

Breach of Contract & Remedies

1 Breach of contract

Nature of breach

A breach of contract occurs where a party to a contract fails to perform, precisely and exactly, his obligations under the contract. This can take various forms for example, the failure to supply goods or perform a service as agreed.

Breach of contract may be either **actual** or **anticipatory**.

Actual breach occurs where one party refuses to form his side of the bargain on the due date or performs incompletely. For example: [Poussard v Spiers and Bettini v Gye](#).

Anticipatory breach occurs where one party announces, in advance of the due date for performance, that he intends not to perform his side of the bargain. The innocent party may sue for damages immediately the breach is announced. [Hochster v De La Tour](#) is an example.

Effects of breach

A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in three situations.

The breaches which give the innocent party the option of terminating the contract are:

(a) Renunciation

Renunciation occurs where a party refuses to perform his obligations under the contract. It may be either express or implied. [Hochster v De La Tour](#) is a case law example of express renunciation.

Renunciation is implied where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract. For example: [Omnium D'Enterprises v Sutherland](#).

(b) Breach of condition

The second repudiatory breach occurs where the party in default has committed a breach of condition. Thus, for example, in [Poussard v Spiers](#) the employer had a right to terminate the soprano's employment when she failed to arrive for performances.

(c) **Fundamental breach**

The third repudiatory breach is where the party in breach has committed a serious (or fundamental) breach of an innominate term or totally fails to perform the contract.

A repudiatory breach does not automatically bring the contract to an end. The innocent party has two options:

- ✚ He may treat the contract as discharged and bring an action for damages for breach of contract immediately. This is what occurred in, for example, [Hochster v De La Tour](#).
- ✚ He may elect to treat the contract as still valid, complete his side of the bargain and then sue for payment by the other side. For example, [White and Carter Ltd v McGregor](#).

2 Introduction to remedies

Damages is the basic remedy available for a breach of contract. It is a common law remedy that can be claimed as of right by the innocent party.

The object of damages is usually to put the injured party into the same financial position he would have been in had the contract been properly performed.

Sometimes damages are not an adequate remedy and this is where the equitable remedies (such as specific performance and injunction) may be awarded.

3 Damages

3.1 Nature:

The major remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the injured party.

In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action.

In making an award of damages, the court has two major considerations:

- ✚ **Remoteness** – for what consequences of the breach is the defendant legally responsible?
- ✚ The **measure of damages** – the principles upon which the loss or damage is evaluated or quantified in monetary terms.

The second consideration is quite distinct from the first, and can be decided by the court only after the first has been determined.

3.2 Remoteness of loss

The rule governing remoteness of loss in contract was established in *Hadley v Baxendale*. The court established the principle that where one party is in breach of contract, the other should receive damages which can fairly and reasonably be considered to arise naturally from the breach of contract itself ('in the normal course of things'), or which may reasonably be assumed to have been within the contemplation of the parties at the time they made the contract as being the probable result of a breach.

Thus, there are two types of loss for which damages may be recovered:

1. what arises naturally; and
2. what the parties could foresee when the contract was made as the likely result of breach.

As a consequence of the first limb of the rule in *Hadley v Baxendale*, the party in breach is deemed to expect the normal consequences of the breach, whether he actually expected them or not.

Under the second limb of the rule, the party in breach can only be held liable for abnormal consequences where he has actual knowledge that the abnormal consequences might follow or where he reasonably ought to know that the abnormal consequences might follow – *Victoria Laundry v Newman Industries*.

3.3 The measure (or quantum) of damages

In assessing the amount of damages payable, the courts use the following principles:

- ✚ The amount of damages is to compensate the claimant for his loss not to punish the defendant.
- ✚ Damages are compensatory – not restitutionary.

The most usual basis of compensatory damages is to put the innocent party into the same financial position he would have been in had the contract been properly performed. This is sometimes called the 'expectation loss' basis. In *Victoria Laundry v Newman Industries*, for example, Victoria Laundry were claiming for the profits they would have made had the boiler been installed on the contractually agreed date.

Sometimes a claimant may prefer to frame his claim in the alternative on the 'reliance loss' basis and thereby recover expenses incurred in anticipation of performance and wasted as a result of the breach – *Anglia Television v Reed*.

In a contract for the sale of goods, the statutory (Sale of Goods Act 1979) measure of damages is the difference between the market price at the date of the breach and the contract price, so that only nominal damages will be awarded to a claimant buyer or claimant seller if the price at the date of breach was respectively less or more than the contract price.

In fixing the amount of damages, the courts will usually deduct the tax (if any) which would have been payable by the claimant if the contract had not been broken. Thus if damages are awarded for loss of earnings, they will normally be by reference to net, not gross, pay. Difficulty in assessing the amount of damages does not prevent the injured party from receiving them: *Chaplin v Hicks*.

In general, damages are not awarded for non-pecuniary loss such as mental distress and loss of enjoyment. Exceptionally, however, damages are awarded for such losses where the contract's purpose is to promote happiness or enjoyment, as is the situation with contracts for holidays – *Jarvis v Swan Tours*.

The innocent party must take reasonable steps to mitigate (minimise) his loss, for example, by trying to find an alternative method of performance of the contract: *Brace v Calder*.

3.4 Liquidated damages clauses and penalty clauses

If a contract includes a provision that, on a breach of contract, damages of a certain amount or calculable at a certain rate will be payable, the courts will normally accept the relevant figure as a measure of damages. Such clauses are called **liquidated damages clauses**.

The courts will uphold a liquidated damages clause even if that means that the injured party receives less (or more as the case may be) than his actual loss arising on the breach. This is because the clause setting out the damages constitutes one of the agreed contractual terms – *Cellulose Acetate Silk Co Ltd v Widnes Foundry Ltd*.

However, a court will ignore a figure for damages put in a contract if it is classed as a **penalty clause** – that is, a sum which is not a genuine pre-estimate of the expected loss on breach.

This could be the case where:

1. The prescribed sum is extravagant in comparison with the maximum loss that could follow from a breach.
2. The contract provides for payment of a certain sum but a larger sum is stipulated to be payable on a breach.
3. The same sum is fixed as being payable for several breaches which would be likely to cause varying amounts of damage.

All of the above cases would be regarded as penalties, even though the clause might be described in the contract as a liquidated damages clause. The court will not enforce payment of a penalty, and if the contract is broken only the actual loss suffered may be recovered (*Ford Motor Co (England) Ltd v Armstrong*).

4 Equitable remedies

4.1 Specific performance

This is an order of the court requiring performance of a positive contractual obligation.

Specific performance is not available in the following circumstances:

- ▶ Damages provide an adequate remedy.
- ▶ Where the order could cause undue hardship.
- ▶ Where the contract is of such a nature that constant supervision by the court would be required, eg, *Ryan v Mutual Tontine Association*.
- ▶ Where an order of specific performance would be possible against one party to the contract, but not the other.
- ▶ Where the party seeking the order has acted unfairly or unconscionably. He is barred by the maxim 'He who comes to Equity must come with clean hands'.
- ▶ Where the order is not sought promptly the claimant will be barred by the maxims 'Delay defeats the Equities' and 'Equity assists the vigilant but not the indolent'.

In general the court will only grant specific performance where it would be just and equitable to do so.

4.2 Injunction

An injunction is an order of the court requiring a person to perform a negative obligation.

Injunctions fall into two broad categories:

- 🚫 Prohibitory injunction, which is an order that something must not be done.
- 🚧 Mandatory injunction, which is an order that something must be done, for example to pull down a wall which has been erected in breach of contract.

Like specific performance it is an equitable remedy and the court exercises its discretion according to the same principles as with specific performance, eg, *Page One Records Ltd v Britton* and *Warner Brothers v Nelson*.