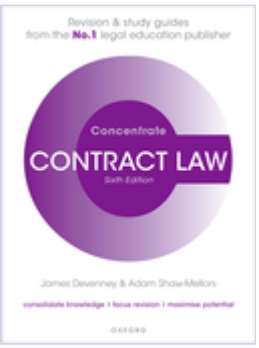

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7. Remedies for breach of contract

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter focuses on damages, the aim of which is generally to protect the claimant's contractual expectation and put the claimant into the position they would have been in had the contract been properly performed. The lost expectation may be measured in terms of the difference between what the claimant expected to get and what was actually received. There are limitations on the claimant's ability to be fully compensated for losses as a result of breach, i.e. remoteness, mitigation, contributory negligence, and the ability to recover for non-pecuniary losses in contract. This chapter also examines agreed damages clauses and the operation of the penalty rule.

Keywords: breach of contract, damages, compensation, expectation, cost of repair, wasted expenditure, remoteness, mitigation, non-pecuniary loss, penalty clauses

Key facts

- Compensatory damages (financial compensation) are the principal remedy for breach of contract. Specific enforcement is available only in limited circumstances generally when damages would not be an adequate remedy, e.g. ***Beswick v Beswick*** (see Chapter 4).
-

Contractual damages traditionally aim to compensate the claimant for losses suffered, as opposed to seeking to punish the defendant. The aim of damages for breach of contract is normally to protect the claimant's contractual expectation and put the claimant into the position they would have been in had the contract been properly performed and the breach not occurred. Compensation for lost expectation may sometimes include an award of damages to compensate for expenditure wasted as a result of the breach.

- The lost expectation may be measured in terms of the difference in value between what the claimant expected to get and what was actually received. However, this loss may extend beyond the financial interest in performance to include purely subjective expectations in performance (the 'consumer surplus') and in such circumstances the cost of repair or replacement may be appropriate to achieve compensation if this would be reasonable (not out of all proportion to the benefit to be obtained) and if this expense represents an actual loss incurred.

- Non-pecuniary losses are generally not recoverable in a claim for breach of contract. However, there are some exceptional circumstances where pleasure, enjoyment, or peace of mind are recognized as being part of the expectation and because of that their loss is compensated.

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- There are other limitations on the claimant's ability to be fully compensated such as the 'duty' to take reasonable steps to minimize loss (**mitigation**), the fact that losses which are too remote a consequence of the breach cannot be recovered (remoteness), and the possibility that a damages award may be apportioned (reduced) to take account of the claimant's own negligence (contributory negligence).

- The parties may agree in advance on the damages to be payable in the event of breach (agreed damages clauses). However, in certain circumstances the courts will strike down these clauses if they are penal (or punitive). It is necessary to distinguish those clauses operating as penalties from those which constitute enforceable liquidated damages. In addition, there are a number of anomalies surrounding the operation of the rule which strike down penal clauses.

7.1 Introduction

The principal remedy for breach of contract in the Law of England and Wales is damages (normally compensation for loss suffered as a result of the breach) and, as we saw in Chapter 5, there may also be an option to terminate or affirm where the breach in question is repudiatory. In the context of consumer contracts there may be a range of possible remedies if the **Consumer Rights Act (CRA) 2015** applies and statutory rights under a sale of goods, digital content, or services contract have not been met.

Damages, as a common law remedy, are available as of right on proof of breach. This chapter focuses primarily on the basis on which those damages are calculated.

There are, however, other potential remedies although syllabuses frequently place less emphasis on these given the constraints of a modular teaching structure.

7.1.1 Other remedies

Debt claim

In a practical sense the most important alternative remedy is probably recovery of the contract price (debt claim; action for an agreed sum) which is relevant where the breach is non-payment of the price or other monetary sum due under the terms of the contract. This claim is for a liquidated (known) figure so that the difficulties of calculation of compensation for losses suffered are avoided. The claim in ***White and Carter (Councils) Ltd v McGregor*** *(1962)* was an action in debt and there was therefore no duty on the innocent party to mitigate by seeking to minimize the loss suffered.

A debt claim may be combined with a claim for damages where there is additional (unliquidated) loss.

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Restitutionary claims

Restitution may allow for the recovery of money paid or the value of benefits conferred on one party on the basis that such a party should not be unjustly enriched at the other party's expense (although restitution is not limited to breach situations, it is convenient to consider it briefly at this point).

Recovery of money paid

An action for money had and received where there has been a *total* failure of consideration (no contractual performance) is an example of a restitutionary claim, e.g. price paid for non-existent wreck of an oil tanker in ***McRae v Commonwealth Disposals Commission*** *(1951)*. The price could be recovered in restitution as the payer had received no part of the performance in return.

Quantum meruit

Another type of restitutionary claim is recovery on a ***quantum meruit*** for the reasonable value of a non-monetary benefit which the innocent party has provided and which is not otherwise recoverable since, for example, an anticipated contract fails to materialize (***British Steel Corp. v Cleveland Bridge & Engineering*** *(1984)*, discussed in Chapter 2). The basis of recovery may be broadly that the other party would otherwise secure a benefit that it contractually did not have to pay for (on the different possible bases of recovery in this area see, for example, Havelock, 'A Taxonomic Approach to *Quantum Meruit*' (2016) 132 LQR 470).

Specific performance

Specific performance is an order which compels the party in breach to perform its obligations, whereas an injunction is generally prohibitory in the sense that it is an order preventing the breach of an obligation in the contract.

Key facts concerning the remedy of specific performance

- Unlike damages for breach, which are available as of right and are the primary remedy for breach, specific performance is an equitable remedy available only at the court's discretion and subject to the usual 'rules of equity' such as 'coming to equity with clean hands'.
- The court is generally only willing to exercise that discretion if damages would not be an adequate remedy. Damages may be an adequate remedy if it is possible to use the compensatory damages to purchase a substitute so specific performance is often limited to unique goods, including the sale of land (see also ***Gregor Fisken Ltd v Carl*** *(2021)* which involved the unique and original gearbox to a Ferrari purchased for $US44). In ***Cavendish Square Holding EV v Makdessi*** *(2015)* Lord Neuberger stated that '… the attitude of the courts … is that specific performance of contractual obligations should ordinarily be refused where damages would be an adequate remedy. This is because the minimum condition for an order of specific performance is that the innocent party should have a legitimate interest extending beyond pecuniary compensation for the breach.' An example of damages not being an adequate remedy on the facts is ***Beswick v Beswick*** *(1968)* (for facts see Chapter 4). See also ***AB v University of XYZ*** *(2020)* where specific performance of a contract between a student and a university was ordered on the ground that there was, in that case, no realistic way to assess damages for the student not being able to have legal representation at a disciplinary hearing. See further ***Gravelor Shipping Ltd v GTLK Asia M5 Ltd*** *(2023)* at [99] (specific performance might be awarded where defendant 'not good for the money').

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- It is unlikely that such an order would be made if it would involve the court in supervision over a period of time (***Ryan v Mutual Tontine Westminster Chambers Association*** *(1893)*).
- Similarly, in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** *(1997)*, the House of Lords (HL) held that a covenant in a lease of retail premises to keep open for trade during usual hours of business was not specifically enforceable because the courts would not make an order requiring a person to carry on a business. Any such order would require constant supervision and might cause injustice if keeping the business open involved the D in a loss.
- A court will not usually order specific performance of a contract involving personal services, such as a contract of employment (***Warren v Mendy*** *(1989)*).

7.2 Damages for breach of contract

Think like an examiner

The topic of damages for breach of contract may feature in a set of problem facts, often in combination with terms and breach and usually requiring an assessment of recovery and quantum in the light of issues of remoteness, mitigation, and contributory negligence—sometimes with an issue relating to the recovery of damages for disappointment and distress. These questions may be based on an understanding of the compensation principle and how that might be applied on the facts, e.g. identifying the lost expectation and considering how to compensate for it. You may be asked whether

your assessment would be different in the light of a clause in the contract which appears to specify the basis of the damages in advance (agreed damages clause). These problem questions can be deceptive and the approach to answering them often causes students unnecessary angst.

Alternatively, essay questions are popular with examiners since it is relatively straightforward to draft an essay question focusing on whether damages for breach of contract compensate fully for losses caused by a breach. You will soon discover that they do not. Other essays may focus on specific limitations on recovery such as remoteness or on the approach to agreed damages clauses and the penalty rule.

This can seem like a large area of law but, as with all things, it is more manageable when broken down. There are a number of topics:

Topic 1: the compensation principle and how lost expectation is measured.

Topic 2: the limitations on the ability of a claimant to be fully compensated: remoteness, mitigation, contributory negligence, recovery of damages for disappointment and distress.

Topic 3: the law governing agreed damages clauses and the application of the penalty rule.

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7.2.1 Topic 1: The compensation principle and how the lost expectation is measured

The traditional aim of contractual damages is to compensate the claimant for the loss they have suffered as a result of the D's breach of contract. Damages are therefore normally assessed by reference to the claimant's loss so that the claimant cannot recover more than their actual loss. Damages are restricted to nominal damages in the event that the claimant suffers no loss since the aim is not to punish the D even if they have profited from the breach. This principle was recently underlined by the Supreme Court (SC) in ***Morris-Garner v One Step (Support) Ltd*** *(2018)* although the SC did note that the law is tolerant of some imprecision where the loss cannot be precisely measured. The SC also reaffirmed that this principle must be read in the light of ***Attorney General v Blake*** *(2001)* where the HL stated that damages with a punitive flavour could be awarded in exceptional situations (in that case a spy published certain information in breach of contract).

Key point

Parke B (at p. 855) in ***Robinson v Harman*** *(1848)*: 'The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.'

It follows that contractual compensation normally focuses on what the claimant expected to receive and compensates the claimant for its loss.

Revision tip

Causation is an element in establishing liability, i.e. linking the breach to the loss which occurs. It is important not to forget this link once the loss has been established and before seeking to measure that loss.

Actual loss

Starting with the identification of the actual loss is key to the determination of the applicable measure of damages to compensate for it (on different conceptions of loss see ***Morris-Garner v One Step (Support) Ltd*** *(2018)*). Damages have traditionally been assessed as at the date of breach. However, in ***Golden Strait Corp. v Nippon Yusen Kubishika Kaisha, The Golden Victory*** *(2007)*, the HL, by a majority of 3:2, held that damages may be reduced where subsequent events are known to the court at the date of the court hearing (and assessment of quantum) and those events would have reduced the actual loss suffered. Contractual principles required the innocent party (shipowner) to be placed in the position that it would have been in if the contract had been properly performed. If the breach had not occurred, the Gulf War would have led to the exercise of the termination clause in March 2003 and no damages could be recovered for loss after that date. The SC in ***Bunge SA v Nidera BV (formerly Nidera Handelscompagnie BV)*** *(2015)* confirmed the general application of this principle. Compare ↲ ***Classic Maritime Inc. v Limbungan Makmur Sdn Bhd*** *(2019)* (discussing application of the above principles outside the context of anticipatory breach), noted by Bridge, 'Exceptions Clauses and Contractual Frustration Clauses' (2020) 136 LQR 1.

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Measuring lost expectation

We saw in Chapter 5 that a breach may occur either as a result of the non-performance of the contractual promise or its defective performance. In either case, the starting point for measuring loss is the difference in value between what a party expected to receive and what that party in fact received due to the breach.

Damages for non-performance

Practical example

Florence and Adam are both car dealers. Florence buys a new car from Adam for £20,000. However, Adam fails to deliver the car. The measure of damages will be the extra cost to Florence, if any, of obtaining a substitute car, over and above the contract price. This is based on the market value of that substitute car on the date of the non-delivery. If that market price is £23,000, then the damages will be the extra £3,000 to ensure the contractual expectation of acquiring the car is fulfilled (**s. 51(3) Sale of Goods Act (SGA) 1979**—non-delivery by a commercial seller in a contract for the sale of goods). If the market price is £20,000 or less than £20,000, only nominal damages will be awarded as there is no loss.

What if the breach is Florence's? Adam tries to deliver the car and obtain the £20,000 contract price but Florence refuses to take delivery and pay. Adam is left with a car which he is expected to sell in the market (mitigation—reasonable steps to keep his loss to a minimum). His damages will be the difference between the contract price and the market price on the date of Florence's non-acceptance (**s. 50(3) SGA 1979**—non-acceptance by the buyer in a contract for the sale of goods). If the market price has fallen to £17,000, then Adam's damages will be £3,000. If the market price is static at £20,000 or has risen, there is no loss. Given that products, particularly new cars, often have standard prices there may well be no loss—other than the loss of the profit that Adam would have made on the sale.

Since Adam is a car dealer and had a number of these cars (so that supply was greater than demand), he could argue that he has lost his profit on the sale to Florence (i.e. profit on this one extra sale). This lost profit may be recoverable where, as in this example, supply is greater than demand (***WL Thompson Ltd v Robinson (Gunmakers) Ltd*** *(1955)*: breach resulted in a lost sale of a car where these cars were readily available).

Cancellation of a contract to supply services

The measure of damages is the difference between what the contractor expected to receive had the contract been properly performed and what they actually received. If the contract had gone ahead as planned, the contractor would have received the price but would have needed to cover its fixed costs and the costs of performing the contract, leaving the net profit. It follows that the measure of damages would, subject to mitigation and on the assumption that none of the latter costs have been incurred, normally be the anticipated net profit.

p. 147 **Damages for defective performance**

The starting point for the measure of damages is the difference between the value of the performance as promised and the value actually received.

Practical example

Florence buys a car from Adam for £20,000. The market value of the car at the date of the contract to purchase (assuming it is as promised) is £22,500. Adam impliedly promises that the car is fit for purpose and of satisfactory quality. It is not (defective performance), and consequently its actual value is only £18,500.

Promised value (£22,500) – What actually received (£18,500) = £X (£4,000).

Is it ever possible to recover the cost of putting right the non-performance or defective performance rather than being limited to the difference in value?

This 'cost of repair' or 'cost of achieving the contractual performance' may greatly exceed the difference in value measure of damages.

Practical example

Morgan agrees to sell Nazola a plot of land at the back of his garden. Nazola in turn agrees to comply with his request that she build a 6-foot-high red-brick wall as a boundary between the plots to ensure privacy. Morgan is very specific that the bricks should be red since he likes red bricks. It is clear that if Nazola either fails to build the wall or fails to build the wall in accordance with the contractual requirements, then Morgan will have lost his contractual expectation (his 'consumer surplus': Harris, Ogus, and Phillips (1979) 95 LQR 581). It is equally clear that a damages award based on the difference in value between the land with or without a wall, or at a lower height or with different bricks, might fail to adequately compensate Morgan. On the other hand, although we might see a justification in awarding Morgan cost of repair damages to build the wall to ensure privacy, we might well consider it wasteful if an 8-foot red wall had been erected or a 6-foot yellow wall and Morgan was insisting on the cost of knocking it down and rebuilding to meet his specific requirements.

When can the cost of repair be awarded?

Ruxley Electronics and Construction Ltd v Forsyth (1996) (HL)

FACTS: The D employed the P to build a swimming pool and specified the maximum depth and the depth at a point for diving. The swimming pool depths did not meet these requirements but were safe and there was no difference in value as a result. The D argued that he should be able to recover £21,560 to demolish and rebuild the swimming pool to the depths specified in the contract.

HELD (agreeing with the trial judge): The cost of demolition and rebuilding was refused. Instead the HL awarded damages of £2,500 for loss of amenity (recognizing concern over diving depth).

- Recovery of cost of replacement had to be reasonable, i.e. not out of all proportion to the benefit to be obtained.
- Intention to rebuild was relevant to assessing the loss for which compensation was required—and hence was relevant to the reasonableness of awarding cost of replacement.

Revision tip

Cost of replacement tends to be relevant to land and buildings on land. It has the effect of guaranteeing the result of the obligation. Thus if a surveyor is employed to survey a property but fails in his/her duty to exercise reasonable care and skill (breach of qualified obligation)—so missing property defects which need to be rectified and should have been reported—usually only the difference between the price paid (at least where the purchase price is the market value for the property as represented) and the actual value of the property can be recovered (***Watts v Morrow (1991)***). If cost or repair were recoverable, the obligation broken would have been treated as if a guarantee.

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Consumer contracts and breaches of statutory rights relating to goods

In a consumer contract falling within the **CRA 2015**, the right to repair or replacement of:

- non-conforming goods (breaches of satisfactory quality, fitness for purpose, description, correspondence with sample or correspondence with a model seen and examined pre-contract) in a consumer contract; or
- goods incorrectly installed where installation forms part of the consumer contract and installation was the trader's responsibility; or
- non-conforming digital content in a consumer contract;

is specifically provided for as a remedy available to the consumer. But this remedy cannot be disproportionate when compared to other available remedies (see **s. 23(3)** and **(4) CRA 2015**).

Recovery for wasted expenditure (reliance loss)

Wasted expenditure damages: it is possible to recover damages to compensate for expenditure which has been incurred in preparing for or performing the contract—and which has now been wasted as a result of the breach. This type of reliance loss might be regarded as a type of expectation loss as it is now accepted that such loss is only recoverable if it would have been recouped if the contract had been properly performed: ***Omak Maritime Ltd v Mamola Challenger Shipping Co., The Mamola Challenger*** *(2010)*.

1. This *must* be the measure of damages where it is impossible to say what successful performance would have looked like, or been measured as

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McRae v Commonwealth Disposals Commission (1951) (High Ct Australia)

FACTS: The Commission sold an oil tanker, said to contain oil and lying at a particular location. The P paid £285 for the tanker and fitted out a salvage expedition but could not find the tanker.

HELD: Although the Commission was in breach of contract, since the promised tanker did not exist it was not possible for the P to establish its lost expectation (or profit on the oil). Instead the P recovered:

(i) £285—price paid for the wreck (restitution—total failure of consideration); and

(ii) £3,000—cost of salvage expedition (wasted expenditure).

Anglia TV v Reed (1972) (CA)

The same applied to the profits on a film being made for television which had to be cancelled when the lead actor pulled out of the filming. It was not possible to say what the profit would have been as the film had not been made or sold to any television company. However, the Court of Appeal (CA) held that the film company could recover for the expenditure they had wasted ahead of the breach—and even before the D was contracted to appear, since he would have been aware that costs had already been incurred and these costs were likely to be wasted if the film did not proceed.

2. In other cases the claimant has a choice

The claimant has a choice whether to claim lost expectation (in a forward/profit sense) or lost expectation (in a wasted expenditure sense) *but* the claimant cannot claim wasted expenditure loss (and will be limited to lower expectation loss) if the expenditure would have been wasted anyway under the terms of the contract (so called 'bad bargains').

This is because to award wasted expenditure in such circumstances would amount to putting the claimant in a better position than they would have been in if the contract had been properly performed (as they would not have covered all of their expenses). Bad-bargain losses flow from the fact that the claimant made this contract on these terms rather than from the breach.

C & P Haulage Co. Ltd v Middleton (1983) (CA)

The D had a contractual licence to use the Ps' garage. The Ps wrongfully ejected the D but the D saved on this rent as he was permitted to use his own premises. Instead he sought the costs of fixtures for the garage but these were not recoverable under the terms of the contract in any event. Therefore, these wasted expenses were not caused by the breach but by the terms of the contract.

Equally, since the overall principle of calculation is compensation for losses suffered and the types of losses must be looked at as a whole, where the result of the breach is positive (no loss of expectation) and the effects of breach wipe out any wasted expenditure, there can be no wasted expenditure recovery. To do otherwise would put the claimant in a better position than if the contract had been performed and the breach had not occurred.

Omak Maritime Ltd v Mamola Challenger Shipping Co., The Mamola Challenger (2010)

Charterer repudiated charter but the owner was able to rehire at a higher rate (no lost expectation). The judge rejected the claim for wasted expenditure in preparing the vessel for the original charter on the basis that it would put the owners in a better position overall (due to the rehire receipts) than they would have been in had the contract been properly performed. This wasted expenditure, unlike the position in ***C & P Haulage***, was caused by the breach (on the basis that these costs would have been covered by the hire) but the overall position meant that they could not be recovered separately because there was no loss of hire.

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What is the applicable burden of proof?

There is a presumption in favour of the innocent party (the claimant) to the effect that the claimant would have recovered their wasted expenditure had the contract been properly performed. It was for the defendant (the guilty party) to seek to rebut this by showing that the claimant's expenditure would not have been recovered (***CCC Films v Impact Quadrant*** *(1985)* and ***Omak Maritime Ltd v Mamola Challenger Shipping Co.*** *(2010)*).

7.2.2 Topic 2: Limitations on the ability to be fully compensated for lost expectation and put in the same position as if the contract had been properly performed

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↵ See Table 7.1.

Table 7.1 Limitations on compensation for lost expectation

Remoteness	A claimant cannot recover for a loss which is too remote a consequence of the breach, i.e. although caused by the breach, the loss in question is too far away from what would have been contemplated to result.	In general terms losses can only be recovered if they were **within the reasonable contemplation of the parties *at the time of making the contract* as the probable result of its breach** (***Hadley v Baxendale*** *(1854)*). In ***Attorney General of the Virgin Islands v Global Water Associates Ltd*** *(2020)*, the Privy Council were of the view (at [32]) that '[t]o be recoverable, the type of loss must have been reasonably contemplated as a serious possibility …'.
Mitigation	Innocent party cannot recover for any loss which he failed to take reasonable steps to minimize. What are reasonable steps in the circumstances is a question of fact (***Payzu Ltd v Saunders*** *(1919)*): Ps should have paid cash to acquire future goods at the contract price.	***Pilkington v Wood*** *(1953)*: reasonable steps did not extend to requiring P to bring onerous legal proceedings against the vendor of a house in order to protect D's solicitor from the consequences of his negligence. Where steps are reasonable but increase the loss, the full extent of that loss can be recovered: ***Banco de Portugal v Waterlow & Sons Ltd*** *(1932)* (decision to exchange all notes increased the loss but was reasonable in the circumstances). But if the mitigation wipes out the loss then there is no recovery and limited to nominal damages for the breach: ***British Westinghouse v Underground Electric*** *(1912)*. An interesting recent case is ***Globalia Business Travel SAU of Spain v Fulton Shipping Inc. of Panama, The New Flamenco*** *(2017)*. This case concerned a charterparty of a cruise ship named the *New Flamenco*. The charterparty was to end on 28 October 2007 but the parties orally agreed an extension to the charterparty to 2 November 2009 and this was recorded in an addendum. Ultimately the charterers (wrongly) disputed the extension agreement. The owners treated this as an anticipatory breach and on 17 August 2007 terminated the contract. The ship was redelivered on 28 October 2007. Under normal principles the owners would have been entitled to claim

		their net lost profits for the repudiated extension period. However, in the light of difficulties in the chartering market, the owner sold the ship for US$23,765,000 in October 2007. Expert evidence indicated that if the ship had been sold in November 2009 (when the charter extension should have expired), the value of the ship would only have been US$7,000,000. In other words, by selling in October 2007, the owners had secured US$16,765,000 more for the ship. Popplewell J held that the charterers were not entitled to such a credit as 'it was not a benefit which was legally caused by the breach'. This was reversed by the CA. However, on appeal the SC (2017) preferred the view of Popplewell J: '… there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time … If the owners decide to sell the vessel, whether before or after termination of the charterparty, they are making a commercial 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.'
Contributory negligence	Claimant's damages award *may* be reduced to take account of claimant's own fault in contributing to the loss suffered. Whether it does, depends on the nature of D's breach of contract.	***Vesta v Butcher*** *(1989)*: apportionment may be possible if D's breach was a breach of a qualified contractual obligation ('fault': Law Reform (Contributory Negligence) Act 1945), but no apportionment for claimant's negligence if D breached a strict contractual obligation (***Barclays Bank plc v Fairclough Building Ltd*** *(1995)*, ***Hi-Lite Electrical Ltd v Wolseley UK Ltd*** *(2011)*, and the Privy Council in ***Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd*** *(2023)*).
Damages for disappointment and distress	Non-pecuniary losses are generally not recoverable in a breach of contract claim.	There are limited instances only when damages for disappointment and distress can be recovered in contractual claims.

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Limitation 1: Remoteness of loss

Hadley v Baxendale (1854)

FACTS: The Ps engaged the Ds, a firm of carriers, to transport their broken mill shaft to Greenwich so that it could be used as a pattern for a new one. Carriage was delayed and the Ps lost profits in operating the mill as a result of the delay.

HELD: These profits were not recoverable since this loss depended on the fact, which the carriers did not know, that there was no spare shaft at the mill enabling it to operate. The loss of profits was therefore too remote a consequence of their delay in carriage, i.e. it was not in the contemplation of

both parties at the time they made the contract as the probable result of a delay in the carriage. It would have been different if the carriers had been told that there was no spare mill shaft since any delay would inevitably have extended the shutdown.

Alderson B: the damages 'should be such as may fairly and reasonably be considered either *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*'.

Losses are either 'normal loss' or 'abnormal loss'

(i) The D is liable for such losses as occur 'naturally' or as a result of the 'usual course of things' after this sort of breach of contract (normal loss) since both parties are taken to have knowledge of normal losses (and usually assume responsibility for it).

(ii) The D will be liable for losses that did not arise naturally (abnormal losses—dependent on special facts) but normally only if these losses were actually within the contemplation of both parties at the time they made the contract, i.e. both parties must have had actual knowledge of the special facts giving rise to the loss in order to assume responsibility for it.

Koufos v Czarnikow Ltd, The Heron II (1969) (HL): normal loss

FACTS: Shipowners chartered a vessel to the charterers for the carriage of sugar from Constanza to Basrah knowing that the charterers were sugar merchants, the cargo was sugar, and that there was a sugar market at Basrah. The route taken meant that arrival was delayed and the market price of sugar fell. The charterers sought damages based on the difference in market price for their sugar caused by the delay.

HELD: Although the shipowners did not actually know of the intention to sell the cargo immediately on arrival, given the facts, the HL considered that this must have been within their reasonable contemplations as probable so that the market fall was normal loss, within remoteness, and recoverable. See also ***Barkby Real Estate Developments Ltd v Cornerstone Telecommunications Infrastructure Ltd*** *(2022)* (defendant should have realized there was a serious possibility that the claimant had a financing arrangement in place).

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949) (CA): normal loss and abnormal loss

FACTS: The Ps operated a laundry business and purchased a boiler for dyeing fabrics which they told the Ds, suppliers, would be put to immediate use in their business. The boiler was delivered late and the Ps sought loss of profits.

HELD: The Ps were able to recover their normal loss of profits on the use of the boiler in the period of the delay (normal loss when equipment purchased for a business) but not the loss of profits on some lucrative government contracts which they 'could have accepted' had the boiler arrived on time. This loss was abnormal loss depending on these special facts and was too remote since there was no evidence that the Ds knew of the intentions with regard to these lucrative contracts.

p. 153 ↵ Type of loss: it seems that provided the *type* of loss caused by the breach is within the reasonable contemplation of the parties, the extent of it need not be (although compare ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*** *(1949)*).

H Parsons (Livestock) Ltd v Uttley Ingham & Co. Ltd (1978) (CA)

Illness to pigs due to eating mouldy pig nuts caused by the failure to ventilate the food hopper was within the parties' reasonable contemplations, so that the fact that some of the pigs died from a rare intestinal disease, e-coli, did not need to be specifically within the parties' contemplation. This case was followed in ***Martlet Homes Ltd v Mulalley & Co Ltd*** *(2022)* where damages were recoverable in respect of a waking watch, used as a fire precaution, whilst the owner replaced the combustible cladding, which has been installed in breach of contract, on tower blocks.

Transfield Shipping Inc. v Mercator Shipping Inc., The Achilleas (2008) (HL)

FACTS: Time charterers were late in redelivery of the vessel. The owners had rechartered the vessel and, in response to the late redelivery, managed to agree an extension of the cancelling date under the new charter but only on the basis that the new charterers received a reduction in the daily rate of the hire. The charterers argued that damages for their late redelivery were limited by the remoteness principles to the difference between their charter rate and the market rate at the time of redelivery for

the period of the overrun since they had no knowledge of the terms agreed under the new charter. The owners wanted to claim their actual loss (the amount of daily reduction in the price they had been forced to give the new charterers for a period of 191 days).

HELD: Recovery was limited to the difference between the charter rate and market rate since the charterers had **not assumed responsibility** over the renegotiated recharter terms. (Their Lordships had differing approaches so that it is necessary to be familiar with each if tackling an essay question examining remoteness.)

Lord Hoffmann considered that the actual loss (i.e. the actual terms) could not be contemplated and it would not be reasonable to hold the charterers liable for this risk. This must particularly have been the case given that damages limited to the difference between the original charter rate and the market rate for the overrun **were accepted as the appropriate measure in the shipping market**. Interestingly, more recently in ***Attorney General of the Virgin Islands v Global Water Associates Ltd*** *(2020)* the Privy Council was keen to stress that the case before it was not concerned with '… the recoverability of damages caused by unusual volatility in the market or questions of market understanding, which the HL addressed in ***Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*** … and in which Lord Hoffmann and Lord Hope of Craighead sought to bring into play the concept of assumption of responsibility as a further limitation on contractual damages …'.

Limitation 4: No recovery in contract for non-pecuniary losses

Contractual damages may undercompensate an innocent party because he or she can generally recover only for economic (pecuniary) loss in contract and not for disappointment or distress (***Addis v Gramophone Co. Ltd*** *(1909)*).

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Exceptions to the rule that damages for distress are not recoverable

1. ***Watts v Morrow*** *(1991)*, per Bingham LJ at p. 1445: damages for distress were recoverable where 'the major or important' object of the contract (prior to ***Farley v Skinner (No. 2)*** it needed to be 'the very object') *was*:
    - to obtain some form of pleasure or peace of mind (***Jarvis v Swans Tours*** *(1973)*: package-holiday contract; damages for disappointment were recoverable when the contract failed to comply with brochure promises since 'enjoyment' was part of the lost expectation); *or*
    - to relieve a source of distress (***Heywood v Wellers*** *(1976)*: solicitor employed to obtain a non-molestation injunction so avoiding this was part of the contractual expectation).

Farley v Skinner (No. 2) (2001) (HL)

FACTS: Potential purchaser specifically asked surveyor whether property he intended to purchase would be seriously affected by aircraft noise. The surveyor's report stated that this was unlikely. However, there was noise as the property was close to a navigation beacon outside Gatwick. In ***Watts v Morrow*** the CA had rejected an argument that a survey contract was a contract whose *very object* was to provide peace of mind.

HELD: 'Peace of mind' only needed to be a major or important object and not the sole object of the contract and, since the purchaser had specifically asked for a report on this matter, it had become an important part of the contract. Damages for distress were recoverable. Compare ***Khan v University of Leeds*** *(2018)* where damages for mental distress would have been refused if there had been liability as the claim was in relation to a matter peripheral to the main educational purpose of the contract.

Hamilton Jones v David & Snape (a firm) (2003)

A **major or important object** of the contract with solicitor was to ensure for client's peace of mind that her ex-husband could not remove their children from the jurisdiction, although the very object of the contract in accordance with legislation was the protection of those children. See also ***Haque v Faradhi*** *(2023)* (the wrongful expulsion of a person from a faith-based group did not come within this exception).

Commercial contracts: despite this relaxation in the basic test for the exception to operate, damages for distress will *not* normally be recoverable where the object of the contract is the carrying on of a commercial activity with a view to profit **since the major object of such a contract will be to make a profit** (***Hayes v Dodd*** *(1990)*).

2. It is possible to recover in contract for distress consequent on physical inconvenience or discomfort loss where that physical inconvenience or discomfort is directly caused by the breach, i.e. the breach leads to a physical conclusion which itself gives rise to distress (***Perry v Sidney Phillips & Son*** *(1982)* and ***Watts v Morrow***).

Practical example

David manufactures bicycles at his factory in Burton Green. David contracts with the Burton Green Hotel for himself and his employees to enjoy a special spa day at the hotel, after the number of his bicycle sales tripled. The hotel's brochure details the facilities available on the day, the lavish lunch, and ↵ the beauty and relaxation treatments which 'will be provided for all guests'. The total cost of the day for David and 20 members of staff is £2,500. David pays this in advance.

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The day is a disaster as the spa has been double-booked. There are no beauty and relaxation treatments available for David and his party. The lunch consists of a few lettuce leaves and a tablespoon of cottage cheese. David wishes to know if he can recover some compensation.

Clearly there are a number of breaches of contract, although not a total failure of consideration since the party has had some use of the facilities for the day. David will therefore want to be compensated for his loss (and will argue that he should be able to recover for the loss suffered by others in his party). This is a 'party convenience' contract calling for special treatment: Lord Wilberforce in ***Woodar v Wimpey***, so David should be able to recover for the loss of the party. *Can you envisage any circumstances in which the individual employees might (in theory—since promisee action is more convenient) have a direct right of enforcement under the* **Contracts (Rights of Third Parties) Act 1999***?* See Chapter 4.

The damages will therefore be the difference between the value of what was promised and what was received by David and his party. It is clear that this loss was within both parties' reasonable contemplations and David could not reasonably mitigate if these problems only came to light on arrival on the day booked for the spa day.

He will wish to recover damages for disappointment and distress for himself and his party and can do so as this contract falls within the pleasure/holiday contract exception (***Jarvis v Swans Tours***, ***Jackson v Horizon Holidays***). Pleasure or enjoyment was part of the contractual expectation and was denied by the breach.

7.2.3 Topic 3: Agreed damages clauses

What is an agreed damages clause?

The parties may set out in their contract the amount of damages to be paid upon breach. There are advantages for both parties in the use of such clauses:

- The innocent party does not have to prove its loss and need not be concerned with limitations on recovery such as remoteness and mitigation.
- The clause provides clear notice of the extent of the risk upon non-performance.
- Agreed damages clauses should avoid much of the disruption to the continuing relationship between the parties and the associated costs of a dispute on quantum.

It follows that agreed damages clauses are generally regarded as efficient and desirable. However, there is a danger that where the damages payable are set too high, the clause will have a punitive effect, which would be contrary to the essential compensatory aim of contractual damages. ↵ ↵

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Key point

The distinction between clauses which will be enforced and those which will not is expressed as a distinction between liquidated damages clauses (enforceable) and penalty clauses (unenforceable and the courts instead award damages based on unliquidated principles to compensate for actual loss). Table 7.2 explains the distinction and the consequences of classification.

Table 7.2 Agreed damages clauses

Type of Clause	Valid?	Nature	Consequences
Liquidated damages clause	√	Traditionally defined as a genuine attempt to pre-estimate the loss which will be suffered by breach. In ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)* it was held that law relating to penalty clauses needed to be recast. More specifically a liquidated damages clause is a proportionate response to a legitimate interest, which the innocent party has in the enforcement of the primary obligation(s). In ***CFL Finance Ltd v Jonathan Bass*** *(2019)* at [48], Judge Briggs stated: 'There is little guidance on what may constitute a legitimate interest, save that there can be no legitimate interest in punishing the defaulting party.'	If a liquidated damages clause, the liquidated sum will be payable whether the actual loss is greater or smaller than this stipulated sum. ***Cellulose Acetate Silk Co. Ltd v Widnes Foundry (1925) Ltd*** *(1933)*: 'penalty' for late performance at rate of £20 a week. Actual loss of £5,850 but liquidated damages so limited recovery to 30 weeks × £20 = £600.
Penalty clause	X	Traditionally defined as a clause which was not a genuine pre-estimate of the loss suffered in the event of breach but an extravagant and unconscionable clause designed as a threat to compel the other to perform by penalizing that other for non-performance, i.e. predominant function was deterrence. ***Jobson v Johnson*** *(1989)*: D had contracted to purchase shares in a football club but if he defaulted on payment of any instalment of price, he had to retransfer the shares for only £40,000. He defaulted when he had paid £140,000 of the purchase price. CA held the retransfer clause was not a genuine pre-estimate of the loss on breach, but an unenforceable penalty. Following ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)* ***a penalty clause is essentially defined as a secondary obligation which bears no proportion to the legitimate interest, if any, which the innocent party***	Penalty clause is unenforceable so that claimant can recover its actual loss. What if the unenforceable penalty clause is lower than the claimant's actual loss? Might it be argued that the unenforceable penalty clause acts as a limitation clause? Although the point remains unsettled, there is some authority to support such a view: see ***Eco World—Ballymore Embassy Gardens Co. Ltd v Dobler UK Ltd*** *(2021)*.

Type of Clause	Valid?	Nature	Consequences
		has in the enforcement of the primary obligation(s). The SC also questioned some of the wider aspects of ***Jobson v Johnson*** *(1989)*, particularly around the precise form of relief granted.	

Distinguishing liquidated damages and penalty clauses

This is a question of construction of the contract and public policy. Traditionally reference has been made to the guidelines (a summary follows) laid down by Lord Dunedin in ***Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd*** *(1915)*.

Lord Dunedin's traditional guidelines

- Terminology used was not conclusive, e.g. ***Cellulose Acetate***.
- Was the clause **a genuine pre-estimate of the likely loss at the time contract was made rather than in the light of the breach**? The estimate did not have to be correct, i.e. it did not need to be the same as the actual loss as long as it was a genuine and sensible estimate of the likely loss resulting from that breach.
- In commercial contracts made 'at arm's length' the clause was likely to have been intended by the parties as an enforceable liquidated damages clause: ***Philips Hong Kong Ltd v AG of Hong Kong*** *(1993)*. Account would not be taken of unlikely hypothetical breaches, since it would be very difficult to draft a clause that would *never* operate in a penal way. The courts should uphold the parties' agreement.
- It was a penalty if the sum stipulated was much greater than the possible loss resulting from the breach.
- It was a penalty if the breach was non-payment and the agreed figure was greater than the price due.
- Where a single sum was payable for a variety of different breaches it might have been thought that it should be considered a penalty because it was difficult to see how it could be a genuine pre-estimate of likely loss in the case of all of these types of breaches. But in the commercial context the courts should ignore trifling breaches when applying this guidance: ***Cenargo Ltd v Izar Construcciones Navales SA*** *(2002)*. It followed that if an agreed damages amount increased in proportion to the seriousness of different breaches then it was more likely to be considered as liquidated damages.
- Situations where it is difficult to estimate the loss were just the situations where the amount in the clause was likely to be 'the true bargain between the parties' and hence a liquidated damages clause.

p. 158 ↵ In ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)* the SC considered, in detail, the operation of the penalty rule, the first time the SC (or HL) had done so for a century. In so doing the SC resisted calls for both the abolition and extension of the penalty rule in relation to contracts. ***Makdessi***, the first case, concerned a share purchase contract, in respect of a marketing company, between commercial parties. Under the agreement the seller agreed not to compete with the marketing company. The contract

provided that if the non-competition stipulation was breached (a) no further instalments would be payable under the contract (clause 5.1) and (b) the buyer would have an option to buy the seller's remaining shares at a reduced price (as it would disregard goodwill, clause 5.6). The seller breached the non-competition stipulation and the buyer sought to exercise clauses 5.1 and 5.6. The seller claimed that these clauses were unenforceable on the ground that they were penalty clauses. This claim was rejected at first instance but accepted by the CA.

The second case, ***ParkingEye***, involved a car park where parking was free for the first two hours but, if that period was exceeded, a fee of £85 was payable. The defendant parked his car for almost three hours and subsequently refused to pay the £85 fee on the ground that it was a penalty clause. At first instance and in the CA the defendant's argument failed. Compare ***Ahuja Investments Ltd v Victorygame Ltd*** *(2021)* where a clause whereby the interest rate increased by 400% on default was found to be a penalty clause.

The SC held that the law relating to penalty clauses needed to be recast. More specifically a penalty clause is a secondary obligation which bears no proportion to the legitimate interest, if any, which the innocent party has in the enforcement of the primary obligation(s). However, Lords Neuberger and Sumption did state: '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 … [guidelines] … would usually be perfectly adequate to determine its validity.' Applying this to the facts of ***Makdessi***, the SC held that relevant clauses were not penal. The buyer had a legitimate interest in the compliance with non-competition stipulations which were crucial to the health of the company. Moreover, both parties were experienced commercial parties with the benefit of legal advice. As regards ***ParkingEye***, the SC also held that the fee was not penal in nature. Although it did not represent the loss which the claimant would suffer as a result of the defendant staying beyond two hours, the claimant had a legitimate interest in the efficient functioning of the car park and the charges were comparable to charges in the locality. ***ParkingEye*** was distinguished in ***Britannia Parking Group Ltd v Semark-Jullien*** *(2020)* on the ground that the later case also involved a debt recovery clause; this does not necessarily mean a different decision would be reached but the district judge's conclusion was remitted to another district judge to consider this distinction.

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The penalty rule applies only where the sum specified as agreed damages is payable on breach and not where it is payable in the occurrence of some other event

This means that even if the agreed sum is penal in nature (i.e. excessive amount or threat to compel performance), it will be enforceable (i.e. payable) where it is payable on an event other than breach. ***Alder v Moore*** *(1961)*: declaration under insurance arrangements and following injury that a professional footballer would not play football again and that if he did, he would be subject to a £500 penalty (he had been paid £500 by the insurer). He played football again and argued that he did not need to repay the £500 since it was an unenforceable penalty payable on breach. Held: it was not a sum payable on breach (i.e. a promise not to play, with the £500 repayable if he did), but a positive obligation to repay £500 if he played again. It followed that it was enforceable and had to be repaid. The SC in ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)* reinforced a distinction between primary obligations (to which the penalty rule does not apply) and secondary obligations (to which the penalty rule does apply). Yet the distinction is not always straightforward as is illustrated by its application to the ***Makdessi*** case where the SC was clearly uneasy on whether or not one of the relevant clauses was a primary or secondary obligation.

The penalty rule will not normally apply to prevent a deposit from being forfeited by the payer in the event of that payer's breach of contract

Practical example

Nazia has agreed to buy Laura's house and on exchange of contracts pays her a 10% deposit. This deposit is normally forfeited in the event that Nazia (the payer) changes her mind and withdraws from the purchase. However, it might be argued that this sum is an unenforceable penalty which is payable on breach, particularly if Laura has suffered little in the way of loss due to the breach. Nevertheless, although the deposit may exceed the actual loss and so could be considered 'penal' in nature, it will normally be forfeited and cannot be recovered (***Howe v Smith*** *(1884)*).

However, it seems that the penalty rule can apply to deposits and if the deposit is unreasonable then the penalty rule may apply to it (***Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*** *(1993)*). In ***Workers Trust*** a deposit of 25% had been demanded when the prevailing local rate was 10%. The Privy Council considered the deposit to be unreasonable and therefore repayable.

Template problem question covering damages

David manufactures bicycles at his factory in Burton Green. He wishes to manufacture a new model of bicycle with optimal electronic settings and performance. However, he needs to purchase specialist machinery for this purpose. The only manufacturer of this equipment in the UK is Creative Maximum Performance plc (CMP).

(i) David therefore enters into a contract with CMP plc for the manufacture and delivery of this specialist equipment by 1 July, intending to produce the new model bicycles in time to supply the Christmas market. The equipment costs £50,000. However, he does not disclose these specific intentions to CMP plc as he wishes future expansion and the new products plan to remain confidential in order to be ahead of the competition. CMP plc knows only that David manufactures bicycles.

The contract between David and CMP plc contains the following clause: 'In the event that the equipment is not supplied by 1 July, CMP plc will pay, by way of agreed compensation, £5,000 for every day by which delivery is delayed.'

(ii) Having made the contract to acquire the specialist equipment, David enters into a contract with Eclipse plc, a chain of bicycle shops, for the supply of 5,000 new model bicycles a week for 20 weeks at a contract price of £1,000,000, with the first delivery commencing on 1 August.

The equipment was eventually delivered by CMP plc but was 35 days late. David was unable to meet the initial deliveries under the Eclipse contract and Eclipse has advised that it plans to sue for 'substantial damages'.

CMP claims that the clause in its contract with David is unenforceable.

Advise David.

p. 160 ↵ Is the agreed compensation clause in the contract between David and CMP an enforceable liquidated damages or an unenforceable penalty? You need to: (i) explain the consequences to each finding, i.e. if liquidated damages, then this sum is payable; (ii) consider the traditional principles in ***Dunlop v New Garage & Motor*** for determining the classification, bearing in mind that this is a commercial contract and, although CMP is the only manufacturer of this equipment in the UK, there is no evidence that this was not an arm's length negotiation; and (iii) consider the impact, if any, of ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)*.

If it is a liquidated damages clause then CMP must pay £5,000 x 35 days (***Cellulose Acetate Silk***) which is £175,000. The contract price is £50,000. Traditionally, the classification of this clause would depend on whether £5,000 a day could be seen as a genuine pre-estimate of the loss due to a day's delay judged at the date of the contract. We know the contract price but would need to consider evidence of David's operating costs and production to determine this. It might be argued that it would be a penalty clause (threat to compel performance). On the other hand, it is difficult to imagine that its insertion was down to David, given CMP's market position, and we have to contend with the vague notion of 'legitimate interest' following ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)*. It would possibly be a penalty if breach were non-payment (see ***Dunlop v New Garage***).

If the clause is a penalty, it is unenforceable and we would need to discuss the calculation of unliquidated damages in the usual way. David's lost expectation due to delay would be his lost profits on putting the new equipment into use in his business (***Victoria Laundry v Newman Industries***: normal loss of profit). Could David recover for his lost profit on the lucrative Eclipse contract and other costs if sued by Eclipse for failure to
p. 161 deliver? This may be a loss which is ↵ dependent on special facts (abnormal loss) but CMP has no knowledge of the special facts and therefore of the fact that loss over and above normal lost profits is likely to result. It follows that to the extent that the loss on this contract exceeds normal lost profit on the use of the equipment it may be too remote to be recoverable. However, recovery is probably not impacted by any failure to mitigate since David would have found it difficult to secure an alternative supplier of the equipment, there being no other supplier in the UK.

David may therefore be keen to argue that the agreed compensation clause is a liquidated damages clause.

Key debates

There are numerous possible essay-style questions on damages for breach and you should be led by the emphasis in the syllabus of your module. The 'limitations on compensation' question allows the examiner to test the full range of principles for determining compensation but it is equally difficult for a student to produce an exceptional or unusual answer in the absence of specific readings and analysis. You should therefore ensure that you: (i) understand the terminology so that you answer the question set; (ii) cover the relevant ground; and (iii) have read a range of articles and readings. It is vitally important to have the readings to ensure depth to your analysis where the essay focuses on a more specific element of damages, e.g. remoteness, or recovery of non-pecuniary loss or cost of repair damages (***Ruxley***).

1. Remoteness has proved popular in recent years as a result of the controversies surrounding the decision in ***The Achilleas*** (and the assumption of responsibility test) when compared to the principles in ***Hadley v Baxendale***.
    - Lord Hoffmann, '*The Achilleas*: Custom and Practice or Foreseeability?' [2010] Edin LR 47.
    - Kramer, 'The New Test of Remoteness in Contract' (2009) 125 LQR 408.
2. Cost of repair damages: ***Ruxley*** and consideration of the approach taken by Lord Scott in ***Farley v Skinner (No. 2)***.
3. Debate about the differing approaches to agreed damages clause in commercial and consumer contracts or a more general critique of the penalty rule.
    - Morgan, *Great Debates: Contract Law*, 3rd edn (Bloomsbury, 2020), 234–242.
    - Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' (2016) 75 LQR 11.
    - Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018).

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Key cases

Case	Facts	Principle
Ruxley Electronics and Construction Ltd v Forsyth *(HL)*	D employed P to build a swimming pool and specified the maximum depth and depth at a point for diving. The swimming pool depths did not meet these requirements but was safe and there was no difference in value as a result. HL rejected D's argument that he should be able to recover £21,560 to demolish and rebuild the swimming pool to the depths specified in the contract. HL agreed with trial judge and awarded £2,500 for loss of amenity.	Cost of repair damages will be available (to avoid a windfall) only where the cost of repair or replacement was reasonable (not out of all proportion to benefit to be obtained) and an intention to repair was a relevant consideration.

Case	Facts	Principle
McRae v Commonwealth Disposals Commission *(High Ct Australia)*	The Commission sold an oil tanker, said to contain oil and lying at a particular location. It could not be found. P sued for breach and recovery of lost profits on tanker. Commission alleged *common* mistake (both thought the tanker existed). Held that the Commission was in breach of contract since it had promised that the tanker was lying at the location (had taken this risk so not common mistake) but since it was not possible to establish the lost profit on non-existent oil, P was limited to recovering the price paid and the cost of the salvage expedition.	Where lost profits are too speculative to prove, a claimant may be limited to recovering for wasted expenditure.
Omak Maritime Ltd v Mamola Challenger Shipping Co., The Mamola Challenger	Charterer repudiated charter but the owner was able to rehire at a higher rate (no lost expectation). The judge rejected the claim for wasted expenditure in preparing the vessel for the original charter on the basis that it would put the owners in a better position overall (due to the rehire receipts) than they would have been in had the contract been properly performed.	Although the contract did not prevent recovery of the wasted expenditure (no provision as in ***C & P Haulage v Middleton***), its recovery would not be permitted if overall it would put the claimant in a better position than if the contract had been performed. This case arguably recognizes wasted expenditure as an element of expectation recovery.
Hadley v Baxendale	Ps engaged Ds, a firm of carriers, to transport their broken mill shaft to Greenwich so that it could be used as a pattern for a new one. Carriage was delayed and Ps lost profits in operating the mill as a result of the delay. However, the lost profits were too remote a consequence of the delay to be recovered since they depended on the special fact that there was no spare mill shaft and this fact was not known to the carriers.	Remoteness rule in contract: the loss must fall within the reasonable contemplations of both parties as liable to result in the event of breach. This loss of profits was not in the contemplation of *both* parties at the time they made the contract as the probable result of a delay in the carriage since the carriers had no notice of the key facts.
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd *(CA)*	Ps operated a laundry business and purchased a boiler for dyeing fabrics which they told Ds, suppliers, would be put to immediate use in their business. The boiler was delivered late and Ps were able to recover their normal loss of profits on the use of the boiler in the period of the delay but not the loss of profits on some lucrative government contracts which they 'could have accepted' had the boiler arrived on time. This loss was abnormal loss depending on these special facts and was too	Remoteness: normal loss can be recovered as both parties have imputed knowledge of such loss. However, abnormal loss is dependent on special facts and both parties must generally have actual knowledge of these special facts for the loss to fall within their contemplations.

Case	Facts	Principle
	remote since there was no evidence that Ds knew of the intentions with regard to these special contracts.	
Farley v Skinner (No. 2) *(HL)*	Potential purchaser specifically asked surveyor whether property he intended to purchase would be seriously affected by aircraft noise. Surveyor's report stated that this was unlikely. However, there was noise as the property was close to a navigation beacon outside Gatwick. HL held that damages for distress and disappointment were recoverable since the purchaser had specifically asked for a report on noise, making 'peace of mind' a major or important object of the contract. *Obiter*, such damages would have been recoverable for distress consequent on physical inconvenience, i.e. resulting from the aircraft noise.	Exceptional situations when damages for distress and disappointment can be recovered have been extended so that 'contracts to obtain some form of pleasure or peace of mind' no longer need to be the sole purpose of the contract as long as they are major or important objects.
Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd *(HL)*	Dunlop supplied tyres to dealers and the dealers received discounts for agreeing not to sell the tyres at below Dunlop's list price. If they did, they had to pay £5 per tyre 'by way of liquidated damages'. The dealer sold the tyres at below list price and pleaded that the clause was an unenforceable penalty. Held that it was an enforceable liquidated damages clause. Since any pre-estimate of loss would be difficult, this was just the situation where the sum agreed should be enforced as the parties' bargain.	Making the traditional distinction between liquidated damages and penalty clauses: see Lord Dunedin.
Makdessi v Cavendish Square Holdings BV and ***ParkingEye Ltd v Beavis*** *(SC)*	The first case, ***Makdessi***, concerned a share purchase contract, in respect of a marketing company, between commercial parties. Under the agreement the seller agreed not to compete with the marketing company. The contract provided that if the non-competition stipulation was breached (i) no further instalments would be payable under the contract (clause 5.1) and (ii) the buyer would have an option to buy the seller's remaining shares at a reduced price (as it would disregard goodwill, clause 5.6). The seller breached the non-competition stipulation and the buyer sought to exercise clauses 5.1 and 5.6. The seller claimed that these clauses were unenforceable on the ground that they were penalty clauses. This claim was rejected at first instance but accepted by the CA.	The SC held that law relating to penalty clauses needed to be recast. More specifically **a penalty clause is a secondary obligation which bears no proportion to the legitimate interest, if any, which the innocent party has in the enforcement of the primary obligation(s)**. Applying this to the facts of ***Makdessi*** the SC held that relevant clauses were not penal. The buyer had a legitimate interest in the compliance with non-competition stipulations which were crucial to the health of the company. Moreover, both parties

Case	Facts	Principle
	The second case, ***ParkingEye***, involved a car park where parking was free for the first two hours but, if that period was exceeded, a fee of £85 was payable. The defendant parked his car for almost three hours and subsequently refused to pay the £85 fee on the ground that it was a penalty clause. At first instance and in the CA the defendant's argument failed.	were experienced commercial parties with the benefit of legal advice. As regards ***ParkingEye***, the SC also held that the fee was not penal in nature. Although it did not represent the loss which the claimant would suffer as a result of the defendant staying beyond two hours, the claimant had a legitimate interest in the efficient functioning of the car park and was comparable to parking charges in the locality.

Exam questions

Problem question

Theresa is a famous film star. She recently purchased a large house in Devon as her country retreat. She subsequently asked Nick, a builder, to build a tennis court on a particular spot in the grounds of this house. The spot was chosen as it was the most private part of the grounds and Theresa did not want the paparazzi watching her play tennis. She also asked Nick to build a swimming pool, of a specified depth and suitable for diving, in the grounds. Unfortunately, Nick built the tennis court in slightly the wrong spot meaning that it can just about be seen by the paparazzi. The tennis court is perfect in every other way but Theresa demands that Nick rebuilds it in the correct position. Theresa also demands that Nick rebuilds the swimming pool as Nick has not built it quite deep enough for it to be safely used to dive into.

Advise Theresa.

Head to the Outline Answers *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-7-outline-answers-to-essay-questions?options=showName>* **section of the online resources for help with this question.**

Essay question

Critically discuss the impact of ***Makdessi v Cavendish Square Holdings BV*** and ***ParkingEye Ltd v Beavis*** *(2015)* on agreed damages clauses.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-7-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-7-interactive-key-cases?options=showName>
- Multiple-choice questions <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-7-multiple-choice-questions?options=showName>

You can also find an interactive glossary <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName> on our online resources. Additionally, to help you focus your revision, there is also a diagnostic test <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName> available. For general advice on your revision and exam technique, you can listen to our podcast <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>, or alternatively, you can access the transcript here <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>.

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