Chapter 11

REMEDIES FOR BREACH OF CONTRACT

11.1 INTRODUCTION

From the previous chapter, it can be seen that a breach of contract may be of such a nature as to justify the injured party treating the contract as discharged. In such a case, the normal remedy of the injured party is to obtain monetary compensation, in the form of **damages**, for the breach, to compensate him for the failure to fulfil the promise, as well as to **repudiate** the contract, if he so desires. In some cases, however, the innocent party may not need to go to court to obtain a remedy, such as when he is entitled to withhold his own performance, until the other side complies with his obligations. The claimant is entitled to choose whichever form of compensation he feels is most appropriate to his case.

However, not every breach of contract will entitle a person to treat himself as discharged, where there has only been a breach of warranty; for example, the only remedy at common law is damages. In such cases where damages are insufficient, ***equity*** may assist the injured party, who may choose to obtain a **declaration** that the contract is terminated. Where the damages are an inadequate remedy, e.g. a contract for the sale of land, where there is no satisfactory substitute for the object which he had bargained for, the injured party may seek **specific performance** of the contract itself. An **injunction** might also be sought, where the breach takes the form of doing something contrary to the terms of the contract, such as where an employee goes into competition against his employer, contrary to what has been agreed.

11.2 DAMAGES

Damages are a common law remedy and are intended to restore the party who has suffered loss to the same financial position he would have been in, had the contract been properly performed. Contractual damages, thus, look forward to the post-contractual position (unlike tortious damages, which look backward to the pre-tort position). They are assessed on the *actual loss/injury* to the claimant, his property, or his economic position, not on the gain to the defendant, whom the law of contract does not set out to punish. The claimant is, thus, able to profit or to achieve a better result (e.g. via the award of exemplary damages); he will, however, be entitled to *substantial damages* for his losses, where his position has been adversely affected.

11.2.1 REMOTENESS OF DAMAGE

Not every type of damage caused to the claimant as a result of the breach of contract will be recoverable. If the loss flowing from the breach is too remote and indirect and not, therefore, within the reasonable contemplation of the parties, it will not be recoverable.

11.2.1.1 The Two-Limbed Test in *Hadley v Baxendale*

Hadley v Baxendale (1854) 9 Ex. 341 established that the claimant can claim damages in respect of two different types of loss:

- those losses which fairly and reasonably can be considered to arise naturally, i.e. according to the usual course of things, from the breach of the contract; or

- those losses which the parties may reasonably be supposed to have contemplated as the probable result of a breach of the contract, at the time when the contract was entered into.

In this case, the claimant, Hadley, operated a mill, whose crankshaft broke, thus forcing the mill to shut down. Hadley contracted with the defendant, Baxendale, to deliver the crankshaft to engineers for repair by a certain date. Baxendale failed to deliver on the date in question, causing Hadley to lose some business. Hadley sued for the profits he lost due to Baxendale's late delivery, and the jury awarded Hadley damages of £50. Baxendale appealed, contending that he did not know that Hadley would suffer any particular damage by reason of the late delivery.

The court ruled that Hadley was not entitled to recover lost profits, holding that Baxendale could only be held liable for losses that were generally foreseeable, or if Hadley had mentioned his special circumstances in advance. The mere fact that a party is sending something to be repaired does not indicate that they would lose profits if it was not delivered on time.

The rule of the case stands for placing the risk of loss on the party in the best position to handle it. In the business world, there is no reason to suspect that courier companies would have superior knowledge of milling operations and the likely losses, whereas the mill owner is in a better position to estimate, and hence avoid, loss (for instance, by having spare equipment, or an agreement with other co-operating businesses that use cranks and shafts). Therefore, denying compensation if the courier is not informed avoids shifting the costs of loss reduction and prevention.

11.2.1.2 Post *Hadley v Baxendale* Developments

The above case can be contrasted with the 1949 case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. Here, the claimant contracted to buy a boiler from the defendants, which was delivered several months late. The claimant sued for lost profits. The court awarded the claimant damages for its ordinary profits, on the grounds that it was reasonable to think that, since the defendant knew that the claimant was in the laundry business, it was foreseeable that the lack of a boiler would keep them from receiving the profits laundry businesses usually generate. The engineering company could not plead ignorance as to what the boiler was for, because any reasonable person would understand that it was essential to their business. The claimant's claim for the loss of "highly lucrative" dyeing contracts failed, however, as these could not have been in the contemplation of the parties at the time when the contract was made.

As a result of much subsequent case law, the present test on remoteness appears to be: whether, if the defendant had thought about the results of his breach at the time he entered into the contract, he would have considered the *type* of loss which occurred as a serious possibility, or real danger (even if he would not have contemplated the *extent* of the loss). So, in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, the court thought that it was within the parties' contemplation, and that it was a serious possibility, that a bulk food storage hopper which was unfit for its purpose of storing food in a suitable condition for feeding pigs, might lead to "illness" or "injury" to the pigs, even if the pigs actually died of a rare intestinal disease which could not have been foreseen. Once the serious possibility was established, the fact that the degree of illness was not contemplated did not matter.

11.2.1.3 Incidental and Consequential Losses

Incidental losses are those which the claimant incurs after the breach has come to his notice (e.g. the administrative costs of buying a substitute, the cost of returning defective goods, or

hiring a replacement in the meantime).

Consequential losses may be loss of profits (e.g. reliance loss). However, there can also be further harm, such as personal injury or damage to property which the claimant can prove, over and above the harm that arose, as a direct result of those breaches which the claimant can prove in accordance with *Hadley v Baxendale*. Therefore, if the defendant sells the claimant a cow which is diseased and infects the claimant's other cows, the claimant is entitled to claim, not only for damages in selling a defective cow, but also for the losses caused by the cow to the other cows (*British Sugar plc v NEI Power Projects Ltd* [1997] 87 BLR 42).

11.2.1.4 Damages for Non-Financial Losses

Damages may also be recovered for discomfort, vexation and disappointment. In *Jarvis v Swan Tours Ltd* [1973] 2 QB 233, a solicitor went on a Swan Tour and sued for damages when the hotels and the buses fell short of the standards promised. He was held entitled to recover damages for the disappointment and discomfort he had been caused as a result.

However, damages for distress and disappointment are limited by the courts to those cases where the contract broken was, itself, a contract to provide peace of mind or freedom from distress, as opposed to carrying on a commercial activity with a view to profit. So, when a claimant attempted to argue that the purchase of a Rolls Royce had been the culmination of a lifelong ambition, such that when the garage had not repaired it properly or quickly enough, causing him to suffer distress and inconvenience, no damages were awarded for the claimant's "emotional anguish" while his car was being repaired (*Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95 (CA)).

The Court of Appeal recently set forth guidelines on how courts should assess damages regarding ruined holidays, in *Milner v Carnival Plc (t/a Cunard)* [2010] EWCA Civ 389. Mr and Mrs Milner paid £59,000 for a 106-day world cruise on the maiden voyage of Cunard's "Queen Victoria". They were kept awake by banging noises, and none of the alternative cabins offered to them were satisfactory. They left the ship at Hawaii after 28 days and were refunded £48,270 for the balance of the cruise. They then claimed damages for: (1) the 28 days they had been on board; (2) the wasted costs of Mrs Milner's formal gowns; and (3) for disappointment and distress.

Ward LJ (reducing damages from the High Court judge's decision), realised damages as follows:

- £3,500 diminution in value;
- £8,500 distress and disappointment;
- no award for alleged wasted expenditure on the gowns.

Ward LJ averred that the damages claims for: (1) diminution in value; and (2) damages for consequential losses, distress and inconvenience, should be considered as two distinct heads. Neither of these two heads should overlap, thus avoiding the risk of duplicating damages. Further, each case must be decided upon its own facts and merits, and both heads of loss should be considered in the round. The point to note about this decision is that, regarding diminution in value, the starting point would be the discounted price actually paid, namely the net cruise cost of £10,182, £3,000 for the 28 days that they were at sea, *not the £59,000 price of the advertised holiday*! As to disappointment and distress, Mr and Mrs Milner could reasonably have expected the "holiday of a lifetime".

11.2.2 MEASURE OF DAMAGES

Once the court has decided that the consequences of the breach are not too indirect, it needs to decide how much money should be awarded in respect of, and in consequence of, the breach.

Damages can be compensated in one of three ways (at the claimant's choice):

11.2.2.1 Loss of Expectation (to put the Claimant in the Same Position as if the Contract had been Performed)

Damages for loss of bargain are assessable to put the claimant in the position he would have achieved, had the contract been performed. So, in a contract for the sale of goods which are defective, the claimant would be entitled to receive damages reflecting the differences between the price paid under the contract and the actual value of the defective goods.

Alternatively, the "cost of cure" will be awarded, especially in sale of goods contracts and building contracts, in cases where the claimant is not entitled to the cost of re-instatement and where the breach causes no diminution in the market value of the property. In *Ruxley Electronics and Construction Ltd. v Forsyth* [1995] UKHL 8, Forsyth contracted with Ruxley to construct a swimming pool in his backyard, to a depth of 7 feet, 6 inches. The completed pool had a maximum depth of only six feet. As a result, Forsyth sued for the cost of demolishing the swimming pool and rebuilding a second pool to conform to the original specifications.

The trial judge found that the pool, as constructed, was perfectly safe to dive into and that the shortfall in depth had not decreased the value of the pool. The House of Lords agreed with the court of first instance that the householder was entitled to damages of £2,500 for *loss of amenity* and rejected his claim for the cost of *reinstatement* (£21,560) which would have involved demolition of the existing pool and the reconstruction of a new one, on the ground that the cost of reinstatement was an unreasonable claim, in the circumstances. The House of Lords held that the expense of the work involved would be out of all proportion to the benefit to be obtained. Whilst the pool was not as deep as specified, it was still perfectly safe to dive into. Having said this, had the extra 18 inches of depth in the swimming pool been truly important to the consumer, the quantum of damages would be the cost to destroy the deficient pool and to reconstruct the desired one. In this sense, a court will determine reasonableness by the consumer's subjective and idiosyncratic preferences, and will not impose its own ideas of what is reasonable.

Ruxley confirms that, in contractual disputes as to construction works, there are two main measures of damages: (1) the difference in value; and (2) the cost of reinstatement. If it would be unreasonable to award the cost of reinstatement, due to the disproportionate expense, in comparison with the material benefit to be gained, then courts should award the difference in value.

11.2.2.2 Reliance Loss (the Cost to the Claimant of Relying on the Contract)

An alternative claim, where expectation measures are difficult to quantify, could be to place the claimant in the position where he would have been, had the contract never been entered into, by compensating him for expenses he has incurred in his abortive performance, i.e. the costs of preparing for the contract. Under this heading, expenses which the claimant was never obliged to incur may be recovered.

In *Anglia Television Ltd v Reed* [1972] 1 QB 60, the claimants incurred expenditure in

preparing for filming a television play. They subsequently entered into a contract with the defendant playing the leading role. The defendant repudiated the contract, and there being no substitute available, they were forced to abandon the play. The claimants sued the defendant for the production expenses incurred by the claimants before the contract. They were held entitled to recover the whole of the wasted expenditure.

11.2.2.3 Restitution (benefits obtained by the Defendant under the Contract)

Where a bargain is made, and the price paid, but the defendant fails to deliver the goods, the claimant is entitled to recover the price paid, plus interest thereon.

11.2.2.4 Choosing the Claim

The claimant's choice in the above claims may be limited. In *loss of bargain*, he must give some evidence of the value of his expectations. If he is unable to do so, or if his expectations are so speculative that no value can be put on them, he will be limited to claims in reliance loss and restitution. To establish reliance loss, the claimant must show a total failure of consideration. A familiar example illustrates this point. In *Chaplin v Hicks* [1911] 2 KB 786, a woman who was wrongly deprived of the chance of being one of the winners in a beauty competition was awarded damages for loss of a chance. The court did not attempt to decide on the balance of probabilities for the hypothetical past event of what would have happened, if the claimant had been duly notified of her interview. Vaughan Williams LJ held that the presence of all the contingencies, upon being entered into the beauty competition, meant that carrying out the calculation was "...not only difficult but incapable of being carried out with certainty or precision..." However, his Lordship yielded:

> "... I do not agree with the contention that, if certainty is impossible of attainment, the damages for breach of contract are unassessable... I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages...".

11.2.3 DUTY TO MITIGATE DAMAGES

It is the claimant's duty to mitigate his losses, i.e. to do his utmost not to increase the amount of damage done. The court will not award damages for loss which has been caused by the innocent party's *failure* to take reasonable steps to mitigate his loss – although the defendant must prove such failure.

11.2.4 LIQUIDATED DAMAGES

The parties to the contract may make a genuine pre-estimate of damage, in advance of any breach of contract, of those losses which are likely to result in the event of a breach – and stipulate that such sum shall be payable in the event of a breach of contract. A "liquidated damages" clause of this type, thus, enables a party to know his liability in advance of any breach. However, the clause must be a genuine assessment of losses in order to be valid; if it is intended to *penalise* the contract breaker, to discourage breaches of the contract, it will be void and not enforceable. Instead, the injured party will have to prove the amount of his loss.

The parties may often be in dispute over whether a payment clause in a contract is, in fact, a genuine liquidated damages clause, or a dishonest penalty clause. In *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79, the House of Lords decided that a liquidated damages clause would be considered a penalty and therefore unenforceable, where

the sum to be paid by the defendant was "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be provided to have followed from the breach". So, where the clause specifies the payment of a larger sum on non-payment of a smaller one, the court will consider the clause a penalty. In the circumstances of the case, however, the formula reached by the parties was held to be a genuine attempt to agree liquidated damages and would be upheld.

A clause in a contract for liquidated damages would need to be highlighted as an onerous term, as can be seen in the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348. There, the delivery note appended to photographic transparencies which were delivered to the defendant contained onerous conditions, in small type, subjecting the claimant to a "holding fee" for each day of delay. The court held that the term had not been sufficiently brought to the attention of the defendant.

11.2.5 THE PROBLEM WITH DAMAGES

Sometimes, the common law remedy of damages will be inadequate compensation to the victim of a breach of contract. For example, the claimant may have contracted to purchase a particular plot of land from the defendant, for which compensation cannot provide a satisfactory equivalent in the event of the defendant's breach. Equity, therefore, developed a number of remedies, discretionary in nature, directed towards ensuring that a claimant was not unjustly treated by his being confined to the common law remedy of damages. Two such remedies will now be considered: specific performance and injunctions.

11.3 EQUITABLE REMEDIES

An order for *specific performance* will compel the party in breach to fulfil the terms of his contract. These terms must be positive in nature, whereas negative stipulations are, normally, enforced by an *injunction*.

11.3.1 SPECIFIC PERFORMANCE

If the claimant can show that damages are inadequate, the court may entertain his claim for specific performance, instead of letting the defendant buy himself out of his contractual obligations, by paying damages for his breach. Antiques, valuable paintings and other irreplaceable items, such as where the piece of land is needed for a specific purpose and is unique, may be the subject of an action for specific performance. It may also be ordered where the amount allowable as damages would be nominal. In *Beswick v Beswick* [1968] AC 58, an agreement was drawn up between Mr Beswick and his nephew, John, to pay an annuity to Mrs Beswick, in exchange for her assistance in transferring the goodwill of the business to John. Since the contract was for the benefit of someone not party to the contract (Mrs Beswick), John did not believe it was enforceable and so did not fulfil his part. The court held that the contract was valid. The aunt was Peter's personal representative, and so was a party to the contract.

However, the court will only award this remedy, provided that no unperformed obligations exist by the claimant, which are, by their nature, incapable of enforcement. So, no court will compel an employee to do any work by ordering specific performance of a contract of employment (or by restraining the breach of such contract by injunction); see *Johnson v Shrewsbury and Birmingham Rly* (1853) 3 DM & G 358. In addition, the court will not, generally, order specific performance of building contracts. The justification is that damages may be an adequate remedy, as the claimant can engage another builder, the difficulty of continually supervising the building work and the building specifications often being too imprecise. For an order of specific performance to be made, the court must be able to ensure that the defendant complies, fully,

with the order. By contrast, a contract for the sale of land would be readily enforceable, requiring only that the seller should execute and deliver a transfer and other documents.

11.3.2 INJUNCTIONS

An injunction requires the defendant to observe a negative restriction of a contract. It can be made even to enforce a contract of personal service for which specific performance would be refused, such as where the claimant has contracted to obtain services of a personal quality from the defendant, e.g. to sing or take part in a film, and a satisfactory substitute is unavailable.

An *interim* (interlocutory) injunction can be used to quickly prevent a breach of contract by the defendant before it actually occurs, e.g. a freezing injunction may be sought, in order to prevent the defendant from moving goods which are the subject of a contract outside of the jurisdiction, in a case where a claim for damages is being heard and the proceeds of the sale of the goods are likely to be used to pay the damages. However, an interlocutory injunction will only be granted if the claimant can show that there exists some chance that his action will succeed and that the "balance of convenience" is in his favour (*American Cyanamid Co v Ethicon Ltd* [2001] 1 WLR 19).

Prohibitory injunctions restrain (prohibit) the defendant from carrying out some threatened action, e.g. an injunction to prevent Y from buying beer for his pub from Z, instead of from X. In *Lumley v Wagner* (1852) 1 De GM & G, the defendant contracted to sing for the claimant in his theatre for three months and, at the same time, *not* to sing elsewhere during this time without the claimant's consent. The court held that it could not force or even encourage the defendant to sing at the claimant's theatre. It could only persuade her to do so, by making an injunction to prevent her from singing elsewhere. The problem is that an injunction of this type may put so much economic pressure on the defendant that he decides to perform *badly*. Such pressure also has the effect of making the defendant perform the positive part of the contract. However, the court will not make an injunction if the defendant would be deprived entirely of earning a living, e.g. an actress who undertakes to act for the claimant and, at the same time, not to act, sing or take up any other employment for two years without the claimant's consent; the court would only restrain the defendant from working for a British film producer (*Warner Bros v Nelson* [1937] 1 KB 209).

Mandatory injunctions require the defendant to undo something he has agreed not to do.

11.3.3 RESCISSION

Rescission provides an equitable remedy for breach of contract. The rule has the same effect if the remedy is used for breach as if used for misrepresentation. The contract must be capable of being completely rescinded, otherwise it cannot be rescinded at all; it must be possible to restore the status quo.

11.4 CLAIMS FOR RESTITUTION

Finally, at times, ***quasi-contractual*** remedies may be available. For example, where the injured party has performed his side of the contract (e.g. paid for goods ordered), but the other party has not performed his obligations in full (such as where he has not delivered the goods to the customer), he may be entitled to **restitution** in respect of his own performance, i.e. the price paid, plus the interest thereon; or where the injured party has, under the contract, paid money to the defendant under a mistake of fact, or under a void contract, or has supplied services in the mistaken belief that he was contractually bound to do so – in such cases he is entitled to be paid as much as he deserved (***quantum meruit***).

11.4.1 CLAIMS IN QUANTUM MERUIT

(a) **Contractual**

These claims may be used to recover a reasonable price or remuneration where a contract exists for the supply of goods and services and but the parties have not agreed a specific amount to be paid. Section 8 of the Sale of Goods Act (SOGA) 1979 and s. 15 of the Supply of Goods and Services Act 1982 address this issue on a statutory footing.

(b) **Quasi-contractual**

A claim may be made under this head where, for example, work has been carried out under a void contract. While a claimant in these circumstances cannot recover for breach of contract, because there is no valid contract, he may be able to claim on the basis of *quantum meruit*. In *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, the correct procedures were not followed in appointing the claimant as managing director. Consequently, his appointment was nullified, but the claimant had already provided services for the company in accordance with the agreement which he believed was properly entered into. Since the company had received a benefit from his work, he was allowed to recover compensation on a *quantum meruit*. In the same way, in *Mohammed v Alaga* [1999] 3 All ER 699, the Court of Appeal held that a person who had provided translation services under an illegal, and therefore void, fee sharing agreement with a firm of solicitors could claim on a *quantum meruit* basis for the work actually done.

11.4.2 TOTAL FAILURE OF CONSIDERATION

A total failure of consideration will result in the recovery of any proceeds paid. The action is based on failure of consideration, not its absence. Money paid by way of a gift, therefore, cannot be recovered in quasi-contract.