where the inference could be based on the course of dealing between the parties ¹⁴³⁷ or on a relevant trade usage. ¹⁴³⁸ In the absence of such an express or implied provision for the payment of interest, however, interest was not payable. In 1893 in the *London Chatham* case ¹⁴³⁹ the House of Lords decided that the common law does not permit the award of interest by way of general damages for delay in payment of a debt beyond the date when it was contractually due. Various statutes gave an entitlement to interest, or empowered the courts to award interest, in certain types of case. ¹⁴⁴⁰ In 1934 the courts were given a general statutory discretion to award interest in proceedings for debt or damages, and this was subsequently extended. ¹⁴⁴¹ In 1985 the House ¹⁴⁴² refused to depart from its previous decision, though it approved a Court of Appeal decision ¹⁴⁴³ that damages could be recovered in some circumstances. Recently, however, the House has said that damages for loss of interest should be recoverable whenever the loss has been pleaded and proved. ¹⁴⁴⁴

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁴³⁵. See Vol.II, paras 39-285 et seq. But see below, para.26-244 n.1284.

¹⁴³⁶. By ss.137–140 of the Consumer Credit Act 1974 the court was empowered to reopen certain transactions where the rate of interest is “grossly exorbitant”. These sections have now been replaced by ss.140A–140C (inserted by Consumer Credit Act 2006 ss.19–22), which apply when there is an unfair relationship between creditor and debtor. See above, para.26-215 and below, Vol.II, paras 39-212 et seq.) cf. ss.244 and 343 of the Insolvency Act 1986. See also below, para.26-232.

¹⁴³⁷. *Re Anglesey* [1901] 2 Ch. 548. See also *Great Western Insurance Co v Cunliffe* (1874) L.R. 9 Ch. 525; *Re Duncan & Co* [1905] 1 Ch. 307.

¹⁴³⁸. *Ikin v Bradley* (1818) 8 Taunt. 250; *Page v Newman* (1829) 9 B. & C. 378, 381. cf. the implied term arising under the Late Payment of Commercial Debts (Interest) Act 1998 (below, para.26-232; Vol.II, paras 39-295 et seq.).

¹⁴³⁹. *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] A.C. 429.

¹⁴⁴⁰. See below, paras 26-232 et seq. and 26-236.

[1441.](#) See below, paras 26-236 et seq.

[1442.](#) *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104 (which was further considered by the House of Lords in *President of India v Lips Maritime Corp* [1988] A.C. 395). See Mann (1985) 101 L.Q.R. 30.

[1443.](#) *Wadsworth v Lydall* [1981] 1 W.L.R. 598. (See below, para.26-229.)

[1444.](#) *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 A.C. 561.

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(b) - Damages for Loss of Interest at Common Law

The starting point: no recovery

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The starting point for the discussion may be taken the decision of the House of Lords in the *London Chatham* case ¹⁴⁴⁵ in 1893. There it was treated as well settled that as a general rule, debts do not carry interest, nor are damages available for simple later payment, so that a debtor who pays late discharges his obligation by paying the sum originally due. The House viewed this rule without enthusiasm, ¹⁴⁴⁶ and it is perhaps not surprising that ultimately it first should be the subject of a major exception ¹⁴⁴⁷ and later reduced almost to vanishing point. ¹⁴⁴⁸

Finance charges on particular transaction contemplated

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In 1981 an exception to the common law rule was created by the Court of Appeal ¹⁴⁴⁹ (and was expressly approved by the House of Lords in 1985 ¹⁴⁵⁰). This was that provided the second rule in *Hadley v Baxendale* ¹⁴⁵¹ (the remoteness test where a promisor with notice of special facts had assumed responsibility for a type of loss not normally within contemplation ¹⁴⁵²) was satisfied, special damages could be awarded where, as the result of the defendant failing to pay money when it was due, the claimant had actually incurred interest charges ¹⁴⁵³ in obtaining finance from another source. The defendant knew that the claimant needed the payment to finance a purchase, and that, if the defendant failed to make the payment, the claimant would need to borrow the amount elsewhere. An analogous situation arose where the plaintiff was buying a machine on hire-purchase. The defendant's breach of contract led to the need to replace an expensive part of it; since it was found that the plaintiff acted reasonably in buying the replacement on hirepurchase, the defendant was held liable to pay the finance charges. ¹⁴⁵⁴

Loss of interest compensable if pleaded and proved

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⚠ However, in the *Sempra Metals* case ¹⁴⁵⁵ the House of Lords went further than the Court of Appeal. It severely restricted the rule in the *London Chatham* case of 1893. Although the actual decision in the *Sempra Metals* case was on the remedy in restitution, four of their Lordships took the opportunity to limit the effect of the *London Chatham* rule to cases where the claimant does not plead or prove any losses arising from late payment of the debt due to him: the rule still prevents the award of damages for "an unparticularised and unproved claim" for interest losses. ¹⁴⁵⁶ But their Lordships held that at common law it is always in principle open to a claimant to plead and prove his actual interest losses (including a loss of compound interest) caused by late payment of a debt. ¹⁴⁵⁷ ⚠ (Such a claim is

subject to all the ordinary rules on damages, such as those on remoteness and mitigation, ¹⁴⁵⁸ and presumably also the new requirement that it was reasonable to assume that the defendant was assuming responsibility for the loss. ¹⁴⁵⁹) The actual decision in the *Sempra Metals* case permitted a claim in restitution for compound interest where a payment had been made under a mistake of law (to which a more favourable limitation rule applied than in the case of a damages claim).

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁴⁴⁵. *London, Chatham and Dover Ry Co v South Eastern Railway Co* [1893] A.C. 429.

¹⁴⁴⁶. See e.g. [1893] A.C. 429, at 440, 441 and 443.

¹⁴⁴⁷. See next paragraph.

¹⁴⁴⁸. See para.26-230.

¹⁴⁴⁹. *Wadsworth v Lydall* [1981] 1 W.L.R. 598. (See also above, para.26-175.)

¹⁴⁵⁰. *The President of India case* [1985] A.C. 104, at 125–127.

¹⁴⁵¹. (1854) 9 Ex. 341.


¹⁴⁵². Above, paras 26-119—26-125.

¹⁴⁵³. *Compania Financiera “Soleada” SA v Hamoor Tanker Corp Inc (The Borag)* [1981] 1 W.L.R. 274 (interest charges held unreasonable).

¹⁴⁵⁴. *Bacon v Cooper (Metals) Ltd* [1982] 1 All E.R. 397 (see above, para.26-085).

¹⁴⁵⁵. *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 A.C. 561.

¹⁴⁵⁶. [2007] UKHL 34 at [96].

¹⁴⁵⁷.  [2007] UKHL 34 at [16]–[17], [94], [100], [132] and [154]. (Lord Mance rejected the invitation to revisit the common law rule.) In a fraud case, compound interest was refused when the claimants had merely pleaded that they had suffered loss and damage, without any allegation of the use to which the monies paid away as a result of the fraud would have been put had there been no fraud, or allegation of losses the claimants had suffered in addition to having paid away the principal sums: *JSC BTA Bank v Ablyazov* [2013] EWHC 867 (Comm). The court awarded simple interest under its statutory discretion: see below, para.26-236. It has been held that “general evidence” that the claimant suffered loss from the delay will suffice: *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3264 (Comm) at [123], [2014] Lloyd’s Rep. I.R. 398; *Sainsbury’s Supermarkets Ltd v Mastercard Inc* [2016] CAT 11 at [521].

¹⁴⁵⁸. On the relevance of the impecuniosity of the claimant, see above, paras 26-083—26-086.

¹⁴⁵⁹. *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 A.C. 61. See above, paras 26-126 et seq.

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(c) - Admiralty and Equity

Admiralty—equity jurisdiction

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In some jurisdictions outside the common law, interest could be awarded by the court, e.g. in the Admiralty Court on a salvage award, ¹⁴⁶⁰ or in the equitable jurisdiction of the Chancery Court. ¹⁴⁶¹

^{1434.} See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

^{1460.} *The Aldora* [1975] Q.B. 748; *The Rilland* [1979] 1 Lloyd's Rep. 455.

^{1461.} *Wallersteiner v Moir (No.2)* [1975] Q.B. 373, 388, 406; *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428 (fiduciary relationship). The award of interest in equity was examined (especially in relation to compound interest) in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 (below, para.26-236 n.1232) and in the *Sempre Metals* case [2007] UKHL 34.

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(d) - Statutory Rights to Interest

Interest on commercial debts

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! Interest is payable on certain debts “created by virtue of an obligation under a contract ... to pay the whole or any part of the contract price” ¹⁴⁶² ! under a term implied into contracts by the Late Payment of Commercial Debts (Interest) Act 1998. The Act applies to “a contract for the supply of goods or services” ¹⁴⁶³ where both parties are acting in the course of a business. ¹⁴⁶⁴ It is an implied ¹⁴⁶⁵ term in any such contract that any “qualifying debt” ¹⁴⁶⁶ created by the contract carries simple interest (called “statutory interest” in the Act). ¹⁴⁶⁷ The rate of statutory interest (or the formula for calculating it) is to be prescribed by order of the Secretary of State. ¹⁴⁶⁸ Once statutory interest begins to run on a qualifying debt, the supplier is entitled to a fixed sum of compensation in addition to the statutory interest. ¹⁴⁶⁹

Period of statutory interest: where a date for payment has been Agreed

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! The period for which interest is payable is set out in s.4, which has recently been amended. ¹⁴⁷⁰ Where the parties agree a date for payment of the debt, statutory interest starts to run on the next day, ¹⁴⁷¹ subject to three exceptions. The first exception is when the debt relates to an obligation to make an advance payment ¹⁴⁷²: the debt is then treated as created on the day when the supplier’s obligation is performed. ¹⁴⁷³ The second exception applies where the purchaser is a public authority: if the agreed date would be later than the end of the “relevant 30-day period” that would apply if the parties had not agreed a date, ¹⁴⁷⁴ then statutory interest will start to run from the last day of the period. ¹⁴⁷⁵ The third exception is when the purchaser is not a public authority: if the agreed date would be more later than the end of a “relevant 60-day period”, ¹⁴⁷⁶ statutory interest will start to run from the last day of the period ¹⁴⁷⁷ unless the agreed payment day is not grossly unfair to the supplier.

¹⁴⁷⁸ !

Where no date for payment agreed

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If the parties have not agreed a date for payment, statutory interest runs from day after the end of “relevant period”, which is the latest of the following dates: after the period of 30 days from the performance of the obligation to which the debt relates ¹⁴⁷⁹; from the day when the purchaser has notice of the amount of the debt ¹⁴⁸⁰; or, if there is a procedure of acceptance or verification (whether provided for by an enactment or by the contract) under which the conforming of goods or services

with the contract is to be ascertained, from the day after the procedure is completed. In the last case, if the parties have agreed on a period of over than 30 days for the procedure to be carried out, the procedure will be treated as being completed after 30 days unless the parties have expressly agreed otherwise and the longer period is not grossly unfair to the supplier. ¹⁴⁸¹

When interest ceases to run

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⚠ Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term. ¹⁴⁸² Statutory interest also does not run for any period where “by reason of any conduct of the supplier”, ¹⁴⁸³ “the interests of justice require”. ¹⁴⁸⁴ ⚠

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁴⁶². ⚠ s.3(1), Late Payment of Commercial Debts (Interest) Act 1998. A claim for unliquidated damages is not within the Act, at least in the absence of some mechanism in the contract that has the effect of converting the claim into part of the contract price: *National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd* [2013] EWHC 3025 (TCC) at [7]–[8]; *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC) at [56]. Rather, the court has discretion to award interest under s.35A of the Senior Courts Act 1981, see para.26-236.

¹⁴⁶³. Defined by s.2(2), (3) and (4). (Some other relevant definitions are found in s.16). Certain contracts are excepted by s.2(5) (as amended): consumer credit agreements; mortgages, pledges, charges or other securities. Section 12 makes provision for the conflict of laws. The Act does not apply to a contract governed by the law of part of the UK by choice of the parties if there is no significant connection between the contract and that part of the UK and, but for that choice, the contract would have been governed by a foreign law: s.12(1). On the application of this provision, see *Martrade Shipping & Transport GmbH v United Enterprises Corp* [2014] EWHC 1884 (Comm).

¹⁴⁶⁴. s.2(1). The meaning of “business” includes a profession and the activities of any government department or local or public authority (s.2(7)). By the Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No.5) Order 2002 (SI 2002/1673), the provisions of the Act apply to businesses of all sizes and to the public sector.

¹⁴⁶⁵. In cases where the contract provides “a substantial remedy” (as defined in s.9) for late payment of the debt, s.1(3) and Pt II of the Act (ss.7–10) permit the parties to oust or vary the right to statutory interest conferred by s.1(1).



¹⁴⁶⁶. As defined by s.3(1). Section 3(2) and (3) exclude debts where any other enactment or any rule of law confers a right to interest or to charge interest. By s.13, the Act applies to a qualifying debt despite any assignment of the debt or the transfer of the duty to pay it, or any change in the identity of the parties, whether by assignment, operation of law or otherwise.

¹⁴⁶⁷. s.1(1).

¹⁴⁶⁸. s.6. Currently set at 8 per cent over the official dealing rate of the Bank of England: SI 2002/1675. For the purposes of s.6 the official dealing rate in force on June 30 applies in respect of interest which starts to run during the following six-month period July 1 to December 31, and the rate in force on December 31 applies to interest starting during the six-month period January 1 to June 30.

¹⁴⁶⁹. s.5A, inserted by Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674). The

amount of compensation is fixed on a scale under the regulations by reference to the size of the debt (see reg.2(4)): £40 for an unpaid debt up to £999; £70 from £1,000 to £9,999; and £100 for £10,000 and over. (The compensation is intended for recovery costs.)

- [1470.](#) Late Payment of Commercial Debts Regulations 2013 (SI 2013/395), in force since March 16, 2013, Late Payment of Commercial Debts (No.2) Regulations 2013 (SI 2013/908), in force since May 14, 2013 and Late Payment of Commercial Debts (Amendment) Regulations 2015 (SI 2015/1336), in force since June 21, 2015. The Regulations implement Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.
- [1471.](#) s.4(2) and (2A). The provision applies only to a date agreed in advance, not one agreed only after performance: *Ruttle Plant Hire Ltd v Secretary of State for Environment, Food and Rural Affairs* [2009] EWCA Civ 97 at [25]. The agreed date “may depend on the happening of an event or the failure of an event to happen”: s.4(2C). Section 14 extends the application of the Unfair Contract Terms Act 1977 to a contract term postponing the time when a qualifying debt would otherwise arise.
- [1472.](#) ss.4(2G) and 11.
- [1473.](#) s.11(3). Section 11(4)–(7) prescribe detailed rules on advance payments in respect of part performance or the hire of goods.
- [1474.](#) s.4(2D); for how the relevant period is calculated, see below, para.26-234.
- [1475.](#) s.4(2A).
- [1476.](#) s.4(2E); the period is calculated in the same way as the 30-day period, see below, para.26-234.
- [1477.](#) s.4(2A).
- [1478.](#)  s.4(2F). The Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674) reg.3, allow representative bodies to bring proceedings in the High Court on behalf of small and medium-sized enterprises to obtain an injunction preventing other businesses using terms purporting to oust or vary the right to statutory interest in relation to qualifying debts created by those contracts. The Department of Business, Innovations and Skills has consulted on amendments to this regime: Late Payment: challenging “grossly unfair” terms and practices: Consultation Paper (2015).
- [1479.](#) s.4(2A)(b) and (2H)(a). If the debt arises from a period of hire of goods, the 30 days runs from the last day of that period: s.4(6).
- [1480.](#) If the amount is unascertained, the 30-day period runs from the day when the purchaser has notice of the sum claimed: s.4(2H)(b). The amount claimed need not be accurate for s.4(2H)(b) to apply. The debtor should pay what it thinks is due and ask for substantiation of the balance. If it has paid less than is really due, it can ask for a remission of the interest on the balance under s.5 (see para.26-235, below). The debt does not cease to be a “qualifying debt” under s.3(1) because the invoice is wrong: *Ruttle Plant Hire Ltd v Secretary of State for Environment, Food and Rural Affairs* [2009] EWCA Civ 97 at [29]–[41].
- [1481.](#) s.4(5D). Section 4(7A) (see above, n.1218) sets out what is to be taken into account determining whether the term is grossly unfair.
- [1482.](#) s.4(7).
- [1483.](#) s.5(1). “Conduct” includes any act or omission (s.5(5)) and may be relevant whether it occurs before or after the time when the debt is created (s.5(4)).
- [1484.](#)  s.5(1) and (2). By s.5(3) a reduced rate of statutory interest may apply if “the interests of

justice require". For possible analogies, see, Vol.II, paras 38-359 et seq. on "unfairness", and above, para.15-096 on "reasonableness". In *Ruttle Plant Hire Ltd v Secretary of State for Environment, Food and Rural Affairs* [2009] EWCA Civ 97 at [53] it was said that interest should be remitted where the supplier had created or allowed uncertainty over the amount due. In *Rowles-Davies v Call 24-7 Ltd* [2010] EWHC 1443 (Ch) the court reduced the rate because of the supplier's delay in claiming, to 4 per cent above the official bank rate from the date when each debt became due until 30 days after it was claimed, and thereafter 8 per cent above the official bank rate. See also *First Personnel Services Ltd v Halfords Ltd* [2016] EWHC 3220 (Ch) at [164]–[169], applying the principles stated by Jackson J. in *Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805 (TCC) at [55], a case involving a statutory discretion to award interest, see below, para.26-238 n.1261.

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Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 8 - Remedies for Breach of Contract
Chapter 26 - Damages
Section 12. - Interest ¹⁴³⁴
(e) - Statutory Discretion to Award Interest

Statutory power to award interest

26-236

A statutory provision may empower the court to award interest in particular circumstances, e.g. where a bill of exchange has been dishonoured. ¹⁴⁸⁵ The first general discretionary power was enacted in 1934 ¹⁴⁸⁶ and is now found in two separate statutes covering the main courts. ¹⁴⁸⁷ (It should be noted that those statutes do not confer on the creditor a right to interest ¹⁴⁸⁸). The High Court ¹⁴⁸⁹ and the county court ¹⁴⁹⁰ are empowered, in proceedings for the recovery of a debt or damages, ¹⁴⁹¹ to include "in any sum for which judgment is given" simple ¹⁴⁹² interest ¹⁴⁹³; subject to any rules of court, ¹⁴⁹⁴ the court is given a discretion to fix the rate of interest, ¹⁴⁹⁵ to decide whether the interest should be on "all or any part of" the debt or damages, and for "all or any part of the period between the date when the cause of action arose" and either the date of payment (of any sum paid before judgment) or the date of judgment. ¹⁴⁹⁶ The claimant ¹⁴⁹⁷ is also entitled (subject to a similar ¹⁴⁹⁸ judicial discretion as to the rate of interest, the period for which it is payable, and whether it should be on all or only part of the debt or damages) to the award of simple interest where the defendant pays the whole of a debt to the claimant after proceedings for its recovery were instituted but before any judgment. ¹⁴⁹⁹ Where an action has been brought for damages for breach of contract, payment of the amount claimed prior to the hearing does not extinguish the cause of action ¹⁵⁰⁰; hence, when the payment does not include interest on the amount claimed, the court can still award the damages and interest under the statute. ¹⁵⁰¹ It should be noted, however, that neither enactment ¹⁵⁰² gives the court a discretionary power to award interest on any sum paid late before any proceedings for its recovery have been begun. ¹⁵⁰³ This applies to late payment of the whole or part of a debt and to a sum paid as damages before the commencement of proceedings. ¹⁵⁰⁴ But interest may arise as of *right* under other statutory provisions, ¹⁵⁰⁵ such as under the Late Payment of Commercial Debts (Interest) Act 1998. ¹⁵⁰⁶ Any claim for interest, whether under the statutory provisions or otherwise, should be specifically pleaded ¹⁵⁰⁷ but the court has power to award interest even if a claim for interest was not made. ¹⁵⁰⁸ Special rules apply to the award of interest on damages in respect of death or personal injuries. ¹⁵⁰⁹

Exercise of the discretion to award interest

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The basic principle ¹⁵¹⁰ is that the court should award interest wherever the defendant's breach of contract deprived the claimant of the opportunity to put the subject-matter of the claim to work to earn profits or income. ¹⁵¹¹ So where the buyer failed to pay the price of goods sold and delivered to him, interest has been awarded:

"... on the simple commercial basis that if the money had been paid at the appropriate commercial time, the other side would have had the use of it." ¹⁵¹²

Where the seller failed to deliver the goods, the buyer's damages should include interest on the normal measure of the damages, viz the difference between the contract price and the market price for substitute goods available at the date fixed for delivery. ¹⁵¹³ Again, where the claimant has reasonably incurred expenditure as the result of the defendant's breach, ¹⁵¹⁴ interest should be awarded as damages in respect of that expenditure. ¹⁵¹⁵ The court should not award interest if that would give the claimant double recovery for the same loss: the use of property, or the receipt of the income arising from its use, is the equivalent of interest earned by a sum of money. ¹⁵¹⁶ For instance, if the seller retains income-producing property, which would have been transferred to the buyer had he paid the price, the seller should not be given interest on the price if he is entitled to the income arising from the property during the delay until the price is paid. ¹⁵¹⁷ Where the breach of contract deprives the claimant of the use of land or goods, and the court awards him damages for the loss of that use (e.g. loss of rents or profits), he should not also be awarded interest on the value (or price) of the land or goods. ¹⁵¹⁸

Period of interest

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⚠ In principle, interest should run only from the date (after accrual of the cause of action) when the claimant incurred the loss in question. ¹⁵¹⁹ The court has a discretion to fix a later date, ¹⁵²⁰ as where the claimant has unreasonably delayed bringing his action. ¹⁵²¹ ⚠ Where the claim is for the cost of remedying defects, the court should also take into account whether the costs have been calculated as at the time of breach or at rates prevalent at the time of trial. ¹⁵²² A question about the relevant dates from which interest should run arises when the claimant was insured against the particular loss. ¹⁵²³ In one case, ¹⁵²⁴ the Court of Appeal was prepared to award interest on damages for the period after the plaintiffs were in fact indemnified by their insurers in respect of the loss. The court implied a term into the contract of insurance, to the effect that the plaintiffs could retain any interest awarded which accrued before the insurers paid the plaintiffs, but that any interest for a later period must go to the insurers.

No power where interest already running

26-239

The relevant statutes provide that interest in respect of a debt must not be awarded "for a period during which, for whatever reason, interest on the debt already runs". ¹⁵²⁵ Hence, if the contract itself fixes interest, the court can only enforce that provision: its statutory power does not override the contractual provision, e.g. the court may not fix a different rate of interest ¹⁵²⁶ or award interest in circumstances in which the contract provides that it is not to be payable. ¹⁵²⁷

Rates of interest

26-240

The court is empowered to award interest "at different rates in respect of different periods". ¹⁵²⁸ In business ¹⁵²⁹ contexts, the rate of interest should reflect the current commercial rate. ¹⁵³⁰ The approach of the Commercial Court is to award interest at a rate which broadly represents the rate at which the successful party would have had to borrow the amount recovered over the period in question. ¹⁵³¹ The Court of Appeal has upheld the practice of the Commercial Court to award interest at a borrower's rate of 1 per cent above the base rate prevailing from time to time, ¹⁵³² but this is only a presumption which can be displaced if its application would be unfair to either party. ¹⁵³³ The Court of Appeal has recognised that the borrowing costs of small businesses are often higher than for first class borrowers for whom 1 per cent above base rate is appropriate: interest on damages at 3 per cent above base rate was awarded, ¹⁵³⁴ where the claim is made by an employee the appropriate rate is the cost of unsecured borrowing by individuals. ¹⁵³⁵

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Rules of court may be made ¹⁵³⁶ fixing the rate of interest which the court may award by reference to the rate fixed from time to time for judgment debts under the Judgments Act 1838 ¹⁵³⁷ or by reference to a rate for which any other enactment provides. The Civil Procedure Rules 1998 contain provisions about interest when the claimant seeks judgment by default, when the claimant makes an offer or when the defendant makes a payment into court. Where the claimant claims interest on a specified amount of money (under s.35A of the 1981 Act or s.69 of the 1984 Act) at a rate no higher than that payable on judgment debts ¹⁵³⁸ at the date when the claim form was issued, a default judgment may include the amount of interest to the date of judgment. ¹⁵³⁹ If the claim is for a different rate of interest, the default judgment must exclude interest but judgment may be entered for interest to be decided by the court. ¹⁵⁴⁰ A Pt 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of interest. ¹⁵⁴¹

Debt or damages in foreign currency

26-242

When the debt or damages are calculated in a foreign currency, the rate of interest should be the commercial borrowing rate in that currency in the relevant country. ¹⁵⁴²

Rate of exchange

26-243

The question of the appropriate rate of exchange when the debt or damages for breach of contract are calculable in a foreign currency is examined in Ch.30. ¹⁵⁴³

Interest due as of right

26-244

The general statutory powers to award interest which have been examined in the preceding paragraphs do not apply where interest is payable under the terms of the contract itself ¹⁵⁴⁴ or under some other special provision. ¹⁵⁴⁵ Thus, the Late Payment of Commercial Debts (Interest) Act 1998 confers on the creditor a right under an implied term to “statutory interest” on “qualifying debts” where both parties are acting in the course of a business. ¹⁵⁴⁶ Similarly, where the contract itself ¹⁵⁴⁷ entitles the seller to claim interest on the price, the seller is not dependent on the exercise of the court’s discretion and the court can award interest only at the rate specified in the contract. ¹⁵⁴⁸ A suitably worded contractual clause may fix interest to run beyond judgment for the debt. ¹⁵⁴⁹

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁴⁸⁵. Bills of Exchange Act 1882 s.57. In the enactment of general powers to award interest (discussed below), this provision has been preserved: s.3(1)(c) of the Law Reform (Miscellaneous Provisions) Act 1934; s.35A(8) of the Senior Courts Act 1981; and s.69(7) of the County Courts Act 1984. See also below, Vol.II, para.39-295.

¹⁴⁸⁶. The Law Reform (Miscellaneous Provisions) Act 1934 s.3(1).

¹⁴⁸⁷. The new statutory provisions were the result of the Law Commission’s Report on Interest No.88, 1978, Cmnd.7229. The Law Commission has since proposed further improvements, including that the court should have power to award compound interest. See Pre-Judgment Interest on Debts and Damages (Law Com. No.287, 2004) but the proposals have been

rejected by Government.

[1488.](#) cf. above, para.26-232; below, para.26-244.

[1489.](#) By s.35A of the Senior Courts Act 1981 (which was inserted by s.15 of and Sch.1 to the Administration of Justice Act 1982). For the power given to arbitrators, see below, para.26-245.

[1490.](#) By s.69 of the County Courts Act 1984. Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 which is examined in the 25th edition of this work (Vol.I, paras 1745-1747) remains in force for courts of record other than the High Court and county court.

[1491.](#) The House of Lords held that the words “any debt or damages” in s.3(1) of the 1934 Act, above: “... are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute of the kind here concerned”. (viz the Law Reform (Frustrated Contracts) Act 1943.) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352, 373. This statement should also apply to ss.35A and 69 of the present Acts, above.

[1492.](#) *Wentworth v Wiltshire CC* [1993] 2 All E.R. 256, 269 (also at 263) (not a contract case). Section 3 of the 1934 Act explicitly excluded “the giving of interest upon interest”: see *Bushwell Properties Ltd v Vortex Properties Ltd* [1975] 1 W.L.R. 1649 (“the court is not to award interest on such part of the sum claimed as represents contractual interest”: at 1660). (The decision was reversed on another point: [1976] 1 W.L.R. 591.) The Law Commission has recommended that the courts be given power to award compound interest: see Pre-Judgment Interest on Debts and Damages (Law Com. No.287, 2004). (Both the Canadian and Australian courts have allowed compound interest: see *McInnes* 118 (2002) L.Q.R. 516.) In equity, compound interest has been awarded for profits made through breach of a fiduciary duty: *Wallersteiner v Moir (No.2)* [1975] Q.B. 373. In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 699, the House of Lords held that in equity compound interest may be awarded only in cases of fraud or against a trustee (or other person in a fiduciary position) in respect of profits improperly made by him. See also *Mathew v T.M. Sutton Ltd* [1994] 1 W.L.R. 1455, 1463.

[1493.](#) For interest on arbitration awards and judgment debts, see below, paras 26-245, 26-246.

[1494.](#) See below, para.26-241.

[1495.](#) See below, paras 26-240—26-241.

[1496.](#) subs.(1) of ss.35A and 69 respectively. After the judgment, interest is payable under a different authority: see below, para.26-246. On the time of “entering up” a judgment, see *Parsons v Mather & Platt Ltd* [1977] 1 W.L.R. 855.

[1497.](#) In the Act, the “plaintiff” is defined as the person seeking the debt or damages: s.35A(7) and s.69(6) respectively.

[1498.](#) As in subs.(1) above.

[1499.](#) subs.(3) of ss.35A and 69 respectively. (This provision is wider than s.3 of the 1934 Act.)


[1500.](#) *Edmunds v Lloyd Italico, etc., SpA* [1986] 1 W.L.R. 492, 495. (The payment merely gives rise to an equitable set-off which could be used as a potential cross-claim.)

[1501.](#) *Edmunds v Lloyd Italico, etc., SpA* [1986] 1 W.L.R. 492. (The defendant could resist any attempt to levy execution on the judgment which failed to give credit for the amount already paid.)

[1502.](#) See nn.1229 and 1230, above.

[1503.](#) *I.M. Properties Plc v Cape & Dalglish (A Firm)* [1999] Q.B. 297 CA. In *President of India v La Pintada Compania Navigacion SA* [1985] A.C. 104, 129–131, the House of Lords considered

this to be a gap in the law. cf. *Mathew v T.M. Sutton Ltd* [1994] 1 W.L.R. 1455.

- [1504.](#) *I.M. Properties Plc v Cape & Dalgleish* [1999] Q.B. 297 CA. (The court also said that the court had no power to award interest on any sum paid by a third party in reduction of the plaintiff's claim against the defendant: at 306, but cf. 308).
- [1505.](#) See below, para.26-244.
- [1506.](#) Above, paras 26-232 et seq.
- [1507.](#) CPR r.16.4(2): the claimant must give details of the legal basis of the claim and, where a specified amount of money is claimed, the percentage rate claimed, the date from which it is claimed, the total amount claimed up to the date of calculation, and the daily rate at which interest accrues after that date.
- [1508.](#) *El Ajou v Stern* [2006] EWCA Civ 165 at [35]–[39]; *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 2863 (Comm) at [45].
- [1509.](#) 1981 Act s.35A; s.69(2) of the 1984 Act. (In particular the court is required, in the absence of special reasons, to award interest on such damages.) See McGregor on Damages, 19th edn (2014), paras 18–050 et seq. and standard textbooks on tort.
- [1510.](#) cf. the statement in a personal injury (tort) case: *Jefford v Gee* [1970] 2 Q.B. 130, 146.
- [1511.](#) Interest should be awarded only on money which has been wrongfully withheld: *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 W.L.R. 578, 587–8.
- [1512.](#) *Kemp v Tolland* [1956] 2 Lloyd's Rep. 681, 691. cf. *Marsh v Jones* (1889) 40 Ch. D. 563.
- [1513.](#) *Panchaud Frères v Pagnan and Fratelli* [1974] 1 Lloyd's Rep. 394, 411, 414. See Vol.II, paras 44-387 et seq.
- [1514.](#) See above, paras 26-032, 26-102.
- [1515.](#) *Harbutt's "Plasticine" v Wayne Tank and Pump Co* [1970] 1 Q.B. 447. (Overruled on another point: see above, para.15-025.)
- [1516.](#) *Fletcher v Tayleur* (1855) 17 C.B. 21, 29 (delay in building a ship); *British Columbia Saw Mill Co Ltd v Nettleship* (1868) L.R. 3 C.P. 499, 507 (delay in obtaining replacement for goods lost by carrier); *Jaques v Millar* (1877) 6 Ch. D. 153 (lease); cf. *Bushwall Properties Ltd v Vortex Properties Ltd* [1975] 1 W.L.R. 1649 (reversed on another point: [1976] 1 W.L.R. 591).
- [1517.](#) cf. *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All E.R. 444, 456–457.
- [1518.](#) *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep. 622 at [42] (conversion).
- [1519.](#) *Harbutt's "Plasticine" v Wayne Tank and Pump Co* [1970] 1 Q.B. 447; *Metal Box Co Ltd v Currys Ltd* [1988] 1 W.L.R. 175 (tort: damages for value of destroyed chattel). For examples from cases on breach of contract see *Sycamore Bidco Ltd v Breslin* [2013] EWHC 174 (Ch); *Hackney Empire Ltd v Aviva Insurance UK Ltd* [2013] EWHC 2212 (TCC), 149 Con. L.R. 213.
- [1520.](#) This is illustrated in cases not involving breach of contract: *General Tire and Rubber Co v Firestone Tyre and Rubber Co* [1975] 1 W.L.R. 819 (infringement of patent); *B.P. Exploration Co (Libya) v Hunt (No.2)* [1979] 1 W.L.R. 783 (upheld in [1983] A.C. 353) (restitution following frustration).
- [1521.](#)  *Metal Box Co Ltd v Currys Ltd* [1988] 1 W.L.R. 175. However, the date should be postponed only if the claimant's delay was exceptional and inexcusable: *Challinor v Juliet Bellis & Co*

- [2013] EWHC 620 (Ch) at [48]; *Hackney Empire Ltd v Aviva Insurance UK Ltd* [2013] EWHC 2212 (TCC), 149 Con. L.R. 213 at [19]. Another illustration of a later date is the payment of demurrage: *President of India v Lips Maritime Corp* [1988] A.C. 395, 424–425. In *Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805 (TCC) Jackson J. reviewed the authorities and concluded that “(1) Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest; (2) In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable for present purposes when, after making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period; (3) When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay” (at [55]).
1522. See *Aerospace Publishing Ltd v Thames Water Utilities Ltd* [2007] EWCA Civ 3, [2007] Bus. L.R. 726 at [94]; *Woodlands Oak Ltd v Conwell* [2011] EWCA Civ 254, [2011] B.L.R. 365 at [35]–[36]. Where there are counter-claims, the interest should be on the balance after set-off: [2011] EWCA Civ 254 at [37].
1523. The period should start only at the first date the insurer could reasonably be expected to pay: *Hackney Empire Ltd v Aviva Insurance UK Ltd* [2013] EWHC 2212 (TCC), 149 Con. L.R. 213 at [14].
1524. *H. Cousins & Co v D. and C. Carriers Ltd* [1971] 2 Q.B. 230.
1525. s.35A(4) of the 1981 Act and s.69(4) of the 1984 Act respectively.
1526. *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 2094 (Comm) at [10], citing this paragraph.
1527. *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 2863 (Comm) at [46].
1528. 1981 Act, s.35A(6); s.69(5) of the 1984 Act. Delay by the claimant in progressing his claim may be reflected in a reduced rate of interest for the overall period (instead of depriving him of all interest for the period of the delay): *Derby Resources A.G. v Blue Corinth Marine Co Ltd* (No.2) [1998] 2 Lloyd’s Rep. 425.
1529. Compare a case where the claimant was a charity: *Hackney Empire Ltd v Aviva Insurance UK Ltd* [2013] EWHC 2212 (TCC), 149 Con. L.R. 213. In cases where one party is a private person, the Court of Appeal is reluctant to interfere with the judge’s discretion in fixing the rate of interest: *Watts v Morrow* [1991] 1 W.L.R. 1421, 1443–1444, 1446.
1530. cf. *The Mecca* [1968] P. 665, 672.
1531. *Cremer v General Carriers SA* [1974] 1 W.L.R. 341, 355–358. See *JSC BTA Bank v Ablyazov* [2013] EWHC 867 (Comm) (a fraud case) at [20] et seq.
1532. *Polish S.S. Co v Atlantic Maritime Co* [1985] Q.B. 41, 67 (followed in *Metal Box Co Ltd v Currys Ltd* [1988] 1 W.L.R. 175, 182–183 (insurers subrogated to a claim in tort for loss of chattels)). For a recent example see *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1742 (Comm), [2007] All E.R. (D) 477 (Oct). (Base rate replaces the minimum lending rates and the London Interbank Offered Rate, previously used: see *Cia Banca de Panama SA v George Wimpey & Co Ltd* [1980] 1 Lloyd’s Rep. 598, 615–617; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1990] 3 All E.R. 723, 732–733.)
1533. The *Shearson Lehman* case [1990] 3 All E.R. 723, 733. It is not relevant that the claimant was cash rich and might not have had to borrow to fund the deficit: *SABIC UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 3202 (TCC) at [10]. However, evidence is admissible as to the

rate at which persons with the general attributes of the claimant could have borrowed the money: *Tate & Lyle Food and Distribution Ltd v G.L.C.* [1982] 1 W.L.R. 149, 154–155.

[1534.](#) *Jaura v Ahmed* [2002] EWCA Civ 210, [2002] 4 C.L. 130.

[1535.](#) *Attrill v Dresdner Kleinwort Ltd, Commerzbank AG* [2012] EWHC 1468 (QB) at [5].

[1536.](#) Under s.35A(5) of the 1981 Act. See CPR r.12.6, below.

[1537.](#) Judgments Act 1838 s.17. See below, para.26-246.

[1538.](#) See below, para.26-246.

[1539.](#) CPR r.12.6.

[1540.](#) CPR r.12.6(2). The procedure for deciding the amount of interest is set out in CPR r.12.7.

[1541.](#) CPR r.36.3(3).

[1542.](#) *Miliangos v George Frank (Textiles) (No.2)* [1977] Q.B. 489, 497; *Helmsing Schiffahrts v Malta Drydocks Corp* [1977] 2 Lloyd's Rep. 444, 449. See further below, paras 30-371—30-381; and Bowles and Phillips (1976) 39 M.L.R. 196.

[1543.](#) Below, paras 30-371—30-381.

[1544.](#) For illustrations, see Vol.II, paras 39-285 et seq. In a contract of loan where the lender is given a discretion to vary the interest rate, there is an implied term to the effect that the rates of interest will not be set dishonestly, for an improper purpose, capriciously or arbitrarily: *Paragon Finance Plc v Staunton* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685.

[1545.](#) By s.35A(4) of the Senior Courts Act 1981 and s.69(4) of the County Courts Act 1984 the court must not award interest in respect of a debt “for a period during which, for whatever reason, interest on the debt already runs”.

[1546.](#) Above, para.26-232; Vol.II, paras 39-295 et seq.

[1547.](#) A course of dealing between the parties, or the custom or usages of a particular trade, may lead to an implied term that interest may be charged: see above, para.26-227.

[1548.](#) Consumer Credit Act 1974 ss.140A–140C enable the court to re-open certain transactions: see above, para.26-215. (cf. ss.244 and 343 of the Insolvency Act 1986.) See Vol.II, paras 39-212 et seq.

[1549.](#) *Economic Assurance Society v Usborne* [1902] A.C. 147. It is not an “unfair term” under the Unfair Terms in Consumer Contracts Regulations 1999 in a loan agreement that interest at the contractual rate would be charged until payment after (as well as before) any judgment: *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481. See Vol.II, paras 38-263 and 39-297.

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(f) - Interest on Arbitration Awards

Arbitration awards

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At common law an arbitrator had no power to award general damages in respect of interest on debts paid late. ¹⁵⁵⁰ But s.49 of the Arbitration Act 1996 ¹⁵⁵¹ provides that (unless the parties agree otherwise) the arbitral tribunal may award simple or compound interest from such date at such rates and with such rests as it considers meets the justice of the case. Such interest may be awarded on the whole or any part of: (a) the amount awarded in respect of any period up to the award ¹⁵⁵²; and (b) any amount which was claimed in the arbitration and outstanding at the commencement of the arbitral proceedings, but was paid before the award was made in respect of any period up to the date of payment. ¹⁵⁵³ This power is similar to that granted to courts ¹⁵⁵⁴ but wider in that compound interest may be awarded. ¹⁵⁵⁵ But the arbitral tribunal cannot award interest on a debt which was paid late but before the proceedings began. ¹⁵⁵⁶

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁵⁵⁰. *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104. See above, para.26-228. (In the same case it was held that the Admiralty jurisdiction does not extend to the award of interest on debts already paid, nor to the award of compound interest.) But see now above, para.26-230.

¹⁵⁵¹. Since an arbitration agreement impliedly empowers the arbitrator to decide the dispute according to the law existing at the date of his award, Arbitration Act 1996 s.49 applies to all arbitration agreements under the Act, whenever made: *Food Corp of India v Marastro Compania Naviera SA of Panama (The Trade Fortitude)* [1987] 1 W.L.R. 134 (decided on the previous Act).

¹⁵⁵². See below, para.26-246 for interest after the date of the award.

¹⁵⁵³. s.49(3). By s.49(6) the provisions in s.49(3) do not affect any other power of the tribunal to award interest, e.g. above, para.26-244.

¹⁵⁵⁴. See above, paras 26-236 et seq. The power of the arbitral tribunal applies whether the sum claimed is a debt or damages: *Edmunds v Lloyd Italico, etc. SpA* [1986] 1 W.L.R. 492, 495–496 (decided on the preceding Act).

¹⁵⁵⁵. See above, para.26-236.

¹⁵⁵⁶. See the *President of India* [1985] A.C. 104. (cf. above, para.26-236).

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(g) - Interest on Judgment Debts

Interest on judgment debts and arbitration awards

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A special enactment prescribes the rate of interest on a High Court judgment debt from the time of entering up the judgment ¹⁵⁵⁷: the current rate is fixed from time to time by statutory instrument. ¹⁵⁵⁸ County Court judgments ¹⁵⁵⁹ for £5,000 or more also carry interest at the same rate. ¹⁵⁶⁰ The rate of interest is fixed at the rate in force at the time the judgment was entered up: it does not fluctuate in accordance with later statutory instruments made before the judgment or award is satisfied. ¹⁵⁶¹ By statute, ¹⁵⁶² an arbitrator has discretion to decide whether an award should or should not carry interest. ¹⁵⁶³ By the Arbitration Act 1996 ¹⁵⁶⁴ an arbitral tribunal may award simple or compound interest from the date of the award (or any later date) until payment: it has discretion to fix the rates of interest and the rests (if any).

¹⁴³⁴. See also Vol.II, paras 39-284 et seq.; McGregor on Damages, 19th edn (2014), Ch.18.

¹⁵⁵⁷. Judgments Act 1838 s.17 (as amended by s.44(1) of the Administration of Justice Act 1970 which empowers the making of an order amending the rate of interest in s.17). The interest runs from the time of entering up a judgment, on which see *Parsons v Mather & Platt Ltd* [1977] 1 W.L.R. 855 (approved by the Court of Appeal in *Erven Warnink BV v J. Townend & Sons (Hull) Ltd* [1982] 3 All E.R. 312). An order for payment of costs ranks as a judgment; but interest on costs cannot be ordered from a date earlier than the date on which judgment was given: *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 W.L.R. 1627 HL (a decision on RSC Ord.42 r.1 that an order for costs cannot be backdated to the date on which judgment had been given in a lower court).

¹⁵⁵⁸. For judgments entered up after April 1, 1993, the rate is 8 per cent: see Judgment Debts (Rate of Interest) Order 1993 (SI 1993/564). On the time from which interest begins to run, see CPR r.40.8. However, a clause in the contract may explicitly fix a rate to run on a judgment for a debt: see above, para.26-244.

¹⁵⁵⁹. By s.74 of the County Courts Act 1984 the Lord Chancellor is empowered to provide by order that county court judgments or orders shall carry interest.

¹⁵⁶⁰. The County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184). Some judgments are excluded from the provision. By SI 1998/2400 (L.9) county court judgments in respect of qualifying debts under the Late Payment of Commercial Debts (Interest) Act 1998 (see above, para.26-232) are included in the 1991 Order.

¹⁵⁶¹. *Rocco Giuseppe & Figli v Tradax Export SA* [1984] 1 W.L.R. 742; cf. the decision of the Privy Council on a New Zealand provision: *Rowling v Takaro Properties Ltd* [1988] 1 All E.R. 163.

[1562.](#) Arbitration Act 1996 s.49(4).

[1563.](#) Under the previous statutory power (s.20 of the Arbitration Act 1950) it was held that if the arbitration award was silent on the question, it automatically carried interest: *Continental Grain Co v Bremer Handelsgesellschaft mbH (No.2)* [1984] 1 Lloyd's Rep. 121.

[1564.](#) s.49(4).

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