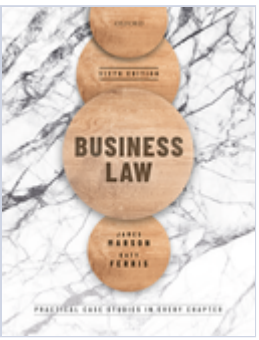

Business Law (6th edn)
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10. Ending the Contract

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Abstract

This chapter discusses other ways in which a valid contract may be discharged, aside from the successful completion of established rights and duties. It also discusses possible remedies where a party breaches the contract. Under the normal rules of contract, a party is only discharged from a contract when that party has completed obligations under it. Having completed the contract each party is free of further obligations. A failure to complete the contract may lead to a breach of contract claim, although situations exist where the parties may release each other from further obligation—referred to as discharge by agreement—or the contract may have been partially or substantially performed. This chapter examines discharge through performance and agreement, how contracts may become frustrated, and the consequences and remedies following a breach of contract.

Keywords: breach of contract, discharge by agreement, law of contract, remedies, discharge, obligations, discharge through performance

A contract establishes the rights and duties of the parties and where successfully completed, the parties will be considered to have discharged their responsibilities. However, this is not the only way in which the contract may be discharged and this chapter aims to discuss these other ways, and importantly, identify the remedies when a party has breached the contract. For example, suppose you were to agree to sell a piece of land, fulfil the essential features of a valid contract, and then decide not to proceed. If you return the deposit paid then would you merely be responsible for the costs incurred by the other party? Read *Mountford v Scott* (see **10.3.2**) and you will appreciate why it is vital to appreciate the implications of contractual obligations and the remedies that are available to the innocent party.

Business Scenario 10

High Performance Construction Industries (HPCI) operates a manufacturing and services business for large and smaller construction projects. The first part of its business is designing, manufacturing, and installing building solutions. Salma approaches HPCI to prepare and install a 350-square foot garage which is 11 feet high and to be constructed of steel with a base of bright orange coloured bricks (to a height of four feet). This is important to Salma as she is very particular about the aesthetics of her property. The contract is agreed with a completion date of five weeks and a cost to Salma of £27,000.

The contract price includes the groundwork, external materials, fitting, and erection of the structure and an expensive climate control and smart hub. This system centrally controls the doors, lights, and the heating, whilst also allowing further functionality such as identifying where the doors are opened and closed, motion sensors, and whether vehicles are in the garage. This system has amounted to £4,500 of the overall cost of the garage and Salma has insisted that HPCI identify its inclusion as a condition of the contract.

Later HPCI wish to expand the business by producing building materials and pre-fabricated structures based on an augmented reality app. This will significantly simplify and speed up the process of customers ordering complex structures which can be erected in only a matter of weeks (compared with the several months' lead-time as is the current timeframe). To achieve this, HPCI need specialist machinery. They order this machine from Bechtel Ltd with delivery to be made on or before 1 January. A clause in the contract provides that for every day that Bechtel Ltd is late with delivery, a payment of £1,000 will be due as a pre-estimate of loss. Bechtel Ltd are aware that HPCI is a commercial business in the construction sector, but have no further knowledge of the use of the machine that they are supplying nor of any of the profits that HPCI generally make.

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Learning Outcomes

- Discuss the methods in which a contract may be discharged (**10.2**–**10.2.4**)
- Explain the development, through the common law and statute, of the doctrine of frustration (**10.2.3**)
- Identify the remedies available for breach of contract (**10.3**–**10.3.2**)
- Explain the implications and effects of the equitable remedies available for breach of contract (**10.3.2**).

10.1 Introduction

This chapter concludes the analysis of the law of contract. Having established in **Chapters 5**–**9** the essential features in the formation of a contract, the different types of terms and their significance, the method of inclusion of terms, and a consideration of the protection afforded through implied statutory provisions, this

chapter considers how a contract will be discharged. Discharge through performance and agreement, how contracts may become frustrated, and the consequences and remedies following a breach of contract are each examined.

10.2 Discharge of contract

Under the normal rules of contract, a party is only **discharged from a contract** when they have completed their obligations under it (complete performance). Having completed the contract each party is free of further obligations. A failure to complete the contract may lead to a breach of contract claim, although situations exist where the parties may release each other from further obligations (discharge by agreement) or the contract may have been partially or substantially performed. Further, the contract may have become radically different from that envisaged, or impossible to perform. In these last examples, the contract will not have been performed but there is no breach as it has been **frustrated**. The methods of **discharge of contract** are identified in **Figure 10.1**.

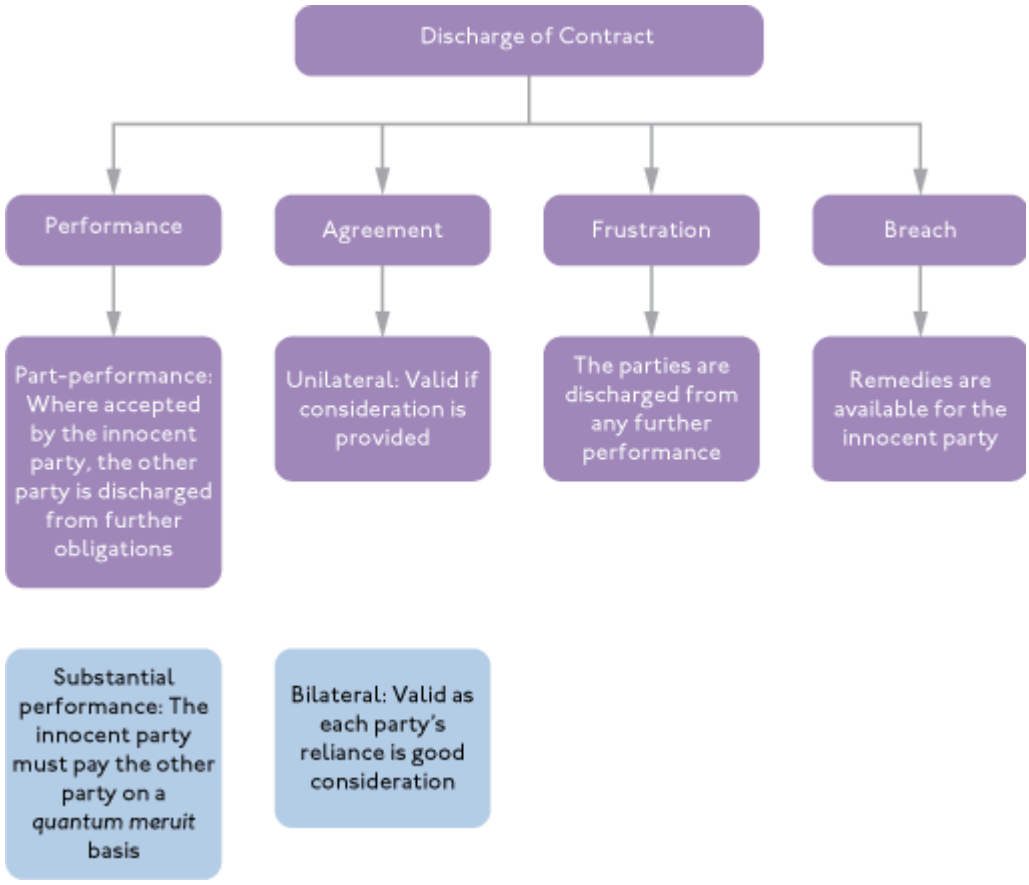

Figure 10.1 Discharge of contract

10.2.1 Discharge Through Performance

The most obvious form of discharge is through the parties' completion of their obligations (the contract being performed). Where complete performance has not been achieved, the courts have had to develop rules on what implications such a situation will have for the parties.

Cutter v Powell (1795)

Facts:

Captain Powell engaged Cutter as part of his crew in a voyage from Jamaica to Liverpool. The contract stipulated that the contract was only fulfilled when the entire contract was performed and payment was only due when the voyage was completed. Mr Cutter died 19 days before the vessel arrived in Liverpool and his widow claimed for his owed wages.

p. 239 **Authority for:**

It was held that the claim must be denied as it was a condition of the contract that payment would be made on completion of the voyage, and this had not been complied with.

This rather harsh application of the rules of contract has been changed where the contract, as opposed to being an entire contract as in *Cutter*, may be divisible (contracts of employment are often examples of divisible contracts). This means that the contract is broken down into smaller units.

Ritchie v Atkinson (1808)

Facts:

Here a contract for the shipment of cargo was agreed at a price of £5 per ton. Not all of the cargo was delivered, therefore the owners claimed a breach. Further, they asserted they were not obliged to pay any amount as all of the contract had not been completed.

p. 240 **Authority for:**

It was held that there was a breach, but as this was a divisible contract, payment was due on the basis of the number of tons of cargo actually delivered.

- *Part-performance:* There may exist situations where a contract is not fully completed, and the other party voluntarily accepts the partial performance. It must be noted at this stage that the acceptance *must* be undertaken voluntarily for it to be valid. Where the innocent party has no choice but to 'accept' the part-

performance the party in breach is not entitled to payment for the work completed on the contract.

Sumpter v Hedges (1898)

Facts:

The parties contracted for the erection of two houses and stables for the defendant, with payment on completion. During the construction, and having completed approximately half of the work, the claimant ran out of money and could not complete the work. The claimant sought approximately half of the contract price as the defendant had completed the works himself and had thereby accepted partial performance (whilst also preventing the claimant finishing the work).

Authority for:

The claim failed as the defendant had no choice but to 'accept' the performance as he was left with a half-built house on his property.

The acceptance of the partial performance discharges the party from any further obligations under the contract and the innocent party must pay an appropriate proportion of the price.

- *Substantial performance:* If, on the other hand, a substantial proportion of the contract has been completed, the innocent party has an obligation to pay, taking into account the shortcomings of the contract.

Hoeing v Isaacs (1952)

Facts:

A contract was established for the decorating and furnishing of a flat for a fee of £750. Whilst the decorating had been substantially completed, there were minor aspects still to be completed to furnishings.

Authority for:

It was held that as the contract had been substantially performed, the claimant was entitled to be paid, with £55 being deducted to reflect the outstanding work uncompleted.

p. 241 ↵ However, the obligation to pay is only where there has been 'substantial' performance.

Bolton v Mahadeva (1972)

Facts:

The claimant agreed with the defendant to install a central heating system in the defendant's house for the fee of £560. When the claimant had completed the works, the defendant refused to pay, citing that the work was defective. When tests were carried out, it was discovered that the flue had been incorrectly installed, which resulted in fumes remaining in the room, and the heat through the radiators was irregular, resulting in differing temperatures in each room. The cost of rectifying these defects was £174.

Authority for:

The Court of Appeal held that as a result, the claimant was not able to recover the amount due as there had not been substantial performance.

There is also a claim for a partial or substantial performance of the contract if the full and complete performance of the contract was prevented through the other party's actions.

Planche v Colburn (1831)

Facts:

A book was commissioned (for a fee of £100) and the author had partially completed this when the contract was cancelled.

Authority for:

It was held that £50 was to be paid to the claimant for the work already completed (known as *quantum meruit* assessment).

- *Time limit for performance:* Unless the parties have otherwise agreed (through express or implied terms), time limits for the performance of the contract are not strict. Therefore, if a party is late in performing their obligations this will not, of itself, enable the other party to reject the performance when it occurs. This is the general rule insofar as there is no unreasonable delay. Where a delay does occur, the innocent party may identify a (reasonable) time for the contract to be completed.

Charles Rickards Ltd v Oppenheim (1950)

Facts:

A contract was entered for the construction of a motor chassis by a given date. That date passed and a later date of four weeks' time was agreed (time being of the essence). This date for delivery of the chassis was missed and some time afterwards the claimant sought to deliver the chassis, but the defendant would not accept delivery. An action for breach of contract was heard by the court.

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Authority for:

It was held that the defendant was entitled to cancel the contract and not accept delivery. It would have been unjust to approach the case on the basis that, having been lenient with regards the first deadline for delivery, the defendant was thereby barred from requiring a quick delivery of the goods, albeit subject to reasonable notice.

A similar argument could be made under the doctrine of promissory estoppel (see **6.2.3**).

10.2.2 Discharge Through Agreement

The parties may agree between themselves that they no longer wish to continue with the contract, and therefore release each other from their obligations. As this is in effect a new contract, and varying a contract requires the formalities as identified in **Chapters 5** and **6** to make it valid, the elements of agreement (referred to as accord) and consideration (referred to as satisfaction) are necessary. There may be a unilateral or bilateral discharge of the contract.

- *Unilateral discharge:* If one party has completed their part of the contract and the other party wishes to be released from their obligations which are outstanding, such an agreement will be allowed, but is only legally binding if consideration (a benefit) is provided.
- *Bilateral discharge:* If both parties have obligations outstanding under the contract, then if both agree to release each other from further obligations, the contract will be discharged by these mutual exchanges of promises. That both parties release each other will be good consideration and stop any legal rights under the contract.

10.2.3 Discharge Through Frustration

Frustration was a doctrine developed by the courts in order to offer relief in circumstances whereby a contract could not be performed or had become radically different from that contemplated (and this was the fault of neither party).

The effects of frustration result in the parties being discharged from any further performance of the contract and any money paid is returned (at the discretion of the court). It should be noted at the outset that this is known as a doctrine of 'last resort' and will therefore only be used where the parties have not made their own arrangement for a frustrating event. The courts encourage parties to draft contracts in as detailed a manner as possible to include for eventualities and the method of resolution to be adopted (***force majeure* clauses**).

There are several examples of what may amount to frustration and, whilst each case is decided on its own merits, there are common themes that aid in identifying what may be held to be frustration.

- *The subject matter of the contract ceases to exist:* In a situation where the subject matter of the contract has ceased to exist before the contract has been performed, and it is neither party's fault that this has occurred, then the courts consider this frustration.

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Taylor v Caldwell (1863)

Facts:

Taylor and Caldwell had entered into a contract on 27 May 1861 where Caldwell had agreed to let Taylor have the use of the Surrey Gardens and Music Hall at a rate of £100 per day. This hire was to take place for four days for the purpose of giving a series of grand concerts. The contract was established, but before the first performance the Music Hall was destroyed by fire and therefore the concerts could not take place. Taylor claimed damages for the money spent on the advertising and preparation for the concerts. The decision of the High Court was 'the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things.'

Authority for:

Where the entire subject matter of a contract is destroyed before the contract is performed, and this is the fault of neither of the parties, the contract is impossible to perform and is held to be frustrated.

Where the sole purpose of the contract has not been destroyed or is not unable to be completed, and the benefit of the contract remains, the contract will not be considered to have been frustrated.

Herne Bay Steam Boat Company v Hutton (1903)

Facts:

The defendant hired a steamship from the claimant for the purpose of taking paying passengers around a Naval Review which was occurring during King Edward VII's coronation. Due to an illness affecting the King, the coronation celebrations, including the Naval Review, were cancelled. Consequently, the steamship was not used and the defendant argued frustration of contract.

Authority for:

It was held the contract was not frustrated. The Naval Review was not the only commercial activity that could have taken place and thus the defendant was not deprived of the sole purpose of the contract.

- *A person engaged under a contract of personal service becomes unavailable:* If a person has personally agreed to perform a contract and subsequently they become unavailable then this may constitute frustration. Whether it will invoke frustration depends upon the length of time the person is unavailable. If it is a temporary situation (such as a short illness as part of a sufficiently long or open-ended contract) then this will not be frustration, but if the person is dead or is permanently unavailable then this will frustrate the contract.

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Condor v The Barron Knights (1966)

Facts:

The Barron Knights was a pop group who hired Condor, a 16 year old, as their drummer. His five-year contract required him to perform shows seven nights per week. Soon after he began work, Condor became ill and the band was informed that if he continued to work under the terms of the contract, Condor would become permanently ill. Condor's doctors suggested he could work four nights per week but as the band did not want a part-time drummer, they terminated the contract.

Authority for:

Condor claimed he was wrongfully dismissed, but it was held that as he could not complete the contract without sustaining permanent injury, the contract was frustrated and not breached.

- *An event central to the contract has not occurred:* If the parties contract for a specific event, and for some reason this event does not take place, the contract will be frustrated.

Krell v Henry (1903)

Facts:

Mr Krell left instructions with his solicitor to rent out his suite of chambers located at 56a Pall Mall. On 17 June 1902 Mr Henry responded to an advertisement for the hire of the flat (from which it was possible to view the procession of the King's coronation). Henry agreed to take the suite, and paid a deposit, but the King became ill before the coronation and hence the procession was cancelled. Henry refused to pay the balance due and Krell began this action to recover that sum. It was argued by Krell that the contract could still continue as the flat was still in existence, and Henry could still have the use of it for the days identified in the contract. The Court of Appeal held that the contract was frustrated. It took a broader view that the entire purpose of hiring the flat was to view the coronation (evidenced from the price paid to hire the premises). The King's illness was the fault of neither party but its effect was to make the contract radically different from what was agreed. Hence the contract was frustrated.

Authority for:

Where, due to the fault of neither party, a contract becomes radically different from that agreed, the contract is frustrated.

- *The contract cannot be performed in the manner specified:* If the contract is specific about the manner in which it must be performed, and this cannot be complied with, the contract will fail due to frustration.

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Nickoll & Knight v Ashton, Edridge & Co. (1901)

Facts:

The parties contracted for the shipping of a cargo of cotton seed from Egypt to England on the ship The Orlando. However, before the contract could be fulfilled, The Orlando was damaged at sea and was unavailable to be used.

Authority for:

The contract was frustrated. The vessel was damaged at sea due to the fault of neither party and as this specific vessel was named in the contract, its unavailability to satisfy the contract frustrated the contract.

- *If the contract becomes illegal to perform:* If the parties have agreed a contract, but before the contract is due to be performed it subsequently becomes illegal, then the contract is frustrated.

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour (1943)

Facts:

Fairbairn, based in England, could not legally supply goods to Fibrosa, based in Poland, as Germany had occupied Poland in 1939 and England had declared war with Germany. There was a provision preventing British companies from supplying, *inter alia*, machinery to an enemy-occupied country, and consequently the contract was frustrated.

Authority for:

Any attempt to deliver the goods under the contract would result in supervening illegality.

- *The contract becomes radically different:* The previous examples have demonstrated where the contract could not be completed due to some event or circumstance. It is also the case that if the contract was to be radically different from that which was envisaged when the contract was formed, then this may constitute frustration.

Davis Contractors Ltd v Fareham Urban DC (1956)

Facts:

A contract was established for the erection of a building that was to be completed in eight months. However, due to shortages in labour, completion was not achieved until 22 months later. The contractors claimed frustration in part as the contract became significantly more difficult than the one that had been agreed. The House of Lords disagreed and stated that the shortage of labour is something that could have been expected, and if not provided for by the parties, then they are assumed to have accepted the risk.

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Authority for:

Simply because a contract involves greater expense or hardship, or the contract becomes a bad bargain, will not amount to frustration.

- *The limits to frustration:* The previous examples have demonstrated that there may be many reasons why a contract may be frustrated, but an essential factor is that it must not be the fault of either party. Simply because the contract cannot be performed will not result in it being frustrated. If one of the parties has deliberately or negligently led to the contract failing, they must accept the loss and/or compensate the innocent party.

Ocean Trawlers v Maritime National Fish (1935)

Facts:

Ocean Trawlers owned a steam trawler (the *St Cuthbert*), which was chartered by the Maritime National Fish company; both companies were based in Halifax, Nova Scotia. A contract was entered into in July 1932, subject to the legislative requirements which made it a punishable offence to leave or depart from any port in Canada, with the intent to fish, with an unlicensed vessel that used an otter or similar trawl. The *St Cuthbert* could only operate with an otter trawl and Ocean Trawlers also operated four other vessels, each fitted with otter-trawling gear. In March 1933 Maritime National Fish Ltd applied for licences for the five trawlers, but only three of the five trawlers were so issued. Maritime National Fish informed the Department of the vessels the three licences should be applied to, excluding the *St Cuthbert*. Maritime National Fish Ltd then asserted that through no fault of its own the charter became impossible to perform and consequently the contract was frustrated. The Privy Council held that this was not a case of frustration and Ocean Trawlers were entitled to recover damages.

Authority for:

In the absence of a contract being radically different from that contracted for, or impossible to perform, it will not be frustrated.

Here, Maritime National Fish Ltd was aware of the relevant legislation requiring licences for the vessels and as it gambled on securing licences for all five vessels, it had to accept any subsequent losses if these were not issued. It was possible for the company to insert a clause into the contract making the hire of the vessels dependent upon the successful granting of licences, but it had not done so. Just because this was a different contract to that anticipated by Maritime National Fish Ltd (i.e. it could not use the *St Cuthbert* as anticipated), it was neither radically different from that contracted for, or impossible to perform.

- Force majeure *clauses:* To 'protect' themselves against a frustrating event ending the contract, the parties may establish a *force majeure* clause that makes provision for the frustrating event. This clause involves some level of foreseeability as to the possible frustrating event that was in the contemplation of the parties at the time of contracting. Examples may include provisions for bad weather and difficulties in supplies of labour. Such clauses are valid and will be accepted by the courts if 1) it is the true intention of the parties and 2) the clause is not designed to limit one of the parties' exposure to liability for breach.

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- *The effects of frustration:* When the court has determined that a contract has been frustrated, the contract ceases to exist as soon as the frustrating event occurs. As this typically affects businesses more than consumer contracts, the courts have encouraged the parties to make provisions in the contract on the basis of such eventualities. If no provisions are contained in the contract, assistance has been provided through the Law Reform (Frustrated Contracts) Act 1943. This statute provides:
  - all money still owing under the contract ceases to be due (s. 1(2));
  - all money paid is recoverable (at the court's discretion—s. 1(2));
  - the money returned includes deposits (pre-payments) and expenses that, before the case law and statutory interventions, resulted in such loses 'lying where they fell'. (The harshness of the application of losses in this respect can be seen in *Appleby v Myers*, where a contractor's expenses for labour and materials lost following a fire were not recoverable as the contract stipulated payment on completion. Section 1(2) codified the law to enable the return of expenses.);
  - any valuable benefit which has been gained has to be compensated for (s. 1(3)).

These provisions do not apply if the parties make their own provisions for the effect of frustration (s. 2(3)).

Where, before the frustrating event, one of the parties received a valuable benefit (other than a payment of money), the other party may claim (a return of) its value. This assessment is made somewhat more difficult in the absence of statutory definition of 'valuable benefit'. However, its effect may be seen in the following case.

BP Exploration Co. (Libya) Ltd v Hunt (No. 2) (1982)

Facts:

In December 1957 the Libyan Government granted Hunt a concession to explore for oil, and to extract it, from a specified area of desert. In June 1960 Hunt entered into an agreement with BP for it to drill and extract the oil, and the concession would be shared between Hunt and BP. BP was to assume all risks in the extraction of the oil. In 1971 Libya nationalized the oil industry and stopped BP's oil extraction, causing a loss of $35 million. Hunt had been provided with compensation from Libya (in the form of oil) and BP claimed damages from Hunt as the contract had become frustrated under the Law Reform (Frustrated Contracts) Act 1943. The House of Lords held that under the Act, the contract had become frustrated, and as a consequence BP was entitled to a share of Hunt's profits as a value/benefit received.

Authority for:

Where one party has received a valuable benefit other than money prior to the frustrating event, and where it is just, some or all of that benefit may be recovered from the other party.

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10.2.4 Discharge Through Breach of Contract

If one of the parties breaches their obligations under the contract, then the other party must ascertain whether the breach of the term was due to a condition or warranty. A breach of a condition gives the injured party the option to both end (repudiate) the contract and claim damages. In some instances it may be advantageous for the injured party to claim damages but also to continue with the contract. In the case of a warranty, as it is a lesser term it entitles the injured party to damages, but they must still continue with the obligations under the contract.

In the event that the full contractual obligations owed by one of the parties is not fulfilled, or the performance is substantially less than could be expected, the innocent party may treat this as a complete breach of the contract. Situations may also arise where one of the parties recognizes that the other party is not going to fulfil their contractual obligations, or the party informs the other of this situation (although this must be clear and unequivocal, but it may be retracted before accepted). This is referred to as an anticipatory breach.

Hochester v De La Tour (1853)

Facts:

A contract was agreed for the claimant to be hired by the defendant as a courier for a term of three months. Before the contract was due to be performed the defendant informed the claimant that his services would not be needed.

Authority for:

The court held this was a case of anticipatory breach and the claimant was able to bring proceedings before the date of the performance of the contract. The injured party did not have to wait until the actual breach occurred before seeking to recover.

However, it may not be a particularly good tactic to seek damages ahead of the actual date of the breach (see **10.3.1**).

Where anticipatory breach occurs, the innocent party can accept this as a breach immediately and treat the contract as repudiated (and presumably make other provisions to lessen the negative effects of the breach). Or they can wait for the time when performance was due, and when the contract is breached, and then seek a remedy.

Shaftesbury House (Developments) Ltd v Lee (2010)

Facts:

In 2007, Ms Lee paid a deposit to secure a property being built on a new development. However, when the property was completed (in 2009) she refused to pay the balance owed to complete the purchase. In so doing, she sought to rely on representations made by an estate agent at a property developer's premises regarding the anticipated increase in its value. There was a clause in the contract which
p. 249 prevented Lee from relying on any ↵ matter in the agreement unless this had been dealt with between the parties' solicitors prior to the establishing of the contract. Lee argued that she informed the claimant in 2007 that she intended not to proceed with the contract and they had an obligation to mitigate their losses by selling the property to another buyer.

Authority for:

The defendant's actions were inconsistent with her repudiating the contract and therefore the claimant could not exercise an action on the basis of anticipatory breach. Further, the standard rule of contract continues that a party does not have to accept an anticipatory breach. They are within their rights to wait until the performance of contract is due and it is not unreasonable for them to do so.

There is no obligation on the innocent party to accept the anticipatory breach, but as soon as they do, reasonable steps must be taken to mitigate losses.

Clea Shipping Corporation v Bulk Oil International (1984)

Facts:

In 1979 the parties entered into a 24-month agreement for the charter of a vessel named the Alaskan Trader. This was an old vessel and one year into the charter the vessel suffered a serious breakdown that would take several months to repair. The charterer informed the owners that they had no further use for it but the owners continued with the repairs at a cost of $800,000. Approximately six months later the repairs had been completed and when the owners informed the charterer that the vessel was again available for their use, they would not use it as they considered the contract had come to an end.

Authority for:

An innocent party has in general an unfettered right to elect whether to accept repudiation of a contract. However, it is possible for a court, in the exercise of its general equitable jurisdiction, to refuse to allow an innocent party to enforce their full contractual rights if they have no legitimate interest in performing the contract rather than claiming damages.

The innocent party is entitled to accept the breach (and seek damages) or they may wish to affirm the breach of the other party (and thereby continue with the contractual obligations). Restrictions exist in a party's ability to affirm the contract.

MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016]

Facts:

The case involved the repudiation of a contract. The question for the Court of Appeal was whether it was possible to affirm a contract where the party in breach had no means possible to perform the
p. 250 contract. The court held that in the event of a repudiatory ↵ breach, the innocent party is not able to affirm the contract if further performance of it is not possible. This would be the case where the breach has the effect of frustrating the commercial purpose of the contract.

Authority for:

The judgment also included *obiter* comments which are interesting for the assessment of the consequences of breach of contract. An innocent party will not be able to affirm a contract if the purpose of this action is simply to allow it to continue in order to claim damages (the innocent party would not have a 'legitimate interest' in maintaining the contract).

The damages available for breach and anticipatory breach are the same.

However, at what point would the 'innocent' party know and be able to take action on an anticipatory breach? In *SK Shipping Pte Ltd v Petroexport Ltd* the Commercial Court identified the following as reasons enabling the innocent party to take action on an anticipatory breach:

1. where the other party acted in a sufficiently clear manner to demonstrate it would not perform its obligations;
2. the words or conduct of the other party were sufficiently clear, to a reasonable person, of this intended breach when considered in light of the circumstances of the case;
3. the innocent party held a (subjective) belief that the other party would breach the contract.

10.3 Remedies for breach of contract

In the event that a contract is not performed, or obligations under the contract are not fulfilled, the innocent party may be entitled to compensation. Under the common law, this is usually in the form of damages (a money payment), but may also involve equitable remedies of specific performance, injunctions, and rectification.

10.3.1 Damages

Any breach of contract entitles the injured party to damages. This is irrespective of whether the term is classified as a 'condition' or 'warranty'. Damages (a money payment) exist to compensate the injured party for any losses sustained under the breach of the contract. Damages can be either '**liquidated**', meaning the parties have anticipated the consequences of the breach, determined the level of damages to be paid and included this in the contract; or they can be '**unliquidated**', which are more frequent and determined by the court. The purpose of damages is not to punish the transgressor, or put the injured party in a better financial position than they would have achieved through the completion of the contract. They are used to either place the injured party in the position they would have been had the contract been completed (expectation losses) or
p. 251 place the injured party in the position they were before the contract had begun (reliance losses). ↵ The Supreme Court in *Morris-Garner v One Step (Support) Ltd* reaffirmed the compensatory nature of damages and that the claimant has the duty to quantify the losses incurred. This should be performed as accurately and reliably as possible (even where specific evidence may be lacking). It further reminded lower courts that damages payments (at common law) are claimed as of right and their award is on the basis of legal principle. The claimant is not permitted to elect how those damages are to be assessed.

In order for the courts to assess damages, there are underlying principles that are applied to ensure fairness. These principles are that the damages must not be too remote, they must be quantifiable by the court, they must be recognized as damages in English law, and the injured party must have sought to **mitigate** their losses as far as is reasonable.

- *Remoteness of damage:* Remoteness is a vital aspect of the contract as it provides that the defendant will not be liable for damages that are deemed too remote. The general rule is that remoteness is assessed at the time of establishing the contract, rather than when the breach occurred.

Jackson v Royal Bank of Scotland Plc (2002)

Facts:

The claimant and their main customer held business bank accounts at the Royal Bank of Scotland (RBS). The claimant provided services to the customer for which they obtained a profit. Unfortunately, RBS revealed some of the claimant's invoices to the customer which identified the level of profit they obtained from that relationship. This was a breach of contract (and of the confidence between the claimant and RBS) and, being appalled at the level of profit being made from them, and that they

considered the claimant was seeking to hide this amount, the customer ceased trading with the claimant. The customer was the main source of income for the claimant and when this was lost they soon were forced to cease trading. They claimed against RBS to recover their losses.

Authority for:

The original decision was for the claimant and the RBS were forced to pay damages on the basis of these lost profits for a four-year period. The Court of Appeal reduced the damages to only a one-year period. The House of Lords, identifying that damages should be determined according to the contract not when the breach occurred, reversed this decision and restored the award made by the court at first instance.

Further, in the following case the House of Lords considered that damages awarded could be restricted.

Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory) (2007)

Facts:

The case involved a charterer of a ship who wrongfully repudiated a charter party. The innocent party accepted the repudiation, but the House of Lords restricted the award of damages.

Authority for:

p. 252 ↵ The reasoning for the decision was because the contract contained a clause that the charterers would be allowed to cancel the contract in the event of war with Iraq (which was a possibility when the contract was formed). It was further known to both parties that this option would have been exercised had war broken out. The contract was repudiated before the outbreak of war, but the war was effective before the term of the contract was completed. As such, the Lords held that with this knowledge, as opposed to only assessing damages at the time of the breach, a more accurate assessment could be achieved along the lines of 'fair compensation'. Hence the assessment of damages was altered from the 'traditional' approach.

The general rules for assessing damages include the following considerations:

1. Do the damages arise naturally in the normal and ordinary course of the contract?
2. Are the damages within the 'reasonable contemplation' of the parties (which depends on the probability/foreseeability of loss, and the knowledge of the defendant)?

Consider

HPCI have ordered a machine for the expansion of their business. Imagine that the delivery deadline of 1 January is missed and that the machine will not be ready until 1 May, what damages would HPCI likely receive? How might your answer change if HPCI wanted the machine to not only expand the business but to fulfil a lucrative, and secret, contract with the Federation of Master Builders to become their preferred contractor for new Augmented Reality projects? The secrecy of this contract would mean it was not in the reasonable contemplation of the defendant and thus this element of a damage claim would likely be unsuccessful.

Hadley v Baxendale (1854)

Facts:

Hadley owned a flourmill and in May the mill was stopped due to a breakdown of the crankshaft (the only one it had). Hadley was to send the crankshaft to a third party for it to be replaced, and Baxendale was the carrier used for the transportation. Baxendale informed Hadley that delivery would be made on the following day. However, delivery was delayed for seven days and this led to a loss of profits that Hadley attempted to recover. Baxendale argued that it had no knowledge that Hadley would have sent the only crankshaft and hence a delay would have completely stopped production. The court concluded that there had been a breach of contract, but damages should be based on what may fairly and reasonably be considered arising naturally from the breach. A complete cessation of work due to the delay would have not been reasonably foreseeable by Baxendale.

p. 253

Authority for:

In assessing quantum of damages, the award should be based on what may fairly and reasonably be considered arising naturally from the breach. This involves assessment of what should have been in the contemplation of both parties at the time they established the contract, as a probable result of the breach.

As Hadley sent its only crankshaft to be delivered by Baxendale, it had an obligation to inform Baxendale of this fact and a delay would have prevented any work being completed. With such information, Baxendale would have realized the consequences of any delay—a total loss of business and the consequent loss of profits. This legal reasoning was continued in the following case:

Victoria Laundry v Newman Industries (1949)

Facts:

The claimant purchased a large, commercial boiler from the defendant which it knew would be put to immediate use. The boiler was situated in the defendant's premises and they were to remove it and to install it in the premises of the claimant. In the removal process, the defendant damaged it and this caused a delay in breach of contract. A claim for damages was made for the loss of profits during the period of the delay but also for losses associated with a secret, lucrative contract which they lost due to the delay.

Authority for:

The losses as a consequence of the delay were reasonably foreseeable (in the reasonable contemplation of the parties) and were recoverable. Those associated with the loss of the secret contract were, by their nature, not in the (defendant's) reasonable contemplation and therefore could not be recovered.

Reasonable expectation can be seen in the following case:

Koufos v C. Czarnikow Ltd (The Heron II) (1967)

Facts:

A cargo of sugar to be delivered to Basrah was delayed (and nine days late) due to voluntary deviations in the route. During these nine days, the price of sugar dropped and Czarnikow sought to recover these losses, but Koufos claimed it was unaware of Czarnikow's intention to sell the sugar at Basrah, but was aware that there was a market for the sugar. It was reasonable for the defendants to be aware that the cargo would have been sold in a recognized commodities market, and prices were liable to fluctuate, therefore the ship owners should reasonably have contemplated the serious possibility or real danger that, if delayed, the value of marketable goods on board the ship would decline.

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Authority for:

This wrongful delay in the delivery of the goods led the House of Lords' assessment as to the measure of damages to be the difference between the price of the goods at their destination when they should have been delivered and the price of the goods when they were in fact delivered.

Having established whether the damages claimed were reasonable in the circumstances of the case, the next issue for the courts is how to quantify the losses.

- *Quantum of damages:* There are two methods a court may use to assess the measure of damages—reliance damages and expectation damages. Reliance loss is designed to prevent the injured party from suffering financial harm and returning them to the position before the contract had been established. The second type of damages is expectation loss. This identifies what the injured party would have achieved from the successful completion of the contract, and seeks to place them, as far as money can, in that position.
- In assessing the quantum of damages the courts will consider any loss of a bargain which the injured party has suffered, whether the parties have identified any 'agreed' damages in advance in the contract, and the duty on the injured party to mitigate their losses. The courts also have to ensure, when determining the quantum of damages, that the injured party is not unjustly enriched. For example, the usual remedy for a breach in a building contract is for the court to award the cost of reinstatement (i.e. to correct the defect). However, *Ruxley v Forsyth* (see later) provided an interesting interpretation of this rule.
- *Loss of opportunity damages:* If the injured party has not received what was contracted for under the agreement, damages is a remedy which is designed to award the cost of rectifying the loss, and provide compensation for any other foreseeable, consequential losses.

Consider

What would be the remedy if HPCI had constructed the garage but had used tangerine coloured bricks instead of the bright orange as requested by Salma? Would the courts grant damages for the costs of demolition of the steel structure to enable the bricks to be replaced before another structure is added? Perhaps not, especially if the costs of rectifying the damage is unreasonable.

Loss of opportunity damages is limited to where the courts see the award as being reasonable and the following case demonstrates where the courts did not provide 'adequate' damages following a breach.

Ruxley Electronics and Construction Ltd v Forsyth (1995)

Facts:

p. 255 Ruxley was engaged to build a swimming pool for Mr Forsyth in his garden. The contract specified that the swimming pool should have a depth at the diving end of 7 feet, ↵ 6 inches. However, upon completion, the depth of the swimming pool was only 6 feet. Whilst this did not have any adverse affect on the value of the property, it did result in Mr Forsyth not having the depth of pool contracted for. It was estimated that it would cost £21,560 for the pool to be rebuilt to the required depth. It was held in the first case that this constituted a breach of contract, but Forsyth was awarded £2,500 for

loss of amenity, not the cost of rebuilding as this would be an 'unfair enrichment' and unreasonable in the circumstances. There had been no consequential loss to the owner of the pool. The House of Lords agreed with this judgment.

Authority for:

In the event of a breach of contract where the contract was to provide the innocent party with something of value, if there is no other reasonable way of providing compensation, the damages should represent the extent of that value.

Lord Jauncy stated: 'Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure.' Common sense may have prevailed here, and there exists an argument that the decision was correct. However, Mr Forsyth did contract with Ruxley for a swimming pool at a specific depth and this was not complied with. Mr Forsyth wanted that depth to enable him to dive into the pool and the one built did not provide this. A sum of £2,500 will not provide the pool contracted for, and would hardly recompense Forsyth for the inconvenience suffered. This may be seen as a judgment of 'rough justice and convenience'.

- *Reliance damages:* Reliance damages are most applicable where the parties cannot, with any certainty, identify what would have been achieved on the successful completion of the contract. It therefore attempts to place the parties in their pre-contractual positions.
- *Damages for injured feelings:* The traditional view of the courts when determining the level of damages applicable in a case has been to ignore any injured feelings or loss of enjoyment suffered.

Anglia Television v Reed (1971)

Facts:

Anglia Television entered into an agreement with an American actor, Robert Reed, to play a part in a TV play. Later, Reed claimed to have been booked to appear in a play in the United States and informed Anglia that he would not be able to complete the contract. Being unable to find a substitute, Anglia claimed damages for the lost profits associated with the breach of contract.

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Authority for:

Damages are usually awarded to place the parties in the position they would have been had the contract been performed. However, whilst the injured party may claim expectation losses (here that would be the lost profits from the play) or reliance losses (the costs incurred until the breach) they

cannot recover both. As expectation losses in this case would be too speculative, reliance losses for costs such as script writers, location fees etc. (amounting to £2,750) could be recovered.

Addis v Gramophone (1909)

Facts:

The claimant was a manager engaged by the defendant who breached the contract when replacing the claimant with a new manager. The claim for damages included the manner in which he was dismissed; his difficulty in obtaining alternative, suitable employment; and the damage to his reputation.

Authority for:

The House of Lords held that the purpose of damages in contract law was to put the injured party in the position they would be had the contract been performed. It did not include exemplary damages or damage to reputation. It would be limited to losses such as the loss of wages and commissions available due in the contractual notice period (six months' notice).

The reasoning for the decision is due to the problems inherent in quantifying such damages and the potential of opening the floodgates for claimants. However, exceptions to this rule have been developed in various cases (e.g. in *Malik v Bank of Credit and Commerce International* (see **19.6.2**) and *Perry v Sidney Phillips*, where the Court of Appeal held that distress following the negligence in a survey of a property which subsequently required the execution of substantial repairs, did entitle the injured party to damages) but can be seen most succinctly in the following:

Jarvis v Swans Tours (1972)

Facts:

Mr Jarvis was a solicitor, aged 35, who booked a 15-day Christmas winter sports holiday with Swans Tours. The brochure described the venue, in Switzerland, as a 'house party centre' in very attractive terms. Mr Jarvis paid £63.45 for the package holiday; however, the holiday was very disappointing. Only 13 people were at the venue in the first week, with no other guests in the second week. Neither
p. 257 the owner of the house nor the staff ↵ could speak English; in the first week there were no full-length skis for Jarvis to use, and in the second week the skis were available but the boots supplied were of no use; the live entertainment consisted of a yodeller from the locality, who arrived in his working clothes, sang four or five songs very quickly, and then left; and the bar was only open one evening—located in an unoccupied annexe in the house. As such, Jarvis sought to recover the cost of

the holiday and his salary for the two weeks spent on holiday. The Court of Appeal held that Jarvis was entitled to be compensated for his disappointment and distress at the loss of entertainment and facilities that he had been promised in Swans Tours' brochure. Damages should recognize the nature of this type of contract, and as it was specifically for enjoyment, if the contract does not provide what was promised then damages could be extended to account for that.

Authority for:

Damages awards should conform to the general rules of remoteness of damage. As such, the loss should be in the reasonable contemplation of the parties. Whilst damages for mental distress are not usually awarded in commercial contracts, they are applicable to non-commercial contracts.

- *Mitigation of loss:* The injured party in a contract has an obligation to limit the losses which they incur as a result of the breach. This is known as the duty to mitigate and means the injured party cannot lie back idly and allow the damages to amass. The background to the duty is one of economic efficiency, avoiding undue hardship to the defendant.

Consider

HPCI informs Salma that, due to supply chain problems, they are unable to supply the smart hub system as promised in their original quote. An alternative system, available from X-Wave Industries, would provide the same functionality, but costs £6,000. HPCI are unwilling to pay the additional amount for this as it would reduce their profits from the contract. Can Salma reject the contract if the smart hub system is not included? If Salma bought the X-Wave system, would such action amount to reasonable mitigation of loss?

The duty to mitigate loss is not absolute and an element of reasonableness is introduced whereby the injured party does not have to take unnecessary steps to reduce loss. This may be witnessed most obviously in contracts of employment where the worker has been unfairly/wrongfully dismissed and they must take steps
p. 258 to find alternative, but appropriate, employment (in relation to factors including locality, seniority, and pay).
↵

Brace v Calder (1895)

Facts:

Mr Brace had entered a two-year contract in December 1892 with Calder (a firm of Scotch whisky merchants consisting of four partners). In May 1893, before the two years had expired, two of the partners retired, with the other two continuing to carry on the business. As a result, Calder offered

Brace to serve the new firm for the remainder of the contract and on the same terms as the original agreement. Brace stated that he had not agreed to serve the new firm and declined the offer, claiming wrongful dismissal. The Court of Appeal held that there was a wrongful dismissal on the dissolution of the partnership, but Brace was only entitled to nominal damages (£50). This was because he was offered alternative work with the new partnership, which was fair and reasonable in the circumstances, and he could not wait for the court case and claim the remainder of the two years of the contract. Brace had failed to mitigate his losses.

Authority for:

Nominal damages may be awarded where an innocent party has failed to mitigate their losses following a breach.

In this situation, as the contract had been breached, but an alternative, suitable, offer was made and would have left Brace suffering no real loss, he was only entitled to nominal damages. The award of nominal damages essentially reflects that the claimant has 'won' the case, but they may not have acted reasonably in the circumstances.

- *Agreed/liquidated damages:* Businesses, particularly, may wish to consider the possibility of a contract not being completed on time or being breached, and the parties may seek to agree beforehand the amount to be paid in relation to this. This allows for greater certainty in the contract and the parties can determine how best to proceed without necessarily relying on the courts to determine such issues. This pre-determination of the damages payments is known as 'liquidated damages', whereas those determined by the court are referred to as unliquidated damages. For liquidated damages to be accepted, it must be a genuine pre-estimate of the loss rather than a penalty clause. A penalty clause is a threat against breaching the contract and will not be enforceable. However, simply because the contract uses the word 'penalty' will not necessarily make it a penalty clause.

Cellulose Acetate Silk Co. v Widnes Foundry (1933)

Facts:

The defendant entered into a contract to build for the claimant a chemical plant with a lead time of 18 weeks. On the basis that this deadline slipped, a 'penalty' payment of £20 per working week would be incurred. When the defendant completed the contract 30 weeks late, the claimant sought £5,850 in damages as the lost profit due to the breach. The defendant argued that, under the terms of the contract, they were only liable for £600 in damages.

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Authority for:

The court held the term regarding the £20 per working week was not a penalty clause. Whilst it did not reflect the actual losses which a delay would cause the claimant, as it was lawful it would be interpreted as a limitation of liability.

There are tests that may help to distinguish liquidated damages from a penalty clause, and the following case provides useful instruction from the House of Lords:

Dunlop Pneumatic Tyre Company v New Garage and Motor Company (1915)

Facts:

Dunlop, manufacturers of tyres, covers, and tubes for motor vehicles, entered into a contract with a third party to supply them with goods under a contract that would only allow resales at prices established by Dunlop. The third party supplied New Garage with Dunlop's goods subject to a clause that it could not sell or offer the goods to any private customer or cooperative society at less than Dunlop's current list prices. Breach of the agreement would lead to liability of £5 by way of liquidated damages for each item. New Garage did breach this agreement and Dunlop sought to recover the damages as agreed; however, New Garage considered the term a penalty clause rather than liquidated damages.

The House of Lords held that the clause should be considered liquidated damages and not a penalty. Lord Dunedin referred to factors that point towards a penalty clause or liquidated damages.

Authority for:

Resultant to this case, the following are indicative in establishing liquidated damages and penalty clauses:

1. The use of the words 'penalty' or 'liquidated damages' may illustrate the nature of the clause but this is not conclusive.
2. The essence of liquidated damages is a genuine pre-estimate of damage.
3. The question whether a sum stipulated is a penalty or liquidated damages is a question to be decided on the terms and circumstances of each contract, and judged at the time of the making of the contract, not as at the time of the breach.
4. To assist this task of construction, various tests have been suggested, which may prove helpful:
    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 that could conceivably be proved to have followed from the breach.

b. 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 trifling, damage'.

p. 260 ↵ The tests established in the case are applicable as a guide to determine scenarios when the courts will hold a term that purports to be liquidated damages as a penalty clause. These will not, in all cases, be rigidly followed. They exist as a guide as to features indicative of contractual clauses that may be penalty clauses but which, in reality, necessitate complex enquiry.

Consider

Given that Bechtal Ltd has informed HPCI that the new machine ordered will not be delivered until 1 May, could HPCI invoke the clause requiring payment of £1,000 per day as unliquidated damages (£120,000)? Assess this carefully in light of the *Cavendish Square Holding BV v Talal El Makdessi (El Makdessi)* and *ParkingEye Ltd v Beavis* ruling and whether such a sum is 'exorbitant or unconscionable.'

A significant clarification of the use and applicability of penalty clauses was provided by the Supreme Court in 2015, and this has seemingly broadened the provision of pre-estimates of loss.

ParkingEye Ltd v Beavis (2015)

Facts:

The case involved Mr Beavis who, whilst using a car park in Chelmsford, was issued with a parking fine of £85 by the management firm ParkingEye Ltd for overstaying the two-hour time limit. Beavis argued the clause and the amount charged for its breach amounted to a penalty clause and was thus unenforceable. Notices at the car park identified the parking regulations and the charge liable for a failure to comply. In the Court of Appeal, Moore-Bick referred to *El Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539 when determining the fairness of such clauses: '[T]he modern cases thus appear to accept that a clause providing for payment on a breach of a sum of money that exceeds the amount that a court would award as compensation … may not be regarded as penal if it can be justified commercially and if its predominant purpose is not to deter breach.'

Authority for:

The Court of Appeal, with which the Supreme Court agreed, considered that the purpose of the £85 charge was to deter motorists from staying in a bay for longer than two hours. Despite its commercial purpose (to facilitate the turnover of shoppers in using the car park), the court allowed the charge.

Insofar as such a charge is not extravagant and unconscionable, it will be allowed as a pre-estimate of loss.

10.3.2 Equitable Remedies for Breach of Contract

As stated at **10.3.1**, the courts will generally provide damages as a remedy for breach of contract wherever possible (as this is usually the simplest form of a remedy as it is a money payment). However, there are occasions where money would not provide an appropriate remedy, or would be unjust due to the nature of the
p. 261 breached contract. This has led to the ↵ development of the equitable remedies, but remember that as they are 'equitable' remedies, they are awarded at the court's discretion.

- *Specific performance:* Specific performance is a remedy that is available when monetary damages are insufficient and do not adequately compensate the injured party for their loss. This is a court order compelling the party in breach to perform their contractual obligations. As the remedy is only available where monetary damages are inadequate, it is an order generally where the subject matter of the contract is unique—such as the sale of land or antiques which by their nature cannot be replaced (although those examples are not guaranteed to be awarded specific performance). Specific performance cannot be ordered in contracts for personal services, or contracts requiring constant supervision by the courts. In *Rainbow Estates v Tokenhold*, specific performance was granted compelling a tenant to carry out repairs to the landlord's premises (as identified in the contract) as once the repairs were completed, no further supervision would be necessary. Finally, as an *equitable remedy*, it must also be available (potentially) to both parties and would not cause unreasonable hardship.

Co-op Insurance Society v Argyll Stores (1997)

Facts:

The Co-op Insurance Society was landlord of a shopping centre in Sheffield consisting of 25 outlets and provided Argyll Stores with a 35-year lease. This lease was granted for the purpose of operating a supermarket and contained a covenant that the supermarket would operate during usual business hours. Approximately 16 years later Argyll Stores decided to close all of its stores, including the supermarket in Sheffield, as it was trading at a loss. Co-op applied for a remedy of specific performance to prevent the closure of the stores in the fear that it would have a detrimental impact on the other businesses in the shopping centre.

Authority for:

The House of Lords refused to order specific performance. To make such an order would have been to punish Argyll Stores and this was not the purpose of remedies in contract law. Per Lord Hoffman: 'The purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party

entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust.'

Specific performance is a very powerful remedy, but may also be perceived as harsh and at times unfair.

Mountford v Scott (1975)

Facts:

Mr Mountford and his wife were members of a small property development company called H. & L. Cronk Ltd who were interested in purchasing properties with a view to building a new development. The new development could only be considered as viable ↵ if the appropriate planning consents were provided. Cronk Ltd sought to obtain options to buy the houses in the area of the proposed development, consequently obtain, if possible, the consents, and to proceed with the sales or to decide not to exercise the option. Mr Scott was a gentleman of West Indian origin who had lived in England for approximately 20 years, and although he spoke and understood English well, he was illiterate. Scott's house was one of the properties Cronk Ltd obtained an option on purchasing. The agreement allowed for Cronk Ltd to purchase his house for the price of £10,000, to be completed within six months of the agreement, with £1 being paid to Scott in consideration for the option. It transpires that later Scott did not want to continue with this arrangement and requested that Cronk Ltd release him, which it would not do. Cronk Ltd decided to exercise the option to purchase Scott's house.

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Authority for:

On the decision of Mountford to refuse to continue with the sale, the court ordered specific performance of the contract. The Court of Appeal held that the agreement was valid and hence constituted an irrevocable offer to sell. The agreement was entered into freely and consideration (of the £1) established a valid contract. Russell LJ remarked that specific performance, rather than damages, should be the appropriate remedy in the case: 'If the owner of a house contracts with his eyes open, as the judge held that the defendant did, it cannot, in my view, be right to deny specific performance to the purchaser because the vendor then finds it difficult to find a house to buy that suits him and his family on the basis of the amount of money in the proceeds of sale.'

Mountford demonstrates the practical use of the remedy of specific performance and provides evidence of its effectiveness in ensuring compliance with the contract. Specific performance is restricted in use, as outlined earlier, and complements the other equitable remedy of injunctions as ensuring fairness is achieved in breaches of contract.

- *Injunctions:* There are two main types of injunction available to the courts—mandatory injunctions and prohibitory injunctions (although interim injunctions may be granted prior to a full hearing to prevent injury to the claimant—these may be seen in cases of infringement of intellectual property—see **Chapter 24**). Mandatory injunctions require the party compelled to perform the contract, whilst the more common type is a prohibitory injunction, which stops a party from breaching the contract. Failing to follow the order of an injunction will result in the transgressor being guilty of contempt of court—a potentially very serious charge. It is a valuable mechanism in ensuring that a party does not breach the contract although, as with specific performance, it will only be used where damages would be inadequate and the issuing of the injunction must be reasonable.

Warner Brothers v Nelson (1937)

Facts:

The case involved the actor Bette Davis who entered an exclusive contract with Warner Bros where she agreed not to undertake any other work without their permission. The contract had two years to run
p. 263 when Davis complained about a number of issues including ↵ not getting a role in a particular production. In response to the dispute she travelled to the UK to take up work for another organization (in breach of contract). Warner Bros applied to the court for an injunction to prevent her taking up this work.

Authority for:

The injunction was awarded against the organization attempting to get Davis to breach her contract rather than preventing her from actually working.

- *Rectification:* The remedy of rectification enables a written document (e.g. a contract) to be changed (e.g. including/removing of clauses) to more accurately reflect the terms that were identified in the oral agreement subsequently produced in writing.

A Roberts & Co. v Leicestershire CC (1961)

Facts:

The claimant was a firm of building contractors who had entered into an agreement with the defendant for the erection of a school building. The contract identified a period of 30 months whilst the original tender was for a period of 18 months, and the claimants believed this tender was for the same period. It transpires the defendants were aware of the misunderstanding on the part of the claimant as to the period of the tender and failed to inform the contractors.

Authority for:

The contract was rectified and the clause identifying the term of 30 months was replaced with a period of 18 months. The defendant knew of the mistake in the written contract compared with the original agreement and understood the consequences of its error.

In order for a claim for rectification to succeed, the parties must have established an oral contract that identified the terms of the agreement, these terms did not change from the oral agreement until it was written, and the written contract does not accurately provide what was stated in the oral agreement. The remedy allows the written document to be altered to reflect what the parties agreed orally, but this will only allow the document to reflect this oral agreement, not what one of the parties wanted to have included. In *Re Sigma Finance Corporation (in administrative receivership)* the Supreme Court reversed decisions of both the High Court and Court of Appeal with the effect that a contract was rewritten to give effect to the context/meaning of the words used in an agreement, even though the natural wording of the agreement was correct. The court considered that a literal interpretation of the words would have been to distort the commercial intentions of the parties.

Rectification may be available where one of the parties believes that the contract reflects the intentions of the parties, but it does not, and the other party is aware of this mistake. This must go beyond the negligence of the party in reading the agreement and not spotting the error, and whilst it may involve 'turning a blind eye' rather than demonstrating actual knowledge, 'unconscionability' will be required. ↵

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Commission for the New Towns v Cooper (GB) Ltd (1995)

Facts:

The defendant's predecessor (as tenant of commercial premises underlet by the claimant's predecessor) had made three agreements with the underlessor. When the defendant acquired the remaining and unexpired lease, it wished to end the contract but wanted to avoid a penalty payment. Therefore, it pretended to be negotiating for one of the options in the relevant contract when in reality it had no intention of using that option. Rather, it intended to use another of the options which would provide it with scope to achieve its aims—but did not inform the other party of this in negotiations. It was agreed that the new contract would be on the same terms as those enjoyed by the predecessor. As soon as the agreement was reached, the defendant attempted to exercise the option and the claimant sought rectification of the agreement.

Authority for:

An order for rectification was made due to the defendant having deliberately attempted to mislead the claimant into making the relevant mistake. Cooper had, according to the Court of Appeal, attempted to put up a 'smokescreen' and intentionally omitted to bring to the Commission's attention the issue of the option.

The Court of Appeal held in *Daventry District Council v Daventry & District Housing Ltd* that a contract may be rectified in instances of common mistake. However, this decision has been criticized due to the emphasis on whether the parties have objectively made a common mistake, rather than a subjective assessment being applied.

There exist limits by when a claim for breach of contract must be made. Under the Limitation Act 1980, an action under a simple contract must be made within six years from when the right to the action arose (s. 5). In the case of contracts made under deed, the claim must be established within 12 years (s. 8(1)).

There is no statutory provision for time limits to claim under the equitable remedies, but as these are equitable, they must be sought within a reasonable time.

Conclusion

This chapter has concluded the topic of the law of contract. These chapters have identified the essential features of a valid contract; the terms within a contract, and their source; the legislative impact on contracts; and the discharge of contracts. This chapter has identified how the courts will ascertain the level of damages, if any, to be awarded in various situations, and the equitable remedies available. The book now proceeds to a further element of the wider topic of obligations; investigating torts applicable to businesses.

Summary of main points

Discharge

- Contracts may be discharged through performance, through part-performance (if accepted by the other party), and through substantial performance.
- Contracts may be discharged through the parties' agreeing to release each other from their further obligations (this can involve unilateral or bilateral discharge).

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- The contract may become radically different from that which was agreed or impossible to perform. If this is neither party's fault then the contract is discharged through frustration.
- Discharge is effective through a breach of contract if the innocent party chooses to accept the repudiation.

Remedies for breach

- Damages are available as the primary remedy in breach.
- Damages may be based on expectation losses (that seek to put the innocent party into the position they would have been had the contract been completed) or reliance losses (that put the innocent party back to the position they were in before the contract was established).
- Damages must not be too remote: they must derive from the breach and have been in the reasonable contemplation of the parties when the contract was formed.
- Damages are not designed to penalize the party in breach and hence they must be quantified to reflect the losses sustained by the innocent party.
- The innocent party must proactively (albeit reasonably) attempt to mitigate their losses rather than wait for the losses to accrue.
- Damages may be agreed in advance (called liquidated damages) but these must not amount to a penalty clause.

Equitable remedies

- Specific performance may be ordered to compel the fulfillment of the contract. This, as with each of the equitable remedies, is available at the discretion of the court and is awarded when damages would not adequately compensate the innocent party. They are generally used in contracts involving unique items.
- Injunctions can be awarded to prevent a party from breaching the contract.
- The courts may also order rectification of the contract so that the written contract is changed to accurately reflect the parties' intentions.

Summary questions

Essay questions

1. 'The equitable remedy of specific performance is harsh, unfair, and it exposes vulnerable people to potentially unsound contractual obligations. It should be abolished and replaced with a common law damages assessment.'

With reference to case law, critically assess the above statement.

2. Identify the methods in which contractual obligations may be discharged. Specifically comment on the differing approaches taken by the judiciary in relation to discharge through frustration.

Problem questions

1. In June 2016 Tariq entered into a contract with Wagner Brothers Ltd to write a script for an intended play that Wagner Brothers Ltd was to provide to Apollo's Theatres Ltd. Apollo's Theatres intended to use this for several performances it had scheduled for November 2017. The contract provided that Tariq was to submit the completed script on or before June 2017.

p. 266 ↵ It transpires that Tariq did not have time to write the script as he was busy with other projects and had taken on too much work. On 25 April 2017 Tariq wrote to Wagner Brothers Ltd with notice that he would not be able to complete the script as promised and had no intention of attempting to do so. By this stage, Wagner Brothers Ltd and Apollo's Theatres Ltd had incurred substantial expenses on the basis of this project. Wagner Brothers Ltd had also entered into preliminary contractual agreements with several television production companies for a mini-series of the script.

Advise Wagner Brothers Ltd and Apollo's Theatres Ltd of any action they can take for damages.

2. Stephane books a holiday with Super Skiing Holidays Plc who specialize in holidays for single people. Stephane books for a two-week vacation to a resort in Switzerland. The brochure describes the resort as hosting a 'house party' where live entertainment will be provided every night and there will be several people to meet and enjoy the resort with.

When Stephane arrives he is unhappy with the quality of the room and the food is of a very poor standard. The only ski boots available are too small for his feet and the skis were designed for children—there were no adult sizes. The entertainment consists of a local plumber who provides his Elvis Presley impersonation for 30 minutes each night on his way home from work. Stephane is joined at the resort by three other guests, each of whom are French and do not speak English, and they leave after five days—leaving Stephane the only person at the resort for the remainder of the holiday.

When Stephane returns home he complains to Super Skiing Holidays but they state it was not their problem and he cannot claim damages for the loss of enjoyment of his vacation.

Advise Stephane.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-10-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Davies, P. S. (2012) 'Rectifying the Course of Rectification' *Modern Law Review*, Vol. 75, No. 3, p. 412.

Nicholson, A. (2016) 'Too entrenched to be challenged? A commentary on the rule against contractual penalties post Cavendish v Makdessi and Parking Eye v Beavis' *European Journal of Current Legal Issues*, Vol. 22, No. 3.

Online Resources

Visit the online resources <https://oup-arc.com/access/marson6e-student-resources#tag_chapter-10> for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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