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CONTRACTS AND ENGLISH DISPUTE RESOLUTION

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Similarly, in S[illegible] LJ's opinion, the work had not merely been `shoddy'. The contractor had [illegible]ed to achieve the 'primary purpose': installation of a safe and effective heatin[illegible]stem.

REMEDIES FOR BREACH[765]

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(1) *Introduction*

12.01 The main judicial remedies for breach of contract are:

I. *the action for debt*:
this is in practice the most common remedy of all; most claims for contractual default are attempts to obtain payment of specified sums (price, hire charges, insurance premium, rent, etc). One of the rules within the so-called `penalty doctrine' (**12.42** (5), below), is that a debtor cannot be required to pay a sum exceeding the principal and interest owed. A problematic aspect of contract law lies at the intersection of the remedy for `debt' and principles of repudiatory breach (**11.08**). An innocent party has an `election'—a choice—whether to `accept' the repudiation or to `affirm' the

[765] *General*: A Burrows, in A Burrows (gen ed), *English Private Law* (2nd edn, Oxford University Press, 2007), 21.17 to 21.71, 21.135 to 21.139 (damages) (discussion now to be read in light of *Transfield* case on remoteness and scope of duty: *Transfield Shipping Inc v Mercator, `The Achilleas'* [2008] UKHL 48; [2009] 1 AC 61; 21.167 to 174 (debt); 21.180 to 21.197 (specific performance); 21.200 to 21.206, 21.214 to 21.216 (injunctions); 21.156 to 21.159 (account of profits); *`consumer surplus' damages*: D Harris, A Ogus, J Phillips, `Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581, especially 580-6, 595-6, 604-10 (cited by Lord Millett in the *Panatown* case [2001] 1 AC 518, 589); *disappointment damages in general*: D Capper (2002) 118 LQR 193-6; E McKendrick and M Graham `The Sky's the Limit: Contractual Damages for Non-pecuniary Loss' [2002] LMCLQ 161; *mitigation of loss*: M Bridge, `Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 LQR 398; *contributory negligence*: C Hopkins [1995] CLJ 20-3; AS Burrows, *Remedies in Contract and Tort* (3rd edn, Oxford University Press, 2004), 136-44; *account of profits and gains-based claims*: Goff & Jones, *The Law of Restitution* (7th edn, London, 2007), 20-024 to 20-034; A Burrows, `Are "Damages on the *Wrotham Park* Basis" Compensatory, Restitutionary or Neither?'; S Waddams, `Gains Derived from Breach of Contract: Historical and Conceptual Perspectives'; R Cunnington, `The Measure and Availability of Gains-based Damages for Breach of Contract': all three in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart, Oxford, 2008), ch's 7-9, respectively; J Edelman, *Gain-Based Damages* (Hart, Oxford, 2002), ch 5); *recovery of payment after failure of consideration*: Virgo in *Chitty on Contracts on Contracts* (30th edn, London, 2008), 29-054 to 29-063; 29-074 to 29-075; A Burrows, E McKendrick, J Edelman, *Cases and Materials on the Law of Restitution* (2nd edn, Oxford University Press, 2007), 362-86.

contract. In *White & Carter v McGregor* (1962),[766] three Law Lords held that an innocent party who elects not to terminate the contract, despite the other's attempted repudiation, is entitled to complete a 'solo' performance (that is, without the other's co-operation or involvement). He can then validly claim the agreed price for the completed job or task. The majority held that, in general, it does not matter that the other party had declared that he no longer wanted performance. The two dissenting judges (Lords Morton and Keith) considered this claim for debt to be highly inefficient and unmeritorious. It would conflict with the economic goal of encouraging innocent parties to restrict their losses by 'mitigating' (generally on this doctrine, see below). However, the technical response to this argument is that the doctrine of 'mitigation' is confined to claims for damages, and that the claimant is here asserting a right to a debt. Debt and damages (on which **12.15** ff) are subject to different regimes.[767] This difference is illustrated by *Reichman v Beveridge* (2006)[768] where the Court of Appeal held that a landlord is entitled to sue for rent (an action in debt) for the residue of a business tenancy. The landlord is under no obligation to 'mitigate' by accepting the tenant's attempted renunciation. If the tenant finds it convenient to try to release itself from its covenant to pay rent it must find a new tenant to whom the lease might be assigned or sub-let. And so the landlord was not acting unreasonably by insisting on its right to keep open the tenancy and to maintain its rights to rent payments. Since the *White & Carter* decision (1962), the cases have established that there are two restrictions (which will be further examined below) upon the innocent party's opportunity to take advantage of this rule:[769] (i) the claimant cannot succeed in suing for debt if his performance requires the other party's co-operation; (ii) the claimant must show a 'legitimate interest' in pursuing his unwanted performance. The second requirement will be applied quite generously in favour of the innocent party. Simon J in *The Dynamic* (2003) formulated the following principle:[770]

'(1) *The burden is on the contract-breaker to show that the innocent party has no legitimate interest in performing the contract rather than claiming damages. (2) This burden is not discharged merely by showing that the benefit to the other party is small in comparison to the loss to the contract breaker. (3) The exception to the general rule applies only in extreme cases: where damages would be an adequate remedy and where an election to keep the contract alive would be unreasonable.*'

And the Court of Appeal in *Reichman v Beveridge* (2006) said:[771] '*There is, therefore, a very limited category of cases [where]... an election to keep the contract alive would be wholly unreasonable and... damages would be an adequate remedy, or that the [innocent party] would have no legitimate interest in making such an election.*'

However, it is submitted that the *White & Carter* doctrine is unattractive. Instead, the United Kingdom Supreme Court should seize the earliest opportunity to declare that an innocent party should normally be confined to compensation, rather than stubbornly 'holding out' for eventual complete payment of the agreed remuneration. The innocent party should only be allowed to maintain the contract if he can show that damages, assessed at the date of the attempted renunciation, would not properly protect an important commercial or other significant interest (mere difficulty in assessing damages should not be sufficient: damages can be awarded despite difficulty in assessment). The innocent party's commercial or other significant interest should have been known to the guilty party, or reasonably obvious to him. And so a management consultant should not be free to go to Hong Kong and make a report into a third party company if the commissioning party has decided to call off the engagement, the example given by Lord Reid in the *White & Carter* case (1962):

'*Then it was said that, even where the innocent party can complete the contract without such co-operation, it is against the public interest that he should be allowed to do so. An example was developed in argument. A company might engage an expert to go abroad and prepare an elaborate report and then repudiate the contract before anything was done. To allow such an expert then to waste thousands of pounds in preparing the report cannot be right if a much smaller sum of damages would give him full compensation for his loss. It would merely enable the expert to extort a settlement giving him far more than reasonable compensation.*'[772]

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[766] [1962] AC 413, HL; on which AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press, 2004), 435-44 (citing US material at 437); Carter, Phang and Phang (1999) 15 JCL 97; A Tettenborn (ed), *The Law of Damages* (London, 2003), 5.45 to 5.49; K Scott [1962] CLJ 12; PM Nienaber, ibid at 213; AL Goodhart (1962) 78 LQR 263; M Furmston (1962) 25 MLR 364; Tabachnik (1972) CLP 149; Priestley (1991) 3 JCL 218; for references to US and Canadian materials or case law, *Anson* (28th edn, Oxford University Press, 2002), 632 nn 18, 19 (US law, which differs from English on this topic, was cited in *Clea Shipping Corporation* v *Bulk Oil International, 'The Alaskan Trader'* [1984] 1 All ER 129, 137, *per* Lloyd J).

[767] On the differences between debt and damages, Millett LJ in *Jervis* v. *Harris* [1996] Ch 195, 202-3, CA.

[768] [2006] EWCA Civ 1659; [2007] 1 P & CR 20; [2007] L & TR 18.

[769] AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press, 2004), 433-40.

[770] *Ocean Marine Navigation Ltd* v *Koch Carbon Inc, 'The Dynamic'* [2003] EWHC 1936; [2003] 2 Lloyd's Rep 693, at [23], *per* Simon J.

[771] [2006] EWCA Civ 1659; [2007] 1 P & CR 20; [2007] L & TR 18, at [17].

[772] [1962] AC 413, 428-9, 442, HL, *per* Lord Reid (Lord Keith also quoting this example).

Nor should a surveyor be free to make a report on a property which the client is no longer interested in buying. The decision in the *Reichman* case (2006)[773] is, however, correct: a landlord should not be required to find a new business tenant. Indeed the business lease is structured to guarantee the landlord's flow of rent—by the taking of guarantees to secure the tenant's payment of rent, should the latter default. And so the tenant must bear the continuing liability for rent unless he finds a suitable replacement tenant for the purpose of an assignment of the lease or a sub-lease. Furthermore, of crucial importance, the landlord has no right to compensation in respect of future loss of rent, as Lloyd LJ explained in the *Reichman* case (2006).[774]

II. *damages*: this is the Common Law claim for compensation; the main aim of compensatory damages is to place the promisee in the position he would have been in if the contract had been properly performed, the so-called `expectation', `loss of bargain' measure; a subsidiary type of damages is to restore the claimant monetarily to the position he enjoyed before the contract was breached, the so-called `reliance loss'; common to either of these measures of damages is the requirement that the loss should be neither *causally* unrelated to the breach, nor too *remote*, nor based on a *failure to mitigate loss*, where the claim could be based either on breach of contract or a failure in tort to exercise due care, damages can be reduced to reflect the claimant's *contributory negligence*;

III. *specific performance*: this is a draconian and cumbersome remedy, requiring the defendant positively to act; however, an individual cannot be ordered to perform a contract for personal services, such as an employment contract; admittedly specific performance ensures `loyalty to promises', but it has the disadvantage of enabling the claimant to insist on performance even though he could easily avoid or at least reduce his loss; and this remedy conflicts with the claimant's general need take steps to mitigate his loss by entering the market for satisfaction from an alternative source; other aspects of specific performance are (i): there can be no specific performance of contracts for personal services, nor against a company to require it to `run a business'; (ii) contracts to transfer movable property are remedied by damages awards, unless the subject-matter is `unique' or very nearly so; (iii) in practice specific performance is seldom encountered outside its heartland, namely contracts for the sale or exchange of interests in land;

[773] [2006] EWCA Civ 1659; [2007] 1 P & CR 20; [2007] L & TR 18.
[774] ibid, at [18].

IV. *injunction*: as just mentioned, specific performance is a mandatory injunction; *other injunctions* can be awarded to stop a party from breaching a promise not to do something, or continuing to breach such an obligation; injunctions to prevent a party breaching a promise *not to do something* are commonly granted, even though damages might have adequately protected the claimant's interests; but no such injunction will be granted if its indirect effect will be to coerce a person into performing a contract for personal services.

(2) *Specific Performance and Injunctions*[775]

12.02 A person will be guilty of contempt of court[776] (and become a `contemnor') if he breaches an injunction or an order of specific performance addressed to him. A party who disobeys an injunction will be guilty of contempt even if he later persuades the court to set aside the relevant order or injunction.[777] A person found guilty of contempt can be imprisoned for up to two years[778] or fined. In the case of both individuals [779] and companies, the court can order 'sequestration' of their assets.[780]

12.03 Specific performance is available only if the contract is supported by consideration (on which **4.01, 4.09**, especially) and the remedies of damages or debt would provide inadequate relief. Specific performance is the primary remedy only in the context of agreements for the transfer of land or shares in private companies.[781] In those situations, the relevant subject-matter is, or is regarded as, `unique'.

12.04 In *Co-operative Insurance Services v Argyll Stores Ltd* (1998) the House of Lords held that specific performance is not available to compel a tenant to honour a long-running covenant to `keep open' a business. This case concerned a lease for a supermarket site in a Sheffield shopping mall. The thirty five year lease, granted in 1979, included a clause that the tenant would continue trading for the same period (a so-called `keep open' clause). The relevant clause stated: `

[775] GH Jones and W Goodhart, *Specific Performance* (2nd edn, 1996); AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, 2004), ch 20; D Harris, D Campbell, R Halson, *Remedies in Contract and Tort* (2nd edn, 2002), ch 12; comparative account: J Smits, D Haas, G Hesen (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Antwerp, 2008); GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press, 1988), 63 ff.
[776] *Arlidge, Eady and Smith on Contempt* (3rd edn, 2005).
[777] *Motorola Credit Corporation v Uzan (No 2)* [2003] EWCA Civ 752; [2004] 1 WLR 113, at [148] to [156] (considered in *Raja v Van Hoogstraten* [2004] EWCA Civ 968; [2004] 4 All ER 793).
[778] *Harris v Harris* [2001] EWCA Civ 1645; [2002] Fam 253, CA, at [12] to [14], noting s 14(1), Contempt of Court Act 1981, restricting the period to a maximum of two years' imprisonment.
[779] *Raja v Van Hoogstraten* [2004] EWCA Civ 968; [2004] 4 All ER 793, at [71] ff.
[780] Sch 1, CPR, at RSC Ord 45, rr 3 (1)(c), 4(2)(c), 5(1)(b)(i)(ii); RSC Ord 46, r 5; on the court's inherent power, *Webster v Southwark LBC* [1983] QB 698.
[781] For specific performance to compel transfer of shares in a *private company*, *Harvela v Royal Trust Bank of Canada* [1986] AC 207, HL (see **3.31** and **3.32**).

[The tenant will] keep the demised premises open for retail trade during the usual hours of business in the locality it [will keep] the display windows properly dressed in a suitable manner in keeping with a good class parade of shops.' Another clause required the tenant to offer a *'full range of grocery provisions'*. In 1994, when the tenancy still had nineteen years to run, the defendant supermarket chain handed back the keys to the landlord. The claimant landlord sought specific performance to force the defendant to trade at this site until 2014, or until it sub-let or assigned to another supermarket company.

12.05 The House of Lords' decision in *Co-operative Insurance Services v Argyll Stores Ltd* (1998) not to over-stretch specific performance in this context seems quite justified. More generally, *apart from agreements to transfer land—where specific performance is the primary remedy*—English law is right to confine this remedy to a residual role, for these reasons. First, specific performance is a heavy-handed remedy. It is sanctioned by contempt of court powers. And so it should be narrowly confined, otherwise if threatens to become a remedial sledgehammer. Secondly, the mitigation principle requires that an innocent party should not be at general liberty to wait for the court to order the guilty party to perform (see further, **12.28**). Thirdly, the parties can insert (i) liquidated damages clauses (**12.41**) or (ii) require payment of a deposit (**12.45**) to apply leverage to induce performance. Lord Hoffmann in the *Co-operative Insurance* case (1998) concluded:

> *'From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal.'*[782]

12.06 Lord Hoffmann's speech in *Co-operative Insurance Services v Argyll Stores Ltd* (1998) contains many lucid and compelling observations on the appropriate scope of specific performance, not just in the immediate context of that case, but more generally. These fundamental observations are collected in the ensuing paragraphs.

12.07 *Residual Status of the Equitable Remedy of Specific Performance*: On this he commented:

> *'Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the Common Law damages to which a successful claimant is entitled as of right.'*[783]

He added:

> *'By the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at Common Law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy.'*[784]

12.08 *Punishment of Defendant not the Aim of Private Law Remedies*: Lord Hoffmann explained:

> *'It is true that the defendant has, by his own breach of contract, put himself in such an unfortunate position. But 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.'*

12.09 *Problem of Constant Supervision of Order to Continue an Activity as Distinct from the Achieve a Measurable Result*: Lord Hoffmann commented:

> *'The most frequent reason given in the cases for declining to order someone to carry on a business is that it would require constant supervision by the court. ...Supervision would in practice take the form of rulings by the court...as to whether there had been a breach of the order. It is the possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable.'*[785]

> *'...The possibility of repeated applications over a period of time means that, in comparison with a once-and-for-all inquiry as to damages, the enforcement of the remedy is likely to be expensive in terms of cost to the parties and the resources of the judicial system.'*[786]

> *'[One must] distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result.'*[787] *'This distinction between orders to carry on activities and orders to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants...'*[788]

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[783] [1998] AC 1, 11, HL *per* Lord Hoffmann.
[784] ibid, 11.
[785] ibid, 12.
[786] ibid, 40.
[787] ibid.
[788] ibid.

12.10 *Disproportion between Harm to Defendant and Loss to Claimant*: Lord Hoffmann observed:

> 'The loss which the defendant may suffer through having to comply with the order (for example, by running a business at a loss for an indefinite period) may be far greater than the plaintiff would suffer from the contract being broken.'[789]

12.11 *Danger of Exposing Defendant to Oppression*: Lord Hoffmann noted:

> '[The court should not] deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make.'[790]

12.12 *Draconian Sanctions of Contempt of Court*: Finally, Lord Hoffmann commented on the severe nature of the judicial order of an injunction or specific performance:

> 'The only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt [on which see **12.02** above]. This is a powerful weapon; so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order.'[791]

12.13 *Injunction to Prevent a Party from Acting in Breach of Contract*: The general rule is that injunctions are readily awarded to prevent a defendant breaching a 'negative' promise, that is, an undertaking not to do something.[792] In such a case, an injunction is not subject to the same restriction as specific performance (the need for damages to be inadequate (**12.03**)). Instead the courts strictly prohibit breach of negative undertakings.[793] For example, a restrictive covenant, which prevents a landowner from using the premises for specified purposes, will be enforceable by injunction. The injunction can be awarded either to prevent the anticipated wrong ('prohibitory' relief) or to reverse the relevant wrong ('mandatory' injunction). However, in the latter situation, where the court is presented with a '*fait accompli*', there is a discretion to withhold a mandatory injunction and instead to award damages 'in lieu'.[794]

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[789] ibid, 15.
[790] ibid (quoting Lord Westbury LC in *Isenberg v East India House Estate Co Ltd* (1863) 3 De GJ & S 263, 273).
[791] [1998] AC 1, 15, HL *per* Lord Hoffmann.
[792] *Doherty v Allman* (1878) 3 App Cas 709, 720, HL, per Lord Cairns LC (this was a dictum; in fact the relevant covenant in a long lease was held to create a positive set of obligations).
[793] AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press, 2004), 527-9 suggests that the courts have gone too far in awarding injunctions without inquiring whether damages would be sufficient protection.
[794] eg, *Oxy-Electric Ltd v Zaiduddin* [1991] 1 WLR 115, Hoffmann J (where an application for striking out was refused, and the case was left to proceed to trial); *Jaggard v Sawyer* [1995] 1 WLR 269, CA (where the injunction was refused and damages in lieu awarded under s 50, Supreme Court Act 1981; the so-called jurisdiction under 'Lord Cairns' Act': originally s 2, Chancery Amendment Act 1858).

12.14 *Injunctions and Personal Liberty*: As just mentioned, the courts tend to award injunctions in respect of 'negative undertakings'. But this is subject to a major qualification: the need to respect personal liberty and thus to acknowledge the limits of acceptable judicial coercion. In the context of contracts for personal services, the courts withhold positive injunctions, because they prefer to respect the liberal principle that a person should not be forced to perform 'personal services' against his will. Statute *explicitly prohibits positive* orders to compel a person to work under contracts of employment.[795] But in our present context of injunctions designed to restrain conduct, there is the distinct and related question whether a negative injunction might *indirectly compel* a person to perform personal services. Where, for example, defendant actors, managers, or employees, have agreed not to work for anyone other than the claimant for a specified period, an injunction to enforce this negative undertaking might indirectly impose compulsion on the defendant to work for or with the claimant. It might indirectly 'yoke' them together, against the defendant's will. The element of indirect compulsion arises from the fact that the defendant might strongly wish to avoid idleness and instead want to advance her brilliant career. Or, more mundanely, she might simply need to maintain her standard of living.[796] But the principle that *individuals* should not be compelled (directly or indirectly) to work for others does not apply if the defendant is a company. In 2006 the Court of Appeal in the *LauritzenCool* case acknowledged this distinction. The court held that it was legitimate to issue an injunction to prevent a company from removing its two ships from the charterer's use.[797] Mance LJ said:

> 'neither the fact that the contracts...were for services in the form of a time charter nor the existence...of a fiduciary relationship of mutual trust and confidence represents in law any necessary or general objection in principle to the grant of injunctive relief precluding the [owners] from employing their vessels [in a way contrary to the charter party] pending the outcome of the current arbitration. Nor does it afford any such objection to...such relief that the only realistic commercial course...left to the [owners] was...to provide the vessels...and to perform the charters.'[798]

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[795] s 236, Trade Union and Labour Relations (Consolidation) Act 1992; on this context, AS Burrows, *Remedies for Tort and Breach of Contract* (3rd edn, Oxford University Press, 2004), 482ff.
[796] *Warren v Mendy* [1989] 1 WLR 853, CA (noted H McLean [1990] CLJ 28), the leading case, surveys the (first instance) cases, notably: *Lumley v Wagner* (1852) 1 De GM & G 604, and *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (in both, injunctions were granted against, respectively, an opera singer and an actress); and *Page One Record Ltd v Britton* [1968] 1 WLR 157 ('the Troggs' case) where the injunction was not granted; this whole line of cases is reviewed luminously by Mance LJ in *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579; [2006] 1 WLR 3686, CA (see text below).
[797] The Court of Appeal in the *LauritzenCool* case, ibid, noted *Regent International Hotels (UK) Ltd v Pageguide Ltd*, *The Times* 13 May 1985, CA, which involved a long-term management of the Dorchester Hotel, London, owned by Pageguide and to be managed by Regent; in the *Regent* case, Ackner LJ said that the *Page One Records* case (see preceding note) had involved a 'contract to manage four young men and was concerned with every aspect of the pop stars' life...All this is far removed from managing a hotel.'
[798] *LauritzenCool* case, ibid, at [30].

(3) *Damages for Breach of Contract*[799]

12.15 *Agreed Compensation*: The parties can agree in advance of breach upon the amount of damages which the innocent party will receive in the event of breach. But the courts will not uphold these stipulations if they are punitive or wholly disproportionate (**12.41** ff).

12.16 *Nominal Damages:* For any breach of contract a claimant is entitled to nominal damages. Such an award is a judgment for a small sum. Its function is to betoken the fact that there has been a technical legal wrong (sums of £ (UK) 5 or £ (UK) 10, for example).[800]

12.17 *Substantial Damages*: If the claimant seeks substantial damages, meaning compensation for real loss, rather than the token award of nominal damages (see the preceding paragraph), 'the claimant must prove, on a balance of probabilities, [recognised] loss resulting from the breach of contract.'[801] Substantial damages can be awarded only if the claimant shows a recognised type of loss, such as economic loss, personal injury, or damage to property.[802] If no loss can be shown, the claimant is entitled only to nominal damages, since to award more than that measure would be to punish the defendant. As Lord Lloyd of Berwick said in *Ruxley Electronics Ltd v Forsyth* (1996), '*If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. The object of damages is always to compensate the plaintiff, not to punish the defendant.*'[803]

12.18 *True Compensation*: The compensatory aim necessarily precludes an award in excess of the claimant's true loss . And thus damages should reflect the fact that the claimant would have paid tax on the sums which the compensation is intended to replace.[804]

12.19 *Protection of Expectations*: As Parke B said in *Robinson v Harman* (1848), the main aim of contractual damages is to place the claimant (the promisee) in the position

[799] *McGregor on Damages* (18th edn, 2009) is the leading work; other important studies are: AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, 2004, Oxford University Press); A Tettenborn (ed), *The Law of Damages* (2003).
[800] *McGregor on Damages* (18th edn, 2009), ch 10.
[801] *Bank of Credit & Commerce International SA (in liquidation) v Ali (No 2)* [2002] EWCA Civ 82; [2002] 3 All ER 750; [2002] ICR 1258, *per* Pill LJ at [14].
[802] eg, limits upon damages for disappointment (*Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732, HL, noted **12.20** below); contractual damages are unavailable for damage to reputation except in special situations: A Burrows in A Burrows (ed), *English Private Law* (2nd edn, Oxford University Press, 2007), 21.48 ff for exceptions.
[803] [1996] 1 AC 344, 365, HL.
[804] AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, 2004), 199ff (noting *British Transport Commission v Gourley* [1956] AC 185, HL, and associated cases).

he would have been in if the promise had been performed or if the warranty had been accurate.[805]

12.20 *Compensation for Aggravation or Consumer Disappointment*: The starting point is that, in general, a defendant is not liable for mental distress caused by breach of contract, even though the distress is not too remote a consequence of the breach.[806] The House of Lords' discussion in *Farley v Skinner* (2002), the leading case, reveals three main exceptions to this proposition:[807] (1) proof of 'physical' discomfort (including noise);[808] or (2) the contract has as one of its main[809] purposes (a) the avoidance of aggravation (such as liability of surveyors commissioned to inspect property or lawyers retained to obtain injunctive relief against violent or threatening persons) or (b) conferment of pleasure (holiday companies or photographers at 'one-off' special occasions);[810] or (3) the 'consumer surplus' measure of compensation,[811] for a non-pecuniary form of loss, a contractual 'solatium', or loss of amenity award; a claim for 'loss' which, although palpable to consumers, is not reflected concretely in the 'market'. The leading discussion of the 'consumer surplus' concept is the *Ruxley* case (1996), [812] where a wealthy 'consumer' recovered £ (UK) 2,500 for the disappointment he allegedly suffered because the other party had failed to construct a swimming pool of specified depth. Exception (2) involves consequential loss, whereas (3) involves denying the claimant the benefit of a promised performance.

12.21 *Damages are to Compensate for Loss Rather than Disgorge Defendant's Gain*: The general function of damages is to compensate rather than to prevent the defendant's unjust enrichment. However, the House of Lords in *Attorney-General v*

[805] (1848) 1 Exch 850, 855; on the claimant's expectation or performance interest, Fuller and Perdue (1936) 46 Yale LJ 52, 373; D Friedmann (1995) 111 LQR 628.
[806] *Addis v Gromophone Co* Ltd [1909] AC 488, HL; *Watts v Morrow* [1991] 1 WLR 1421, 1445, CA, *per* Bingham LJ; *Johnson v Gore, Wood & Co* [2002] 2 AC 1,1 37-8, HL; *Hamilton Jones v David and Snape* [2003] EWHC 3147 (Ch); [2004] 1 All ER 657, Neuberger J at [52] ff
[807] [2001] UKHL 49; [2002] 2 AC 732, HL (D Capper (2002) 118 LQR 193) and E McKendrick and M Graham [2002] LMCLQ 161; cf Canada: *Fidler v Sun Life Assurance Co of Canada Ltd* [2006] SCC 30, noted M Clapton and M McInnes (2007) 123 LQR 26-9.
[808] eg, the *Farley* case [2001] UKHL 49; [2002] 2 AC 732, HL, and *Hobbs v L & SE Ry Co* (1875) LR 10 QB 111, CA (physical inconvenience of late-night walk in the rain); breach of landlord's repairing obligation, *English Churches Housing Group v Shine* [2004] EWCA Civ 434.
[809] *Farley* case [2001] UKHL 49; [2002] 2 AC 732 at [24], *per* Lord Steyn: '*a major or important object of the contract is to give pleasure, relaxation or peace of mind.*'
[810] *Farley* case, ibid, at [52] to [69]; solicitors have been liable under this heading: *Heywood v Wellers* [1976] QB 446, CA, and *Hamilton Jones v David & Snape* [2003] EWHC 3147 (Ch); [2004] 1 WLR 921, Neuberger J.
[811] *Ruxley Electronics etc v Forsyth* [1996] AC 344, HL; Harris, Ogus and Phillips (1979) 95 LQR 581, cited by Lord Mustill in the *Ruxley* case.
[812] *Ruxley* case, ibid; literature on the *Ruxley* case includes H Beale in P Birks (ed), *Wrongs & Remedies* (Oxford University Press, 1996), 227-9; J O'Sullivan in FR Rose (ed), *Failure of Contract* (1997), ch 1; E Peel, in ibid, ch 2; B Coote [1997] CLJ 537, especially on facts (538-9) and proposals for reform (566, 569-70); J Cartwright in Burrows & Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford University Press, 2003), 9-13.

Blake (2001)[813] (**12.37** ff) recognised that the courts can make exceptional and discretionary awards of an equitable account to strip a defendant of a gain made as a result of breach of contract.

12.22 *Compensation is Not Punishment*: Contractual damages are intended to compensate the claimant, rather than to punish the defendant (see also last sentence of **12.17**).[814]

12.23 *Damages Generally Assessed at Date of Breach*: In general,[815] damages are assessed with regard to the facts as they subsisted at the time of breach,[816] notably in the cases of failure to accept or to deliver goods in contracts of sale.[817] However, a large exception to this proposition has been introduced by the House of Lords' decision in *The Golden Victory* (2007), where facts subsequent to breach are shown to have inevitably reduced the value of the damages claim. Burrows contends that the normal date for assessment should be the date of judgment.[818]

12.24 *Finality*: A claimant cannot obtain damages in successive actions in respect of the same cause of action: `Damages resulting from one and the same cause of action must be assessed and recovered once and for all.'[819]

12.25 *Causation*: Damages for a loss cannot be recovered if there is no sufficient causal connection between the defendant's breach and that loss. In *Galoo v Bright Grahame Murray* (1994),[820] the defendant accountancy firm had breached its contract by negligently failing to carry out an audit of two companies. Later the companies went into liquidation. The shareholders and liquidators of those companies sought compensation against the accountants. The claim foundered on the question of causation. The Court of Appeal held that the defendant's breach had

[813] [2001] 1 AC 268, HL.

[814] *Addis v Gramophone Co* Ltd [1909] AC 488, HL(otherwise in Canada, *Royal Bank of Canada v Got* (2000) 17 DLR (4th) 385 (SCC); noted J Edelman (2001) 117 LQR 539; *Whiten v Pilot Insurance Co* [2002] SCC 18); as for punitive damages in English tort law, *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, HL, and *A v Bottrill* [2003] 1 AC 449, PC.

[815] cf Lord Wilberforce, *Johnson v Agnew* [1980] 367, 401, HL: `...not an absolute rule...the court has power to fix such other date as may be appropriate...'

[816] S Waddams, `The Date for the Assessment of Damages' (1981) 97 LQR 445-61.

[817] Respectively, ss 50(3), 51(3) Sale of Goods Act 1979.

[818] Burrows, in M Andenas and D Fairgrieve, *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009), 598-601 (preferring the date of judgment approach adopted by Oliver J in *Radford* v *De Froberville* [1977] 1 WLR 1262 and by Lord Wilberforce in *Johnson* v. *Agnew* [1980] AC 367, HL; Burrows also citing his more detailed discussion of this topic in AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press, 2004), 188 ff, and opposing AS Waddams, `The Date for the Assessment of Damages' (1981) 97 LQR 445.

[819] *Brunsden v Humphrey* (1884) 14 QBD 141, 147, CA, *per* Bowen LJ; *Republic of India v India Steamship Co Ltd, `The Indian Grace'* [1993] AC 410, 420-1, HL; LA Collins (1992) 108 LQR 393, 394; *Jaggard v Sawyer* [1995] 1 WLR 269, 284, CA; *Deeny v Gooda Walker Ltd* [1995] 1 WLR 1206, 1214; Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (3rd edn, 1996), ch 21; Neil Andrews, *English Civil Procedure* (Oxford University Press, 2003), 40.12, n 28; AS Burrows, *Remedies on Torts and Breach of Contracts* (3rd edn, 2004), 174 ff.

[820] [1994] 1 WLR 1360, CA; Burrows, ibid, 107.

not been a sufficient factor in the companies' subsequent commercial activity, that is, their directors' decision to continue to trade.

12.26 *Remoteness*: A contractual claim for compensation will fail if the relevant loss is too `remote', having regard to the parties' field of `contemplation' at the time the contract was formed.[821] The contractual `remoteness of damage' doctrine can be formulated as follows:

> the defendant in breach of contract is only liable for substantial damages (as distinct from the award of nominal or token damages) if the relevant loss was reasonably contemplated by both parties at the time of the contract's formation as a serious possibility, taking into account
>
> (a) (`limb 1') the ordinary course of things and (b) (`limb 2') any special knowledge which the defendant had at that point.
>
> As for (b), the special information must be brought home to the defendant in circumstances indicating that contractual responsibility for that risk is now borne by him.[822]
>
> For most claims it is enough that the contemplation relates to the type of loss;[823] but in the case of claims for loss of profits, the contemplation must extend to the scale of profits.

12.27 The main context where the English contractual remoteness test has precluded recovery of damages for breach of contract concerns *unusual loss consequent on delayed or interrupted supply of goods or services*. There are four leading reported cases on that problem. In *Hadley v Baxendale* (1854)[824] Baron Alderson held that the defendant carrier would not be liable for the customer's production losses if that loss was a special vulnerability not brought home to the carrier at the time of the contract's formation. The next major decision is the *Victoria Laundry* case (1949),[825] where the Court of Appeal held that the late supply of a commercial `boiler', for use in the claimant's cleaning business, did not render the defendant liable to pay compensation for loss of profits arising from the plaintiff's `exceptionally lucrative' deal with a third party. The defendant would be liable only for `ordinary' levels of lost profits. A third case is *Balfour Beatty Construction Ltd v Scottish Power* (1994).[826] The House of Lords held that the supplier of electricity

[821] Line of cases stemming from: *Hadley v Baxendale* (1854) 9 Exch 341; on its history, AWB Simpson (1975) 91 LQR 247, 273-7 and GT Washington (1932) 48 LQR 90, 97ff; DJ Ibbetson *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), 229-31; on its modern application, Burrows, ibid, (3rd edn, 2004), 83 ff; A Kramer in N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract* (2005), 249; AM Tettenborn (2007) 23 JCL 120; A Robertson (2008) 28 LS 172.

[822] In *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112, Waller LJ at [24] and [25].

[823] *Parsons v Uttley Ingham* [1978] QB 791, CA; *Brown v KMR Services Ltd* [1995] 4 All ER 598 CA.

[824] (1854) 9 Exch 341.

[825] [1949] 2 KB 528, CA.

[826] 1994 SLT 807; 23 March, 1994 *The Times*; (a Scots case taken on final appeal to the House of Lords);