THE LAW OF CONTRACT

REMEDIES FOR BREACH OF CONTRACT

Civil remedies may further be subdivided according to the nature of the relief claimed. The injured party may claim specific relief, damages or restitution.

A claim for specific relief is one for the actual performance of the defaulting party’s undertaking. It is usually associated with the so-called equitable remedies of specific performance and injunction but a common law action to recover the agreed sum due under a contract (eg an action for the price, or for wages) is also a claim for specific relief.

A claim for damages is one for money to compensate the injured party for the fact that he has not received the agreed performance.

A claim for restitution arises when the claimant has, in performing his part of the contract, conferred a benefit on the defendant and seeks to get back that benefit or its value. For example, a buyer who has paid in advance but has not received delivery may claim the return of his money. Where precise restitution is physically impossible, the court may award the reasonable value of the benefit: for example, the value of services rendered in partial performance of a contract which cannot be fully performed because it has been frustrated.

THE LAW OF DAMAGES

Ordinary contractual damages

Damages are always available, and can be claimed as of right, whenever a contract has been broken. In this respect they differ from claims for specific relief or restitution, which may be subject to the discretion of the court and to other restrictions to be discussed later in this chapter. Even if the injured party has not proved any loss, he is entitled to nominal damages. Such damages may be claimed simply to establish the existence of a legal right; but an action for a declaration is now a more appropriate remedy for this purpose.

Under both English and Scots law, the general law of contract provides a remedy to a party who suffers loss when another contracting party breaches a term of the contract. The innocent party
may claim damages for loss suffered as a result of the reach subject to certain limitations. Traditionally, these are (See *Chitty on Contracts* (31st ed 2012) Chapter 26):

(1) that actual loss, usually financial, was incurred;

(2) that the loss was foreseeable at the time the contract was entered into; and

(3) that the innocent party has taken reasonable steps to mitigate that loss.

The principle of foreseeable loss was set out in 1854 in the case of *Hadley v Baxendale* ((1854) 156 ER 145), which is applied in Scotland as well as England and Wales. Damages may be recovered if the type of loss “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract.” This may mean losses:

(1) which may fairly and reasonably be considered as arising naturally, “according to the usual course of things”, and/or

(2) arising from any special circumstances which were communicated at the time the contract was made (Above, by Alderson B at 354).

The test under *Hadley v Baxendale* has been considered many times and applied cautiously (see, for example, *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; *Koufos v C Czarnikow (The Heron 11)* [1969] 1 AC 350. In particular, it was noted in *The Heron II* that the test is more restricted than “reasonably foreseeable” loss in tort law, by Lord Reid at 385. See also *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791. For Scots law see, for example, *Caledonian Property Group Ltd v Queensferry Property Group Ltd* 1992 SLT 178; *Nelson Cladding Ltd v Murray Williamson (Builders) Ltd* 1995 SLT (Sh Ct) 86; *Ogilvie Builders Ltd v City of Glasgow District Council* 1995 SLT 15; and *Alonvale Ltd v J M Ing* 1993 GWD 36-2345). The courts have stressed that the rule on foreseeable loss should be applied with a view to commercial reality, the context in which the contract was made and what the parties may reasonably have expected (*Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovis (The Achilles)* [2008] UKHL 48 [2009] 1 AC 61, which has been cited on a number of occasions in Outer House cases in Scotland, for example *Donoghue v Greater Glasgow Health Board* [2009] CSOH 115, 2009 GWD 27-432; and *Upton Park Homes Ltd v Macdonald Solicitor* [2009] CSOH 159, 2010 GWD 2-38, [2010] PNLR 12. Indeed, following *The
Achilleas, it may be that even losses that were not unlikely to occur in the usual course of things will not be recoverable if the defendant could not reasonably be regarded as assuming responsibility for losses of the particular kind suffered. There is still considerable uncertainty around this: see Chitty on Contracts (31st ed 2012) Chapter 26. See also IP6. Paras 3.14 to 3.18).

The claimant’s duty to mitigate the loss is another important limitation on the contractual damages available (British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2) [1912] AC 673). The law expects the victim of a breach of contract to act as if there is no one from whom to claim compensation. This means that the victim must take all reasonable steps to reduce the scale of the loss.

The general law of contractual damages therefore offers some relief to a claimant who has suffered loss as a result of another’s failure to perform their contractual obligation. However, it does so in a careful way, striking a balance between the rights of the parties.

The compensatory principle

The purpose of damages is, in general, to compensate the injured party. The following points arising from this ‘compensatory principle’: -

Loss to claimant or gain to defendant?

As a general rule, damages are based on loss to the claimant (or, in certain exceptional cases, to a third party) and not on gain to the defendant. For example, an employee who in breach of contract left his job to take up a better-paid one elsewhere would not have to hand over his extra earnings in the new job to the original employer: he would be liable for no more than the loss (if any) which the latter had suffered in consequence of the breach (cf The Siboen and the Sibotre [1976] 1 Lloyd’s Rep 293 at 337 (charterparty)).

The distinction between loss to the claimant and gain to the defendant is further illustrated by the situation in which the defendant in breach of contract uses the claimant’s property. The defendant is then liable for the reasonable rental value of the property even though the claimant would not himself have used it or let it out to anyone else (Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd’s Rep 359). This liability is based, not on gain to the defendant, but on the fact that the breach has deprived the claimant of the chance of letting the property out to some person of his choice.
This ‘loss of a bargaining opportunity’ (see A-G v Blake [2001] 1 AC 268 at 281) was also the basis on which damages were assessed where a developer built houses in breach of a restrictive covenant entered into for the benefit of an adjoining landowner. The breach did not reduce the value of the adjoining land but damages were nevertheless awarded amounting to 5% of the developer’s profit, this being the amount which the landowner could reasonably have demanded for releasing the covenant (Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798; cf Jaggard v Sawyer [1995] 2 All ER 189). The basis of such awards is not that the defendant has made a profit from the breach, but that the claimant has suffered loss; and if in a particular case the lost bargaining opportunity has no value, then the damages may be no more than nominal (Surrey County Council v Bredero Homes Ltd [1993] 3 All ER 705, doubted in A-G v Blake [2001] 1 AC 268 at 283).

Gain to the defendant is, however, exceptionally taken into account in a number of situations. If the defendant in breach of contract abuses a ‘fiduciary’ position (e.g. if an agent makes a profit by using confidential information acquired in his capacity as agent) he must account for any profit so made (Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 387; cf A-G v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at 262, 268; A-G for Hong Kong v Reid [1994] 1 AC 324; Mathew v T M Sutton Ltd [1994] 4 All ER 793. Partnership Act 1890, ss 29, 30). On the conclusion of a contract for the sale of land, the vendor is regarded as a trustee of the land for the purchaser and if in breach of the contract the vendor resells the land to a third party at a profit, the purchaser is in equity entitled to that profit (see Lake v Bayliss [1974] 2 All ER 1114). Liability in these cases is not based on breach of contract as such, but on equitable principles.

A more general, if limited, exception to the compensatory principle was recognised in A-G v Blake ([2001] 1 AC 268). In that case, George Blake, a member of the security services, had disclosed secret information to the Soviet Union, in breach of the terms of employment and of the Official Secrets Act 1911. Having been convicted of an offence under the Act, he escaped from prison and fled to Moscow. Some 20 years later, in further breach of the terms of his employment, he there entered into, and performed his part of, a contract with an English publisher for the publication of his memoirs. By then, the information in the book was no longer confidential, so that the qualifications to the compensatory principle did not apply; no confiscation order could be made in criminal proceedings as Blake was beyond the reach of English criminal law; there was no point in seeking an injunction as the book had been published; and compensatory damages were not a sufficient remedy as the publication had not caused any material loss to the Crown. The House of Lords nevertheless (by a majority) held Blake liable to account to the Crown for the amounts due to him from his publishers. It did so on the ground that, where no other sufficient remedy was
available, the court should ‘exceptionally’ be able to grant the ‘discretionary’ ([2001] 1 AC 268 at 284-285) remedy of requiring the defendant to account for benefits derived by him from the breach.

**Meaning of ‘loss’**

In the present context, ‘loss’ means any harm to the person or property of the claimant, and any amount by which his wealth is diminished in consequence of the breach. Suppose that a seller has contracted to deliver a car on October 1, and in breach of contract he delivers it a month later. The buyer has suffered loss in not having the car for a month and this would be so even if the car would not have been of any use to him during that month, eg because he was ill or abroad for the whole of it. Such factors could affect the amount of loss suffered, but the claimant is not generally deprived of his right to damages merely because it is shown that he would (or would not) have used the subject matter of the contract in a particular way. Exceptionally, the fact that the claimant had resold the subject-matter may be relevant for the purpose of showing that he suffered no loss.

In determining whether the claimant has suffered loss, regard must be had to his overall position in consequence of the breach. Suppose that a seller who has not been paid fails to deliver on a falling market. No doubt the buyer is deprived of the goods which were due to him; but at the same time he is released from his obligation to pay the price, and he can buy substitute goods more cheaply in the market. Hence he has not suffered any overall loss. Similarly, the buyer will suffer no loss if he accepts goods which are not in accordance with the contract but which are no less valuable than the goods which the seller ought to have delivered.

Even where the claimant has suffered loss, his overall position is similarly taken into account in determining the extent of the loss. Benefits which he obtains in consequence of the breach are therefore set off against the prejudice that he suffers; and it is the difference between these two amounts which constitutes his loss. Thus an employee who is wrongfully dismissed must set off against his lost wages any amounts earned in substitute employment. The court will not generally award damages which will actually put the injured party into a better position than that in which he would have been, if the breach had not occurred (*Philips v Ward* [1956] 1 All ER 874; *Perry v Sidney Phillips & Sons* [1982] 3 All ER 705). But an exception may be made to this principle where its strict application would create a practical dilemma for that party. The exception is illustrated by a case (*Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (overruled, but on another point, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827); *Watts v Morrow* [1991] 4 All ER 937) in which A rebuilt his factory after it had been burnt down as a result of B’s breach of
contract. It was held that A could recover the whole cost of rebuilding without making any allowance for the fact that he now had a new factory, worth more than the old one which had been destroyed. To take this benefit into account would, in effect, have forced A to spend money on improvements which he might not have wanted, or which he could not have afforded; for he had no reasonable alternative but to rebuild and had done so in order to mitigate his loss.

No punitive damages

In tort cases, the courts occasionally mark their disapproval of the defendant’s conduct by awarding damages in excess of the claimant’s loss. They may, for example, do so where a person publishes a book, with a view to profit, knowing that it contains defamatory matter (Cassell & Co Ltd v Broome [1972] AC 1027). Such punitive (or exemplary) damages cannot be awarded in a purely contractual action (Perera v Vandiyar [1953] 1 WLR 672). However, the same conduct may amount both to a breach of contract and to a tort; for example, where a landlord unlawfully evicts his tenant. In such cases, the injured party can recover punitive damages if he frames his claim in tort (Drane v Evangelou [1978] 2 All ER 437).

Injury to feelings

Punitive damages must be distinguished from damages for injured feelings. The latter are awarded not to punish the defendant, but to compensate a claimant for an injury which he has actually suffered, even though it may not be an economic one. Although such damages are often awarded in tort actions, their availability for breach of contract is limited; a person cannot recover damages merely because the breach of a contract made in the course of his business causes him distress (Hayes v James & Charles Dodd [1990] 2 All ER 815; Johnson v Gore Wood & Co [2002] 2 AC 1); and it has been held that a wrongfully dismissed employee cannot recover extra damages because the manner of his dismissal was ‘harsh and humiliating’ (Addis v Gramophone Co Ltd [1909] AC 488 at 493; Shove v Downs Surgical plc [1984] 1 All ER 7; Bliss v South East Thames Regional Health Authority [1987] ICR 700). But this last rule is now open for reconsideration (See Johnson v Unisys Ltd [2001] UKHL 13, [2001] ICR 480 at [2], [43; Eastwood v Magnox Electric plc [2004] UKHL 35 at [11]; [2004] 3 WLR 322. But damages for injured feelings cannot be included in an award of compensation available by statute for unfair (as opposed to wrongful) dismissal: Dunnachie v Kingston upon Hull City Council [2004] UKHL 36, [2004] 3 WLR 310); and there are many other indications of a growing judicial willingness to award damages of this kind. In particular, damages for injured feelings or distress can be recovered in a contractual action where it is the very object of
the contract to promote the enjoyment or comfort of the injured party. Such damages have, for
example, been awarded against package tour operators for failing to provide holiday
accommodation of the standard required by the contract (Jarvis v Swan Tours Ltd [1973] QB 233);
and against a solicitor whose negligence resulted in his client’s losing the custody of her children
(Hamilton Jones v David & Snape [2003] EWHC 3147 (Ch), [2004] 1 All ER 657); and (in California)
against embalmers whose efforts failed to achieve the degree of preservation required by the
contract (Chelini v Nieri 196 P 2d 915 (1948)).

Damages are also sometimes awarded for inconvenience, as opposed to distress: for example
against a surveyor who negligently fails to draw his client’s attention to defects in a house which the
client later buys as his home (Perry v Sidney Phillips & Son [1982] 3 All ER 705; Watts v Morrow
[1991] 4 All ER 937). It can obviously be hard to distinguish between those two types of loss. In one
case (Roxley Electronics and Construction Ltd v Forsyth [1996] AC 344), damages for ‘loss of amenity’
were awarded where a contract to build a swimming pool for the customer’s own use was broken by
building it to less than the stipulated depth. In another (Farley v Skinner [2001] UKHL 49, [2002] 2
AC 732), the purchaser of a house recovered damages from his surveyor whom he had asked to
report on the extent to which the house was affected by aircraft noise and who, in breach of
contract, failed to provide accurate information on this point. The breach did not in either case
cause any material loss, and it is just as plausible to describe the damages as compensation for
inconvenience as of distress.

Damages for injured feelings must further be distinguished from damages for ‘anxiety’. The reason
why damages of the latter kind cannot generally be recovered in a contractual action (Cook v
Swinfen [1967] 1 All ER 299) is that some uncertainty always exists about the performance of a
contract; so that ‘anxiety’ is a risk to which anyone who enters into a contract voluntarily exposes
himself. Such damages have, for example, been refused where a bank in breach of contract
wrongfully debited its customer’s account (McConville v Barclays Bank (1993) Times, 30 June).
Damages can, however, be recovered where the very object of the contract is to remove a pre-
existing state of anxiety: for example, from a solicitor who failed to take necessary steps in non-
molestation proceedings, so that the molestation of his client continued (Heywood v Wellers [1976]
QB 446).

Damages for injured feelings must further be distinguished from so-called ‘stigma’ damages: that is,
damages for injury to reputation. Such damages are, for example, recoverable where an employer’s
breach of the contract of employment prejudices his former employee’s future employment
prospects (Malik v BCCI SA [1998] AC 20); or where a banker’s breach of contract prejudices his customer’s business reputation (Rolin v Steward (1854) 14 CB 595 at 605) or credit rating (Kpohraror v Woolwich Building Society [1996] 4 All ER 119 at 124). They are recoverable for the injured party’s economic loss and not for the injury to his feelings that may incidentally be caused by such breaches (Hence the claims for ‘stigma’ damages in the Malik case [1998] AC 20 eventually failed for want of proof that the stigma had resulted in rejection of job applications: BCCI SA v Ali [2002] EWCA Civ 82, [2002] ICR 1258).

EXPECTATION, RELIANCE AND RESTITUTIONARY CLAIMS

A breach of contract may cause different kinds of loss and we have to ask for which of these compensation will be given.

Expectations

The first, and most important, principle is that the law protects the expectations created by a contract. Damages are therefore awarded to put the claimant into the position in which he would have been if the contract had actually been performed (Robinson v Harman (1848) Exch 850 at 855); he is entitled to damages for loss of his bargain. It is therefore necessary to determine exactly what the injured party has bargained for, or (in other words) the scope of the duty undertaken by the party in breach. The point can be illustrated by supposing that A intends to lend money on the security of property belonging to X and engages B to value that property. B negligently values the property at £9 million when it is actually worth no more than £6 million; in reliance on that valuation, A lends £7 million to X, who defaults on the loan; and at the time of that default the property has fallen in value so that it yields no more than £2.5 million. A’s total loss is therefore £4.5 million but B is liable to him for no more than the £3 million by which B had overvalued the security (South Australia Asset Management Corp v York Montague Ltd [1997] AC 191 (‘the SAAMCO case’); Nykredit Mortgage Bank plc v Edward Erdman Group Ltd [1997] 1 WLR 1627 (‘the Nykredit case’). The underlying principle is that a wrongdoer is liable only for ‘those consequences which are attributable to that which made the act wrongful’ (SAAMCO case [1997] AC 191 at 213); and where the wrong is a breach of contract, ‘that which made the act wrongful’ depends on the definition of what should have been done under the contract. In the case put, B’s contractual duty was merely one to provide information and he was therefore liable only for the loss which flowed from his having failed to take reasonable care to give accurate information. The position would have been different if B had undertaken to advise A as to whether to make the loan to X on the security of the
property. Failure to take reasonable care in giving that advice would then have made B liable for the whole of A’s loss ([1997] AC 191 at 214). The difference between the outcomes in these two examples follows from the fact that the scope of B’s duty is not the same where he merely undertakes to provide information as it is where he advises A to take a course of action. It ‘has nothing to do with questions of causation or any limit or “cap” [such as remoteness] upon damages which would otherwise be recoverable’ (Nykredit case [1997] 1 WLR 1627 at 1638). Obviously, however, the distinction is sometimes hard to draw (cf Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd [2001] UKHL 51, [2001] 2 All ER (Comm) 929 at [10]-[12]). On the one hand, certain kinds of professional ‘advice’ may amount to no more than the giving of information; while, on the other, a statement that the brakes of a car have been repaired may mean that it can safely be driven and so amount both to information and advice.

The protection of expectations created by the contract is the feature which distinguishes contractual actions from actions in tort (in the ‘disappointed beneficiary’ cases discussed, damages for loss of expectations are recoverable in tort, but the expectations in question exist independently of the contract and are not created by it); and it is particularly important where the claimant has made a good bargain. Suppose that A agrees to sell goods to B for £100. At the time fixed for delivery they are worth £150. If A fails to deliver, B’s damages will be based on the value of the goods that he ought to have received: ie the damages will be £150 if B has already paid for the goods and £50 if he has not. The same principle applies where A warrants that the goods are ‘grade 1’ quality and he delivers goods of ‘grade 2’ quality. If B ‘accepts’ the goods, his damages will be based on the difference in value between what he has actually received (grade 1 goods). The position is different where A does not warrant but only represents that the goods have a certain quality. Here B may be entitled to damages in tort for misrepresentation and in such an action expectations created by the representation are not protected.

**Reliance**

Expenses may be incurred or other losses suffered in reliance on the contract. For example, a buyer may be required by the contract to collect the goods, and if he takes steps to do so but the seller fails to provide the goods, then the buyer will have wasted the costs of collection. Expenses may also be wasted if the claimant incurs them for the purpose of making use of the subject matter, even though he is not required by the contract to incur them. For example a buyer’s costs of installing machinery may turn out to be useless because it is not up to the standard laid down in the contract. Subject to restrictions to be stated below, damages can be recovered in respect of such reliance loss.
This may be true even where the expenses are incurred before the contract. In one case (Anglia Television Ltd v Reed [1972] 1 QB 60) a television company incurred preliminary expenses of £2,750 for the purpose of making a film. They then engaged an actor for the leading part, and he later repudiated the contract. He was held liable for the £2,750 as reliance loss. The company had relied on their contract with him, not in incurring the expenditure, but in allowing it to be wasted: that is, in forbearing to look for someone else to play the part.

Restitution

Such a claim may arise where the injured party has, in performing his part of the contract, conferred a benefit on the other party. It is, for example, available where the defaulting party has wholly failed to perform his part of the contract. Thus if a seller has been paid in advance and then refuses to deliver the goods, he is liable to restore the price to the buyer. The effect of such a claim is to put both parties into the position in which they would have been if the contract had never been made. In this respect it differs from a claim for loss of expectations, which is meant to put the claimant into the position in which he would have been if the contract had been performed. It also differs from a claim for reliance loss: this may put the injured party into the position in which he would have been if the contract had never been made, but it will often leave the guilty party in a worse position; and it may be available even though that party has not received any benefit. As a general rule, restitution is only available only in respect of such benefits. A claim for restitution is not strictly one for ‘damages’ (A-G v Blake [2001] 1 AC 268 at 284).

Relation between expectation, reliance and restitution claims

This is a complex subject, but three leading principles are clear.

First, the claimant can often choose whether to base his claim on expectation, reliance or restitution. The defendant has no similar choice: he cannot insist that the claimant should get only reliance loss or restitution. If the defendant could do this, it would be too easy for him to get out of a bad bargain: for example, a seller who had sold goods for less than they were worth could simply pay back the price. Obviously in such a case the buyer would not want his money back, but damages for loss of his bargain.

Secondly, the claimant’s choice is in some respects limited. Sometimes he cannot claim for loss of expectation. Where the value of his expectation is so speculative that it cannot be satisfactorily
proved, he will be able to claim only reliance loss and restitution (*McCrae v Commonwealth Disposals Commission* (1950) 84 CLR 377 at 411). In many cases the claimant cannot get restitution. For example, a claim to get back money paid under a contract may be rejected if the breach is not sufficiently serious to amount, or to give rise, to a ‘total failure of consideration’. Where this requirement is satisfied, restitution can be claimed even though it will leave the claimant better off than he would have been if the claimant has made a bad bargain. Suppose he has paid £100 in advance for goods which are worth only £75. If the seller fails to deliver, the buyer will get back the whole of his £100. The law will not limit the seller’s liability to £75 for, if it did this, the end result would be that the seller would keep £25 for doing absolutely nothing. On the other hand, the court will not award the claimant his *whole reliance* loss if this would clearly leave him better off then he would have been if the contract had been performed (*C and P Haulage v Middleton* [1983] 3 All ER 94). Suppose A contracts to sell aero engines to B for £100m, and that he has incurred development expenses of £150m when B repudiates the contract. Here A cannot get more than £100m even if he claims reliance loss. Any further loss to A is the result, not of B’s breach, but of the fact that A has made a bad bargain; and there is no compelling reason in this example for shifting that loss to B, since B will not be enriched if a ceiling of £100m is placed on his liability. It does not follow that a claim for reliance loss can never yield more than one for loss of expectation: it may do so where the claimant cannot prove the value of his expectation: or where the value of the expectation is speculative. In the case of the television film mentioned above, the company’s profits might or might not have exceeded the £2,750 recovered as reliance loss. The company did not have to prove what these profits would be. Its claim for reliance loss would have been reduced to the level of its expectations only if the actor could have proved that the profits would certainly have been less than the amount of the reliance expenditure (*CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16).

Thirdly, although the claimant may be able to choose between expectation, reliance and restitution, it does not follow that he must choose: in other words, the various claims can sometimes be combined. In one case (*Millar’s Machinery Co Ltd v David Way & Son* [1935] 40 Com Cas 204) machinery was delivered and paid for, and installed by the buyer. It was then found not to be in accordance with the contract and the buyer recovered the price he had paid (restitution), his installation expenses (reliance) and the net profits which he had lost because his productive capacity was reduced in consequence of the breach (expectation). Of course the buyer could not get the restitution and reliance items plus his *gross* profits, for this would give him these profits plus the costs of earning them, and so in effect give him damages twice over for the same loss (*Cullinane v British Rema Manufacturing Co Ltd* [1954] 1 QB 292; *TC Industrial Plant Pty Ltd v Robert’s
Queensland Pty Ltd [1964] ALR 1083). But, so long as this danger of duplicating damages is avoided, there is no reason why claims of the kind here described should not be combined.

CONSEQUENTIAL AND INCIDENTAL LOSS

The expression ‘consequential loss’ is used in the law of contract in several senses. First it is used simply to refer to loss of profits, that is to an element of expectation loss. Secondly, it is used to refer to reliance loss, such as expense wasted by a buyer in attempting to collect goods which the seller wrongfully refuses to deliver. The breach may not merely deprive the claimant of what he bargained for; he may suffer further harm as a result of the defect in the defendant’s performance. Suppose that the seller of a cow in breach of contract delivers an animal that is diseased. The buyer is entitled to the difference in value between this cow and a healthy one as damages for loss of his bargain. But he may also have put the diseased cow with his other cattle which in consequence were infected and died. He can recover the value of those cattle as a consequential loss in the present sense (Smith v Green (1875) 1 CPD 92). Yet it is hardly realistic to say that the buyer expected not to lose the other cattle or that he put the cow which he had bought with the others in reliance on her not being diseased. The possibility of injury to the other cattle may simply not have crossed his mind. His right to such consequential loss does not fit easily into the categories of expectation and reliance.

The same is true of a further type of loss. Suppose a seller fails to deliver and the buyer makes a substitute purchase. Even if the price of the substitute is the same as that of the goods originally bought, the buyer will have suffered some loss: namely, the administrative expenses of making the second contract. There is no doubt that he can recover such loss (Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd [1962] 1 All ER 418) which (following an American usage) may be called incidental loss (Uniform Commercial Code, s.2-715(1)).

VALUING THE LOSS

For the purpose of an award for damages, the claimant’s loss has to be translated into money terms.

The bases of assessment

The first of these is to determine the basis on which the assessment is to be made. Where the claim is for reliance loss, the basis is the cost to the claimant of his action or forbearance in reliance on the
contract. Where the claim is for restitution, the basis if the benefit obtained by the defendant. But where the claim is for expectation loss, or for consequential loss (in the third of the above senses) there are at least two possible bases of assessment. These will be called ‘difference in value’ and ‘cost of cure’.

In some cases both of these bases of assessment will lead to the same result. Where a seller of goods fails to deliver, the buyer is entitled to damages based on the cost of substitute goods; and this can be described either as the difference in value between what he has got (nothing) and what he should have got (the goods), or as the cost of ‘curing’ the seller’s breach. But (as the following discussion will show) there are other cases in which the choice between the two bases can be of crucial importance. The choice between them is not governed by any fixed or general rule: there are only two prima facie rules, and even these are not rigidly applied. Two illustrations must suffice.

First a seller in breach of contract delivers defective goods. The Sale of Goods Act 1979 here states that prima facie the damages are based on the difference between the actual value of the goods and the value which they would have had, if they had been in accordance with the contract (Section 53(3). If the price has not been paid, the buyer can reduce it by the above amount: s.3(1)(a). The price reduction available under ss.8A(2)(b)(i) and 48C(1)(a) to a buyer who deals as consumer is a concept taken from the Civil law and will probably give the buyer, not the difference in value as such, but a reduction of the price in proportion to that difference. The rule is probably based on the assumption that the defect is one that cannot be cured: for example, that the goods are of a different commercial grade from that contracted for. The buyer can then resell those goods and, with the proceeds of sale together with damages based on difference in value, acquire goods of the contract quality. The rule is only a prima facie one: if the defect is one that can be cured (for example, if the sale is of a car with defective brakes) the court would probably award the cost of cure (cf Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683 at 711-712 (hire-purchase).

Secondly, a builder in breach of contract fails to complete the work which he has contracted to do, or to execute it in accordance with the specifications. Here the law starts with the assumption that the damages will be based on cost of cure (Hoenig v Isaacs [1952] 2 All ER 176; Tito v Waddell (No 2) [1977] Ch 106 at 333; Radford v de Froberville [1978] 1 All ER 33; Dean v Ainley [1987] 3 All ER 748). This is reasonable since normally the owner will in fact need to cure the defects: a house without a roof, or a central heating system which does not work, is of no use to him. A more difficult problem arises where the breach does not make the building appreciably less useful or valuable to the owner but is nevertheless very expensive to cure. This was the position where a builder broke a contract to
build a swimming pool for some £38,500 by making its maximum depth nine inches less than that specified in the contract. This did not significantly affect the value of the pool; nor did it make the pool unserviceable or unsafe, so that the high cost of rebuilding it to the stipulated depth would have been wholly disproportionate to any benefit that the customer would have obtained from this operation. Hence there was no ‘difference in value’, nor could the customer recover the high ‘cost of cure’ (Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344) because it would have been unreasonable, and in conflict with the principle of requiring him to mitigate his loss, for him to incur this cost. He recovered only a much smaller sum as compensation for ‘loss of amenity’.

Where the cost of cure basis applies, the starting principle is that the claimant can use the damages in any way he pleases and so does not need to show that he has undertaken cure or proposes to do so (Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 at 359; and cf at 372). If it is clear that for some other reason that the breach will not be cured, then this fact may induce the court to apply the difference in value basis: for example, where the claimant, instead of curing the breach, has disposed of the subject-matter (Perry v Sidney Phillips & Son [1982] 3 All ER 705; Calabar Properties Ltd v Stitcher [1984] 1 WLR 287 at 299).

Relevance of market values

Where damages are based on difference in value, or on the cost of a substitute, the question arises whether they are to be based on the actual difference or cost, or on market values. The question will here be discussed by taking the common cases of failure by a seller to deliver goods, or by a buyer to accept and pay for them. There is said to be a ‘market’ for goods if there is a place in which they can be bought and sold at a price fixed by supply and demand (Dunkirk Colliery Co v Lever (1878) 9 Ch D 20).

Where a seller wrongfully fails to deliver, the buyer is entitled to the value of the goods, less the price if he has not yet paid it. If there is no market the court has to assess that value as best it can. Relevant factors include the cost of a reasonably close substitute, and the price at which the buyer may have resold the goods to a sub-buyer at or about the time of the seller’s breach. If there is a market, the value of the goods is prima facie assessed by reference to it so that the buyer (assuming that he has not yet paid) will be entitled to the amount (if any) by which the market price exceeds the contract price (Sale of Goods Act 1979, s 51(3)). The reason for the rule is that ‘the buyer is entitled to the expense of putting himself in the position of having those goods, and this he can do by going into the market and purchasing them at the market price’ (Williams Bros v ET Agius Ltd
This principle applies where goods are bought for resale, no less than where they are bought for use. Suppose that A sells 100 tons of wheat to B for £x per ton and B then sells 100 tons of wheat to C for £x + 3 per ton, intending to deliver to C the wheat that is due from A. Later A fails to deliver the wheat; and at this time the market value of the wheat is £x + 5 per ton. B’s damages will prima facie be £5 per ton and not £3 per ton (Williams Bros v ET Agius Ltd [1914] AC 510). The theory is that, as B saw the market rise, he might have bought another 100 tons of wheat (say at £x + 1) to supply to C, and still have had the benefit of his contract with A. Similar reasoning applies in the converse situation. If the sale to C was at £x + 5 and the market price at the date of breach was £x + 3, B’s damages will prima facie be £3 per ton, for he could not have bought at £x + 3 to supply C (Williams v Reynolds (1865) 6 B & S 495). But such reasoning does not apply where B is bound to deliver to C the very same wheat that he bought from A. Suppose that A sells to B the cargo of wheat of a named ship at £x per ton and B resells that cargo to C for £x + 5 per ton. Here B’s loss will be £5 per ton even if the market price of similar wheat at the date of A’s default was £x + 3 per ton. The point is that B could not pass on to C other wheat bought in the market at £x + 3 per ton since C was only bound to accept, and to pay £x + 5 per ton for, the particular cargo in question (Williams Bros v ET Agius Ltd [1914] AC 510 at 523; it is assumed that the resale is not too remote for a consequence: see post, pp 389-392, and Re R and H Hall Ltd and W H Pim Jnr & Co’s Arbitration (1928) 139 LT 50).

Similar principles apply where a buyer wrongfully fails to accept and pay for the goods. Here the assumption is that, on the buyer’s default, the seller will sell the goods to someone else, and his damages will be based on the proceeds of the substitute sale. If there is no market, the damages will be based on the actual proceeds so long as the substitute sale was, in all the circumstances, one which it was reasonable to make. If there is a market, the damages are prima facie assessed by reference to it so that the seller will be entitled to the amount (if any) by which the contract price exceeds the market price (Sale of Goods Act 1979, s 50(3)). The fact that the seller has actually resold above or below the market price is again irrelevant, unless the sale is of particular goods as opposed to a sale of a quantity of some generic marketable commodity.

The rules stated above are concerned only with valuing one of the claimant’s expectations, namely his expectation of getting the performance promised to him. They do not necessarily lay down the limits of his recovery, for he may also have another expectation, that of getting a profit out of the subject-matter. This is obvious enough where the seller is in breach and the buyer loses profits which he expected to make out of the use of the goods. He may lose such profits during the time it takes him to get a substitute; if so, he can recover damages even though the actual cost or market
price of the substitute does not exceed the contract price. A somewhat similar possibility exists where the buyer is in breach. Suppose that a car dealer (A) agrees to sell a new car to a customer (B) for £9,000 and that B wrongfully refuses to accept and pay. A thereupon sells the car to C for £9,000 and claims damages from B for the loss of his profit on the contract with him. A’s case is that he would, if B had not defaulted, have made two sales and two profits and that he has lost one of these. Such a claim will succeed if A can show that he would, but for B’s breach, have performed not only his contract with B, but also that with C: e.g. if A could have got twenty cars from the manufacturers and have found only ten customers, including B and C. The result of B’s default in such a case is that A loses one sale (W L Thompson Ltd v Robinson (Gunmakers) Ltd [1955] Ch 177). But A would not be entitled to damages for loss of his profit on the contract with B in the converse case in which he can only get ten cars but can find twenty customers (Charter v Sullivan [1957] 2 QB 117). Here A will still make the maximum number of ten sales in spite of B’s default. The only loss he suffers is a small amount of incidental loss, that is, the extra expense of negotiating the sale with C. The position is the same if the sale is of a unique object (such as a second-hand car): here there can obviously be only one sale and one profit, and this is not lost if C buys for the same price that B had agreed to pay (Lazenby Garages Ltd v Wright [1976] 2 All ER 770 (BMW car)).

Speculative damages

A breach of contract may deprive the claimant of the chance of gaining some benefit; and where the chance is a ‘substantial’ one (as in Equitable Life Assurance Society v Ernst & Young [2003] EWCA Civ 1114, [2003] 2 BCLC 603), damages can in principle be recovered for the loss of it. Damages have, for example, been awarded for loss of the chance of taking part in the final stages of a beauty contest (Chaplin v Hicks [1911] 2 KB 786); for loss of the chance of earning tips (Manubens v Leon [1919] 1 KB 208), and for loss of the chance of getting pension benefits which depended on the exercise of discretion by a government department (Scally v Southern Health and Social Services Board [1992] 1 AC 294). Damages are also commonly awarded for ‘loss of profits’ even though there was only a chance, and not any certainty, that such profits would be made. In all these cases the value of the chance is to some extent a matter of speculation. The court not only has to value the expected benefit but also to take into account the likelihood of its being actually received by the claimant. Suppose that a tennis player is, in breach of contract, excluded from a tournament in which the winner is to get a prize of £50,000. The damages for loss of the chance of winning will be less than £50,000. The amount will depend on the stage at which the player was excluded and on his chance of winning; obviously the top seed excluded from the final will get more than an unseeded player excluded from the first round. The fact that the chance cannot be valued precisely
is, in these cases, no ground for saying that it has no value at all. But sometimes the chance is so highly speculative that the court cannot sensibly value it. The court will then refuse to award damages for loss of the chance (which is a form of expectation) and instead confine its award to one for reliance loss (McRae v Commonwealth Disposals Commission (1950) 84 CLR 377 at 411).

**Taxation**

Damages in a contractual action may be claimed for loss of some benefit which would, if the claimant had received it, have been taxable in his hands. This is most obviously true where an employee claims damages for wrongful dismissal. Such damages are based on the amounts which the employee would have earned under the contract. To award him those amounts in full might result in his making a profit out of the breach; for if he had earned his salary or wages he might have had to pay income tax, while the damages may be tax free. In such circumstances, the claimant will therefore recover the amount that he would have earned under the broken contract less any tax that he would have had to pay on those earnings (Beach v Reed Corrugated Cases Ltd [1956] 2 All ER 652; cf in tort British Transport Commission v Gourley [1956] AC 185). The exact amount of tax to be deducted will depend on his personal circumstances in each case.

Two conditions must be satisfied before the claimant’s tax liability is taken into account in assessing damages. First, the benefit which he has lost must be one which would, if he had received it, have been taxable in his hands. Loss of income would, but the mere failure to get a capital asset would not, be such a benefit (cf Spencer v Macmillan’s Trustees 1958 SC 300). Thus the incidence of taxation could be irrelevant where a seller wrongfully failed to deliver goods and the buyer made a claim for damages based on the extra cost of obtaining substitute goods. Secondly, the damages themselves must not be taxable, for if the claimant has to pay tax on the damages he will obviously not make any profit out of the breach by being awarded his gross loss. Damages for wrongful dismissal are taxable to the extent to which they exceed £30,000 (Income and Corporation Taxes Act 1988, ss.148, 188(4)). Hence the claimant’s damages must be reduced by reference to his tax liability where his lost income is less than £30,000; where it is more, the court will first assess his net loss and then award such sum as will, after tax on the sum so assessed, be equal to that loss (Parsons v BNM Laboratories Ltd [1964] 1 QB 95; Shove v Downs Surgical plc [1984] 1 All ER 7).

**Alternatives**
Suppose that A agrees to sell to B for £50 ‘a ton of coal or a ton of coke’. At the time fixed for delivery a ton of coal is worth £55, and a ton of coke £51. If A refuses to deliver, B’s damages will depend on who had the right to choose between the two performances. The general rule is that damages will be assessed on the assumption that each party will exercise the choice most advantageous to himself ([Kaye Steam Navigation Co Ltd v W & R Barnett Ltd (1932) 48 TLR 440; The Rijn [1981] 2 Lloyd’s Rep 267; cf Paula Lee Ltd v Robert Zehil & Co Ltd [1983] 2 All ER 390]; hence the damages will be £1 if A had the right to choose but £5 if the contract gave that right to B. But this rule will not be rigidly applied so as to produce absurd or inconvenient results. If, in our example A had the right to choose and had in fact chosen coal before refusing to deliver, the damages would be assessed on that basis ([Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA [1979] 2 Lloyd’s Rep 98; Shipping Corpn of India v Naviera Letasa SA [1976] 1 Lloyd’s Rep 132 at 137-138]). Again, suppose A sells goods to B on the terms that they are to delivered in a given month on any day to be chosen by A. If by the end of the month A has not delivered, damages will be assessed by reference to the market price on the last day of the month – not by reference to the market price on the particular day of the month on which that price was lowest ([cf Harlow and Jones Ltd v Panex (International) Ltd [1967] 2 Lloyd’s Rep 509; Phoebus D Kyprianou Co v Wm H Pim Jrn & Co [1977] 2 Lloyd’s Rep 570 (both cases on buyer’s breach)]. The latter basis would lead to too much uncertainty, whatever its theoretical merits might be.

**Time for assessment**

As costs and prices fluctuate, the exact amount of damages will depend on the point of time by reference to which the assessment is made. The law starts with the principle of assessment by reference to the time of breach. This principle is, for example, stated in the Sale of Goods Act 1979. Where a buyer fails to accept and pay (or where a seller fails to deliver), damages are prima facie based on the market price at the time when the goods ought to have been accepted (or deliver) (Sections 50(3), 51(3); cf The Texaco Melbourne [1994] 1 Lloyd’s Rep 473 at 476 (breach by carrier of goods)). The injured party may, however, be given a reasonable time to consider the position, and damages may then be assessed by reference to the end of that reasonable time and not by reference to the very day of breach ([C Sharpe & Co v Nosawa Co [1917] 2 KB 814; cf Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd’s Rep 109 at 117]). Even with this qualification, the principle of assessment by reference to the time of breach is not an inflexible one; and it will not be applied in the following situations.
First, the breach may not be known to the injured party as soon as it is committed. In that case damages will normally be assessed by reference to the time when the breach was, or reasonably should have been, discovered. This rule would, for example, apply where defects in building work became apparent only some considerable time after the work was done (East Ham Borough Council v Bernard Sunley & Sons Ltd [1966] AC 406).

Secondly, the injured party may know of the breach but be unable at once to act on that knowledge. Suppose that a seller has dispatched goods to the buyer, and that, while they are en route, the buyer wrongfully refuses to pay. If the seller cannot resell the goods while they are in transit, his damages may be assessed by reference to the market value of the goods as soon as the transit is over, or as soon thereafter as it is reasonable for him to resell.

Thirdly, it may in all the circumstances be quite unreasonable to expect the injured party to act on his knowledge of the breach by making a substitute contract. He cannot be expected to do so where he continues, after breach, to negotiate in the hope of securing eventual performance, or where he is actually suing for specific performance of the contract. In such cases damages are assessed by reference to the time when it becomes clear that performance will not be obtained: ie when the negotiations break down (Radford v de Froberville [1978] 1 All ER 33; Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financiere SA [1979] 2 Lloyd’s Rep 98; The Aktion [1987] 1 Lloyd’s Rep 283 at 314), when the court refuses to order specific performance (Wroth v Tyler [1974] Ch 30 as explained in Radford v de Froberville, supra; Domb v Isoz [1980] Ch 548 at 559; Meng Leong Development Plc Ltd v Jip Hong Trading Co Plc Ltd [1985] AC 511), or when it becomes clear that the defendant will not comply with an order for specific performance and the claimant elects instead to seek damages (Johnson v Agnew [1980] AC 367 at 401).

ANCIPATORY BREACH OF CONTRACT

The victim of an anticipatory breach can either continue to press for performance or rescind the contract by ‘accepting’ the breach.

If he takes the former course, the time for assessment is governed by the same rules that apply in cases of actual breach. It follows that damages will (subject to the exceptions just discussed) be assessed by reference to the time when the contract ought to have been performed, and not by reference to the time of repudiation (Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory [1979] AC 91).
The prima facie rule of assessment by reference to the time of breach also applies where the victim ‘accepts’ the breach (Roper v Johnson (1873) LR 8 CP 167); but here it is subject to the important qualification that, on ‘accepting’ the breach, the injured party must mitigate his loss. This means that he will be expected to make a substitute contract on, or within a reasonable time of, his acceptance of the breach (L Roth & Co Ltd v Taysen, Townsend & Co (1895) 1 Com Cas 240). Thus the damages will be assessed by reference to any relevant market when that substitute contract should have been made – not when the original contract should have been performed. However, the burden of proving that such a substitute contract could have been made lies on the party in breach (Roper v Johnson (1873) LR 8 CP 167); and, if he cannot show this, the damages will be assessed by reference to the market when he should have performed. The further question arises whether, in applying the principle of looking to that time, the court can take into account events (other than market movements) occurring, or likely to occur, after the anticipatory breach and before the time fixed for performance. Where the victim has rescinded the contract by ‘accepting’ the anticipatory breach, the court clearly cannot take into account the probability that the victim himself might subsequently committed a breach justifying the guilty party’s repudiation; for the victim’s recession of the contract relieves him from his obligation to perform in the future, so that his failure to do so can no longer be a breach (Berger & Co Inc v Gill & Duffus SA [1984] AC 382 at 391; contrast The Simona [1989] AC 788 (breach not accepted). But the contract may give the guilty party a right to cancel on the occurrence of an event (such as the late arrival of a chartered ship) even though that event did not amount to a breach by the victim. If the guilty party can show that, when the breach was accepted, such an event was already certain to occur, and that he would have exercised his right to cancel on account of it, then the contract will be of no value to the injured party, whose damages will therefore be nominal (The Mihalis Angelos [1971] 1 QB 164 at 210).

RULES LIMITING THE RECOVERABLE LOSS: REMOTENESS, CAUSATION, MITIGATION AND CONTRIBUTORY CONDUCT

A breach of contract may be a starting point of a series of events which cause loss to the claimant; but the law does not hold the defendant liable for all such loss. Our concern in this section is with rules by which the law limits such liability.

Remoteness

The first of these rules is that damages will not be awarded for loss that is ‘too remote’. This principle is illustrated by the leading case of Hadley v Baxendale ((1854) 9 Exch 341), where a shaft in
A mill at Gloucester broke and had to be sent to the makers at Greenwich to serve as a pattern for a new one. The defendants undertook to carry the shaft to Greenwich, but in breach of contract delayed its delivery for a few days, during which the mill was kept idle. The millers claimed damages for the resulting loss of profits but the court regarded this loss as too remote a consequence of the breach. The underlying idea is that it is undesirable to make a defendant pay for such remote loss, for to hold him so liable might either deter him from entering into contracts at all, or lead him unduly to raise his charges to meet such liability. He will be liable only if one or two rules laid down in Hadley v Baxendale is satisfied.

First, the loss must arise ‘naturally, i.e., according to the usual course of things, from such breach of contract itself’ ((1854) 9 Exch 341 at 354). This test was not satisfied in Hadley v Baxendale because ‘in the great multitude of cases’ ((1854) 9 Exch 341 at 356) a carrier’s delay in delivering a broken mill shaft would not keep the mill idle: the millers might have had, or been able to get, a spare shaft. In the contrasting Victoria Laundry (Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528) case, a large boiler had been sold to a laundry and was, in breach of contract, delivered 22 weeks late, so that the buyers could not use it (as they had intended to do) to expand their business. It was held that the sellers were liable for the general loss of profits suffered by the buyers. Having regard to the subject-matter, the likelihood of such loss was obviously very much greater in the Victoria Laundry case than in Hadley v Baxendale.

Secondly, the defendant may be liable if the loss was such ‘as may reasonably be supposed to have been in the minds of both parties at the time they made the contract as the probable result of the breach’ (Hadley v Baxendale (1854) 9 Exch 341 at 354). Liability under this rule depends in the first place on what the defendant knew of the claimant’s circumstances; and in Hadley v Baxendale the defendants did not know enough to make them liable under this rule. It seems that they knew that the mill was stopped, but not that it would remain idle until the new shaft arrived from Greenwich (see the report in 18 Jur 358). In the Victoria Laundry case the defendants knew that the buyers were in the laundry business; but not that the buyers wanted the boiler for the purpose of some exceptionally lucrative government contracts. Hence the defendants were not liable for the actual loss suffered because the buyers could not perform those contracts, but only for loss of ordinary profits.

Under the second rule in Hadley v Baxendale the defendant is not liable if he is unaware of the special circumstances; but it does not follow that he will be liable merely because he knows of them. To impose this degree of liability there must be ‘some knowledge and acceptance by one party of
the purpose and intention of the other in entering into the contract’ (Weld-Blundell v Stephens [1920] AC 956 at 980). No doubt the claimants’ purpose in making the contract of carriage in Hadley v Baxendale was to get their mill started again; but, even if the defendants had known all the facts, they could scarcely be said to have accepted this purpose as the basis of the contract. Such acceptance could, however, be inferred where A contracts to carry B’s goods to a particular market in which B wishes to sell such goods. In The Heron II ([1969] 1 AC 350) the defendants agreed to carry a cargo of sugar belonging to the claimants from Constanza to Basrah ‘with all convenient speed’. The claimants intended to sell the sugar on the sugar market in Basrah; and, although the defendants did not know this, they did know that there was a sugar market there, and they must have known that it was not unlikely that the claimants would want to sell the sugar in that market ([1969] 1 AC 350 at 382; cf The Baleares [1993] 1 Lloyd’s Rep 215). In breach of contract the defendants called at various ports out of the direct route taking on and discharging cargo, so that they took twenty-nine instead of twenty days to reach Basrah. During the extra nine days, the price of sugar at Basrah fell so that the claimants sold the sugar for some £4,000 less than they would have got if the ship had gone straight to Basrah. The House of Lords held the defendants liable for this loss, since, in the light of their knowledge of the circumstances, it was one which they should reasonably have had in their contemplation. And in the circumstances it seems correct to say that they not only knew of the claimants’ purpose but ‘accepted’ it in the sense above discussed: that is, that they contracted to get the cargo to the particular market without undue delay. On the other hand, they could not have contemplated the terms of individual transactions: accordingly, if the delay had prevented the claimants from performing an exceptionally profitable contract of sale for more than the market price, the defendant would not have been liable for this loss (cf The Rio Claro [1987] 2 Lloyd’s Rep 173; Seven Seas Properties Ltd v Al-Essa (No 2) [1993] 3 All ER 577).

Before The Heron II it was sometimes said that a loss was not too remote if it could reasonably have been foreseen; and that the references in that case to the contemplation of the parties suggest that the House of Lords was applying a foreseeability test of some kind. Nevertheless, the case marks a change of emphasis. Reasonable foreseeability is also established as a test of remoteness in the law of tort; and in that branch of the law a reasonable person is credited with the capacity to foresee some consequences which are by no means obvious or even very probable. In the law of contract a much higher degree of foreseeability is required. There must, as it was put in The Heron II be a ‘serious possibility’ or a ‘real danger’ ([1969] 1 AC 350 at 414, 415, 425) that the loss will occur; and references to ‘foreseeability’ as a test of remoteness in contract must be understood in this sense. This test was, for example, satisfied where defects in a pig-food hopper supplied by the defendants
caused the claimants’ pigs to die of a rare intestinal disease: there was a ‘serious possibility’ that the pigs would become ill (H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791 at 812).

The requirement of a higher degree of foreseeability in contract than in tort can be justified on the ground that a contracting party can often draw unusual risks to the other party’s attention before the contract is made (and so make him liable for them); while the victim of a tort has no such opportunity as he usually has no previous relations with the wrongdoer (The Heron II [1969] 1 AC 350 at 386). But this justification would lose its force where a contracting party had in fact had no such opportunity to protect himself; nor would it make sense to maintain different tests where the same facts gave rise to a cause of action both in contract and in tort (cf Archer v Brown [1985] QB 401 at 418). In either of these situations the claimant could probably rely on the (to him) more favourable tort test. In other cases the more restrictive test stated in The Heron II will continue to apply for damages for breach of contract (The Pegase [1981] 1 Lloyd’s Rep 175 at 181).

Causation

A claimant can recover damages only if there is some casual connection between the breach and his loss. Suppose that a ship founders in a storm and it is later discovered that she was technically unseaworthy because she was not carrying a proper medicine chest (For this example of ‘unseaworthiness’, see Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 at 62). The unseaworthiness would be a breach of any contract which the shipowner would not be entitled to damages merely on that account because such a breach would not normally have caused the ship to sink (Monarch Steamship Co Ltd v A/B Karlshamns Oliefabriker [1949] AC 196 at 226).

On the other hand, the claimant may recover full damages even though the breach is not the sole cause of the loss. If the breach ‘is one of two causes, both co-operating and both of equal efficacy, it is sufficient to carry a judgment in damages’ (Heskell v Continental Express Ltd [1950] 1 All ER 1033 at 1048; cf The Silver Sky [1981] 2 Lloyd’s Rep 95). In the leading Monarch Steamship case a contract was made in April 1939 to carry goods from Manchuria to Sweden. The ship was delayed by unseaworthiness and so failed to get to Sweden before the outbreak of war in September 1939. Instead she was ordered to a Scottish port where the goods had to be transferred to neutral vessels. The carriers were held liable for the cost of transhipment even though the loss was caused by a combination of unseaworthiness and the acts of the British authorities. Neither factor was the sole cause of the loss, and both could be said to have operated with ‘equal efficacy’. Similarly, a ship does not usually sink merely because she is unseaworthy; and the ship-owner will often be liable if
the loss is caused by a combination of unseaworthiness and ordinary sea perils. On the other hand, it was said in the Monarch Steamship case that the ship-owner would not be liable if the ship had been delayed by unseaworthiness and then been struck by a typhoon, for in that case the unseaworthiness would have had no ‘real’ but only a ‘fortuitous’ connection with the loss ([1949] AC 196 at 215, approving a statement in the lower (Scottish) court: 1947 SC 179 at 193).

Mitigation

The victim of a breach of contract is said to be under a ‘duty to mitigate’ his loss. The word ‘duty’ is here used in an unusual sense. It merely means that the victim is not entitled to recover damages for a loss that he should have avoided: not that he is liable for failing to avoid it. This ‘duty has two aspects.

First, the injured party must take all reasonable steps to minimise his loss. One application of this principle has already been considered. When a buyer fails to accept and pay for goods, or a seller to deliver them, the injured party is expected to go into the market and to make a substitute contract at the relevant time, which is prima facie the time of breach. If he fails to do so and the market then moves against him, he cannot recover the extra loss which he suffers, as this is due to his failure to mitigate (cf The Elena d’Amico [1980] 1 Lloyd’s Rep 75 at 79). Another application of the principle is that an employee who is wrongfully dismissed must make reasonable efforts to find another comparable job. The crucial point is that the injured party must, and need only (see London and South of England Building Society v Stone [1983] 3 All ER 105), act reasonably. Thus an employee who is wrongfully dismissed is not bound to take another job if this will involve an appreciable reduction in status (Yetton v Eastwoods Froy Ltd [1966] 3 All ER 353); nor is he bound to accept an offer of re-employment from an employer who has wrongfully dismissed him in circumstances of personal humiliation (Payzu Ltd v Saunders [1919] 2 KB 581 at 589). But sometimes a party may be required to accept an offer of performance from the party in breach even on terms other than those originally agreed. In one case (Payzu Ltd v Saunders [1919] 2 KB 581) a person who had agreed to sell crepe de chine on credit refused to deliver except for cash, and the buyer immediately bought against him in the market, which had risen. It was held that the buyer should have mitigated by accepting the seller’s offer to deliver for cash. Where a seller cannot deliver on time, the buyer may similarly be required to mitigate by accepting an offer of late delivery (The Solholt [1983] 1 Lloyd’s Rep 605). In such cases the injured party remains entitled to damages for any loss suffered by him as a result of the difference between the newly offered performance and that originally bargained
for; and if the defaulting party’s offer purports to take away that right, it need not be accepted (Strutt v Whitnell [1975] 2 All ER 510).

The ‘duty’ to mitigate requires the injured party to make a substitute contract to replace that which has been broken. So far we have assumed that the new contract is indeed a true substitute for the broken one. But suppose that A reserves one of the hundred rooms in B’s hotel and then in breach of contract cancels the reservation. C now wishes to book a room in the hotel. If the other ninety-nine rooms in the hotel are taken, B is bound to mitigate by letting A’s room to C; but if less than ninety-nine rooms are taken, B can put C into one of the empty rooms and so claim damages from A.

The second aspect of the ‘duty’ to mitigate is that the injured party must not take unreasonable steps actually to increase the loss (The Borag [1981] 1 All ER 856). In the case just put, it would probably not be reasonable for B to spend money in getting the room ready for A’s occupation after A had cancelled his reservation. But there are other cases in which it would be reasonable for the injured party to incur expenses after the breach – particularly if he was bound by commercial or moral obligations to third parties to do so. The point is strikingly illustrated by a case (Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452) in which an English firm had printed banknotes for the Bank of Portugal, and in breach of contract allowed them to get into the hands of a rogue who put them into circulation. The Bank then cancelled the notes and bought them up in exchange for good notes, even though it was not legally bound to do so. It was held that the printers were liable for the face value of the notes, and not merely for the cost of reprinting, as the Bank had acted reasonably, having regard to its commercial obligations.

The ‘duty’ to mitigate normally arises after the claimant has become aware of the breach (The Superhulls Cover Case (No 2) [1990] 2 Lloyd’s Rep 431 at 461). But it can probably also arise where he had, but failed to take, a clear opportunity of discovering the breach: eg where a buyer of goods is warned by the seller of the need to test them before use but fails to do so.

So far we have considered the duty to mitigate. The law also recognises a distinct, though related, idea: that the loss is in fact mitigated if the claimant has, as a result of the breach, obtained a benefit or avoided loss. This can happen in various ways. First, the claimant may benefit by being relieved of his own obligations under the contract. If a seller fails to deliver, the buyer need not pay, and the amount so saved is taken into account in assessing his loss. Secondly, he may benefit from performing his ‘duty’ to mitigate: for example, a wrongfully dismissed employee may get a substitute job and so receive wages. As such benefits are taken into account even if they are not
obtained. Thirdly, he may benefit as a result of something which he did in consequence of the breach even though he was not required to do so in performing his ‘duty’ to mitigate. A skilled worker may be wrongfully dismissed and, if he cannot find comparable employment, he may take a job as an unskilled labourer. His actual earnings as a labourer will be taken into account in assessing damages (cf Edwards v Society of Graphical and Allied Trades [1971] Ch 354. Cf, in cases of unfair dismissal (which does not usually involve any breach of contract), Employment Rights Act 1996, s 123(4)).

This example should be contrasted with a case (Laverack v Woods of Colchester Ltd [1967] 1 QB 278) in which a contract of employment restricted the employee’s right to invest in competing companies. On wrongful dismissal, the employee was freed from this restriction, and made such an investment. It was held that his profit on the investment was ‘not a direct result of his dismissal’ but a ‘collateral benefit’ ([1967] 1 QB 278 at 290), and that it should not be taken into account. The distinction between the two types of benefit has given rise to difficult questions of causation (e.g. British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Ry Co of London Ltd [1912] AC 673). The claimant need not, however, bring into account benefits which he has received under a policy of insurance taken out by him against the loss caused by the breach (Bradburn v Great Western Rly Co (1874) LR 10 Exch 1; The Yasin [1979] 2 Lloyd’s Rep 45; contrast Mark Rowlands Ltd v Berni Inns Ltd [1986] QB 211, where the rule was excluded by the terms of the contract) or under some other contract with a third party to compensate him for that loss (Gardner v Marsh and Parsons [1997] 1 WLR 489).

Contributory Conduct: Default of the victim

Where the victim of a breach of contract fails to mitigate, the loss is partly due to his default in the sense that he failed to avoid the consequences of an event brought about by the other party’s breach. There is, however, another group of cases in which the event causing loss is partly brought about by conduct of the victim. Goods on board a ship may be damaged partly because the carrier failed to stow them properly and partly because the shipper did not provide adequate packing; or the hirer of a car may be injured partly because the brakes were defective and partly because he drove too fast. In the law of tort such conduct on the part of the victim is known as contributory negligence. At common law its effect was to bar the claim completely if the claimant had the ‘last opportunity’ of avoiding the accident; but where the defendant had the last opportunity the claimant recovered in full. This unsatisfactory ‘all or nothing’ solution was altered by the Law Reform (Contributory Negligence) Act 1945, which provides that where a person suffers loss partly
as a result of his own ‘fault’ and partly as a result of the ‘fault’ of the defendant, he can nevertheless recover damages; but the court can reduce his damages in proportion to the effect which his fault had in causing the loss. ‘Fault’ is defined in the Act to mean ‘negligence...or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence’. The question arises whether the contributory negligence rules can be applied to contractual actions.

For the purpose of answering this question, the cases must be divided into three categories. First the defendant’s conduct is careless and constitutes both a breach of contract and a tort: for example, where a carrier for reward failed to observe the duty of care which he owed to a passenger both under the contract and under the general law. If the passenger were injured partly as a result of this breach of duty and partly as a result of his own carelessness, then the contributory negligence rules would apply (cf Sayers v Harlow UDC [1958] 2 All ER 342; Sole v W J Hall Ltd [1973] QB 574). They would similarly apply where the defendant was in breach of a duty of care arising from a contract to render professional services (De Meza v Apple [1974] 1 Lloyd’s Rep 508 (auditor); affd [1975] 1 Lloyd’s Rep 498 where the applicability of the 1945 Act was left open; Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852; affd without reference to this point at 880 et seq); for such a breach generally gives rise to liability in both contract and tort (Esso Petroleum Co Ltd v Mardon [1976] QB 801 at 819; Midland Bank Trust Co Ltd v Hett Stubbs & Kemp [1979] Ch 384; Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; except where the contract exhaustively defines the defendant’s duty: Greater Nottingham Co-operative Society Ltd v Cementation Piling Foundations Ltd [1989] QB 71). Secondly, the defendant is in breach of contract without being in any way careless. In such a case the Law Reform (Contributory Negligence) Act could not apply because the definition of ‘fault’ in the Act connotes some degree of carelessness; and the question whether the defendant was liable in full or not at all would depend on the principles of causation discussed earlier in this chapter. Thus in one case (Lambert v Lewis [1982] AC 225; cf Barclays Bank plc v Fairclough Building Ltd [1995] 1 All ER 289) a dealer supplied a defective trailer coupling to a customer who went on using it, after it was obviously broken, until there was an accident. It was held that the dealer was not liable as the accident had been caused by the customer’s use of the coupling when he knew that it was broken, and not by the fact that it was defective when sold. Thirdly, the defendant is liable for breach of a contractual duty of care, but that carelessness does not make him liable in tort. Conflicting views have been expressed in the cases on the question whether the Act applies to such a situation (contrast De Meza v Apple [1974] 1 Lloyd’s Rep 508; affd [1975] 1 Lloyd’s Rep 498 (where the point was left open) and Quinn v Burch Bros (Builders) Ltd [1966] 2 QB 370 at 380-383 with Forsikringsaktieselskapet Vesta v Butcher, supra, n 7; the Law
Commission has recommended that there should be power to reduce damages in such cases; Law Com No 219 (1993)).

In the situations so far discussed, the loss is caused partly by the defendant’s (A’s) breach of contract and partly by the claimant’s (B’s) careless conduct; but B’s conduct does not amount to a legal wrong against A. Where B’s conduct does amount to such a wrong (See Rafilatc v Eade [1999] 1 Lloyd’s Rep 506, where this requirement was not satisfied) and each party suffers loss, those losses may be apportioned (quite apart from the Act) on the ground that they resulted from two independent actionable wrongs. Each party can then recover to the extent that his loss was caused by the other’s wrongful act (Tennant Radiant Heat Ltd v Warrington Development Corp [1988] 1 EGLR 41). Thus if responsibility for the event were equally divided between the parties, each would be liable for half the loss suffered by the other.

FAILURE TO PAY MONEY

The obvious remedy for failure to pay a fixed sum of money when due is an action for that sum; but a breach of this kind gives rise to the further problem whether interest or other damages can be recovered in respect of such a breach. The general rule of common law is that interest can be recovered only if the contract provides for it to be paid; but this rule is subject to two statutory modifications. First, there is a right to ‘statutory interest’ where the contract is one for the supply of goods or services between parties acting in the course of a business (Late Payment of Commercial Debts (Interest) Act 1998). Secondly, the court has a discretionary power (applicable to all contracts) to award interest so long as the action for recovery of the principal sum is begun before that sum has been paid (Supreme Court Act 1981, s.35A). If the contract is not one under which there is a right to ‘statutory interest’ and if the payment is simply made late, the person to whom it was due cannot then claim interest unless the contract so provides. The common law rule can work hardship in times of high interest rates or tight credit but it survives in spite of repeated criticism (London Chatham and Dover Rly Co v South Eastern Rly Co [1893] AC 429 at 437; La Pintada [1985] AC 104; Law Com No 88 (partly implemented by the 1998 Act, supra, n 14). It used, moreover, to be thought that no further damages (other than interest) could be recovered for failure to pay money when due (Fletcher v Tayleur (1855) 17 CB 21 at 29). But this rule, too, was hard to justify (Wallis v Smith (1882) 21 Ch D 243 at 257 (‘not quite consistent with reason’); and it no longer prevents a claimant from recovering special damages if he can show that he has suffered a particular loss which is not too remote (The Lips [1988] AC 395 at 423, 429; International Minerals and Chemical Corp v Karl O Helm AG [1986] 1 Lloyd’s Rep 81). Thus in one case (Wadsworth v Lydall [1981] 2 All ER 401,
approved in *La Pintada* [1985] AC 104 at 127) the defendant was late in making a substantial payment, knowing that the claimant needed it to complete the purchase of a farm as his home. As a result of the delay, the claimant incurred extra charges in connection with this purchase; and he recovered these as damages for late payment. Damages can similarly be recovered where a bank wrongfully refuses to honour a customer’s cheque (*Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92); and where a person fails to perform an undertaking to subscribe for debentures in a company (*Wallis Chlorine Syndicate Ltd v American Alkali Co Ltd* (1901) 17 TLR 656), or to provide a letter of credit under a contract for the sale of goods (*Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297).

**PENALTIES AND LIQUIDATED DAMAGES**

Under the rules so far discussed, the amount which will be recoverable on breach of contract is often hard to predict. The parties may try to remove this uncertainty by providing that a fixed sum is to be paid (or that a ‘payment in kind’ or a share transfer at an undervalue is to be made: see *Jobson v Johnson* [1989] 1 All ER 621) on breach. If the sum is a reasonable estimate of the probable loss, the provision will at common law (for possible effects of the Unfair Terms in Consumer Contracts Regulations 1999) be valid; a provision of this kind is known as a *liquidated damages* clause. Sometimes, however, the purpose of the provision is not to make a genuine pre-estimate of loss but to bring pressure to bear on one of the parties to perform his part of the contract. Such a provision is known as a *penalty* clause and is invalid.

**Rules for distinguishing between them**

The category into which a particular clause falls depends on the construction of the clause as a whole. Thus the mere fact that the parties have called it a ‘liquidated damages’ or ‘penalty’ clause is not decisive either way. In the leading case of *Dunlop Co Ltd v New Garage Ltd* ([1915] AC 79 at 87-88 (the order in which the rules are stated in the text differs, for purposes of exposition, from that in the *Law Reports*) four rules of construction were formulated for distinguishing between the two types of provisions.

The first, and most important, rule is that a clause is penal ‘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’. An illustration given in one of the cases, though far-fetched, catches the spirit of the rule: it would be a penalty if a builder promised to pay £1 million on
failure to do building work worth £50 (Clydebank Engineering Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] AC 6 at 10).

The second rule is that a provision will be regarded as a valid liquidated damages clause if ‘the consequences of breach are such as to make precise pre-estimation an impossibility’; and if the actual amount also bears a reasonable relation to the probable consequences of breach. In the Dunlop case itself, a contract for the sale of tyres imposed numerous restrictions on resales and provided that the buyer should pay the seller £5 for every tyre sold or offered in breach of these restrictions. This provision was held valid since such breaches performance. Such an interest might have arisen by reason of commitments to third parties. This was, for example, the position where a charterparty was wrongfully repudiated by the charterer. The shipowner was held entitled to insist on continued performance, and so to sue for the agreed hire; and one reason for this conclusion was that he had assigned the hire to his bank, to whom he therefore owed a duty to keep the contract in being (The Odenfield [1978] 2 Lloyd’s Rep 357). On the other hand, where there is no such legitimate interest in insisting on continued performance, the mitigation rules can apply even to an action for the agreed sum. This view is supported by another charterparty case (Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederi GmbH [1976] 1 Lloyd’s Rep 250; cf The Alaskan Trader [1983] 2 Lloyd’s Rep 645) in which the charterer undertook to make certain repairs to the ship before redelivery and to pay the agreed hire till then. He failed to do the repairs; but it was held that the owner had no legitimate interest in refusing to accept redelivery, and claiming the agreed hire, until the repairs had been done. As the cost of the repairs far exceeded the value which the ship would have had after they had been done, he should have mitigated by accepting redelivery of the unrepai red ship; and his only remedy was in damages.

SPECIFIC PERFORMANCE OF CONTRACTS

A contract is specifically enforced when the court orders the defendant actually to perform his undertaking. Such an order may be positive or negative according to the nature of the undertaking. The court may (positively) order the defendant to do something, for example to convey a house, or to deliver a picture. Such an order is known as one of specific performance. Alternatively, the court may (negatively) order the defendant to forbear from doing something in which he has promised not to do, for example it may restrain him from competing with the claimant. Such an order is known as an injunction.
Disobedience of an order of specific performance or of an injunction is contempt of court, and can be punished in the last resort by imprisonment of the defendant. This drastic effect of the remedy (Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 at 12) is one factor that accounts for restrictions on its scope. But it is not decisive where effect can be given to the court’s order in other ways, without putting the defendant under personal constraint (Miliangos v George Frank (Textiles) Ltd [1976] AC 443 at 494, 497; The Messiniaki Tolmi [1983] 2 AC 787); for example, by ordering the delivery of conveyance of something to the claimant. Recognition of this point accounts for some expansion in the scope of the remedy; but this continues to be limited by other factors which make specific enforcement undesirable or impracticable on grounds to be discussed below. These factors (the ‘adequacy’ of damages may, however, be relevant in an action for the agreed sum to the issue of ‘legitimate interest’) do not, however, restrict the availability of the action for an agreed sum. Although this is a form of specific enforcement, it results merely in an award of money which can be enforced by levying execution on the defendant’s property.

The common law did not specifically enforce obligations except those to pay money. With this exception, there was, and is, no right to specific performance: the remedy is equitable and (like most such remedies) discretionary. Its scope is limited in a number of ways, of which the following are the most important.

**Damages must be ‘inadequate’**

Specific performance will not be ordered where the claimant can be adequately protected by an award of damages. This will generally be the case where he has bought shares or generic goods which are available in the market (Re Schwabacher (1907) 98 LT 127 at 128). On the seller’s default, the buyer can go into the market, get a substitute, and recover any extra cost by way of damages. Specific performance will, on the other hand, be ordered where no satisfactory substitute can be obtained: for example where the sale is of land or a house (however ordinary), or of ‘unique’ goods such as an heirloom or a great work of art (e.g. Pusey v Pusey (1684) 1 Vern 273). Cases which formerly took a narrow view of this category (Cohen v Roche [1927] 1 KB 169 (set of Hepplewhite chairs not ‘unique’) are open to question now that the courts tend to ask, not whether damages are ‘adequate’, but whether specific performance is the more appropriate remedy (Beswick v Beswick [1968] AC 58; Evans Marshall & Co v Beriola SA [1973] 1 WLR 349 at 379; Rainbow Estates Ltd v Tokenhold Ltd [1999] Ch 64 at 72-73). The category of ‘unique’ goods has been expanded to include such ‘commercially unique’ things as ships or machinery (Behnke v Bede Shipping Co Ltd [1927] 1 KB 649; The Oro Chief [1983] 2 Lloyd’s Rep 509 at 520-521) for which no satisfactory substitute is
available to the claimant (see Société des Industries Métallurgiques SA v Bronx Engineering Co Ltd [1975] 1 Lloyd’s Rep 465; The Stena Nautica (No 2) [1982] 2 Lloyd’s Rep 336); and specific relief has been ordered even of a contract to supply generic goods needed by the buyer for his business and not available from another source because of a temporary shortage of supply (Sky Petroleum Ltd v VIP Petroleum Ltd [1974] 1 All ER 954 (petrol during 1973-1974 energy crisis)). Damages may also be regarded as the less appropriate remedy for other reasons, such as the difficulty of assessing them. Thus a contract to execute a mortgage as security for a loan (Ashton v Corrigan (1871) LR 13 Eq 76), and a contract that a debt is to be repaid out of specific property (see Swiss Bank Corp v Lloyds Bank Ltd [1982] AC 584 (where the contract was held to contain no such term) can be specifically enforced since the exact value of having such security rights is uncertain. Damages are also unlikely to be the most appropriate remedy for a consumer who has bought an appliance that does not work. Specific performance is therefore available against a commercial seller of goods to a consumer where the goods are defective by reason of the seller’s breach and the buyer seeks their repair or replacement (Sale of Goods Act 1979, s 48E(2); for limitations, see s 48E(3)).

Discretion of the court

The court has a discretion to refuse specific performance even where this remedy would be a more appropriate one than damages. This discretion (which cannot be excluded by the terms of the contract (Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd [1993] BCLC 442)) is, however, ‘to be governed as far as possible by fixed rules and principles’ (Lamare v Dixon (1873) LR 6 HL 414 at 423). In particular, there are three grounds on which the remedy may be refused.

The first is undue hardship to the defendant. On this ground specific performance may be refused where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant (Tito v Waddell (No 2) [1977] Ch 106 at 326; cf Redland Bricks Ltd v Morris [1970] AC 652); or where, as a result of severe financial misfortune and incapacitating illness, specific performance would cause exceptional personal distress to the defendant (Patel v Ali [1984] Ch 283). But specific performance would not be refused merely because the vendor of a house was caught on a rising market and so had difficulty in buying another house with the proceeds of sale (Mountford v Scott [1975] Ch 258).

Secondly, specific performance may be refused because the contract itself was grossly unfair. For this purpose it is not enough for a seller to show simply that the price was too low; but the remedy will be refused if, in addition, the buyer took unfair advantage of his superior knowledge or if he
exploited his superior bargaining strength by rushing the other party into the transaction. Thus where an antique dealer bought valuable china jars from a widow for a fifth of their real value it was said that he could not specifically enforce the contract (*Falche v Gray* (1859) 4 Drew 651). Specific performance can similarly be refused on the ground that the claimant’s failure to disclose his own breach has reduced the value of the subject-matter (*Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442).

Thirdly, specific performance may be refused if the court in some other way disapproves of the claimant’s conduct: for example, if he refuses to perform a promise which was neither binding contractually (because it was not so intended) nor operative as a misrepresentation (because it related to the future) (*Lamare v Dixon* (1873) LR 6 HL 414). Unfair conduct of the claimant may suffice even if it does not amount to a breach of any promise. Thus specific enforcement of a solus agreement against a garage was refused where the oil company, by giving discounts to other garages, had made it impossible for the defendant to trade except at a loss (*Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187).

**Personal service**

The court will not specifically enforce a contract of personal service (*Johnson v Shrewsbury and Birmingham Ry Co* (1853) 3 De GM & G 914). One reason for this rule was that to order the employee to work would unduly interfere with his personal liberty; and it is now provided by statute that no court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction (*Trade Union and Labour Relations (Consolidation) Act* 1992, s 236). Conversely it was thought that to order specific enforcement against the employer would be a futile attempt to enforce the continuance of a ‘personal’ relationship against the wish of one of the parties, the principle is maintained in the law relating to unfair dismissal (which may not be a breach of contract at all). The employer may be ordered to reinstate or re-engage the employee (*Employment Rights Act* 1996 ss 113-117. Reinstatement or re-engagement is in practice rare: *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 at [23], [78]; but if he refuses to do so, the employee’s remedy, in the last resort, is an award of compensation. The same is true of statutory rights such as the right to return to work after maternity, parental or paternity leave (*Employment Rights Act* 1996, Pt VIII) and the right not to be excluded or expelled from a trade union (*Trade Union and Labour Relations (Consolidation) Act* 1992, ss 174-177).
As a practical matter, however, an employer may actually be forced to reinstate an employee whom he would rather dismiss; or to dismiss one whom he is quite willing to keep. The courts have recognised these changes in the nature of the employment relationship. In one case (*Hill v CA Parsons & Co Ltd* [1972] Ch 305; cf *Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590; *Powell v Brent London Borough Council* [1988] IGR 176) an employer was forced by union pressure to dismiss an employee in breach of contract. The court restrained the dismissal and thus in effect reinstated the employee. Reinstatement can also be ordered where the relation between the parties is not a purely contractual one: for example where a public employee is dismissed in violation of statutory conditions governing his employment (*Malloch v Aberdeen Corpn* [1971] 2 All ER 1278). The Visitor of a university also has power to order the reinstatement of a lecturer who has been dismissed in violation of the university’s statutes (*Thomas v University of Bradford* [1987] AC 795 at 824; *Pearce v University of Ashton in Birmingham (No 2)* [1991] 2 All ER 469 at 475).

**Other contracts**

Specific performance will not be ordered of a promise without consideration, even though it is binding at law because it is made by deed (See *Cannon v Hartley* [1949] Ch 213). The reason for the rule is that equity will not aid a ‘volunteer’ (ie a person who has given no consideration). A contract will not be specifically enforced against a party who has the right to terminate it, for he could, by exercising that right, make the order of court nugatory (*Sheffield Gas Consumers Co v Harrison* (1853) 17 Beav 294; *Gregory v Wilson* (1852) 9 Hare 683). A contract which is sufficiently certain to be legally binding may yet be too vague to be specifically enforceable. As disobedience of an order of specific performance may lead to imprisonment, the defendant must be told by the order exactly what he is to do. Thus a contract to publish an article cannot be specifically enforced if the text has not been agreed (*Joseph v National Magazine Co Ltd* [1959] Ch 14).

**Difficulty of supervision**

Specific performance is sometimes refused on the ground that the defendant has undertaken continuous duties, the performance of which the court cannot, or is unwilling to, supervise. On this ground, specific performance has been refused of a landlord’s undertaking to have a porter ‘constantly in attendance’ (*Ryan v Mutual Tonline Westminster Chambers Association* [1893] 1 Ch 116); of a contract to deliver goods by instalments (*Dominion Coal Co Ltd v Dominion Iron and Steel Co Ltd* [1909] AC 293); and of a contract to do building work (*Flint v Brandon* (1803) 8 Ves 159).
the leading Argyll Stores case (Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1), the House of Lords similarly refused specifically to enforce a covenant in a 31-year lease of a supermarket to keep the premises ‘open for retail business’ at the usual hours. This refusal was, however, based not merely on difficulty of supervision, but also on the ground that it was not in the public interest to force the defendant to carry on trading at a loss when damages were a suitable alternative remedy. This reasoning suggests that ‘difficulty’ of supervision is no longer decisive but must be balanced against the claimant’s interest in specific enforcement. Thus where the duties are not to be performed by the defendant personally, he can be ordered to enter into a contract to procure their performance: such an order has been made against a lessor of luxury flats who had covenanted to employ a resident porter to perform certain specified tasks (Posner v Scott-Lewis [1987] Ch 25). And contracts to build can be specifically enforced if the work to be done is sufficiently defined, the defendant is in possession of the land, and damages would not adequately compensate the claimant (Eg Wolverhampton Corp v Emmons [1901] 1 KB 515; Jeune v Queens Cross Construction Ltd [1993] AC 334; Landlord and Tenant Act 1985, s 17). In such cases, the court will not need to supervise the building operation. It will merely have to ‘examine the finished work’ (Argyll Stores case [1998] AC 1 at 13) and, where this is alleged to be defective, such supervision can be carried out by an expert appointed by the court instead of by the court itself.

Impossibility

The court will not order specific enforcement of an obligation, the performance of which is impossible. If, for example, a husband agreed to sell land belonging to his wife, he could not be ordered to convey it (see Castle v Wilkinson (1870) 5 Ch App 534. Cf Watts v Spence [1976] Ch 165). Nor will the court specifically enforce an agreement to assign a lease if (under the terms of the lease) the assignment requires the consent of the landlord, and he refuses to give his consent (Warmington v Miller [1973] QB 877).

Mutuality of remedy

Under the so-called doctrine of mutuality of remedy, specific performance will not be ordered if the court cannot at the same time ensure that the unperformed obligations of the claimant will also be specifically performed (Price v Strange [1978] Ch 337 at 367-368). Suppose that A promises to convey a house to B in return for B’s promise to work for A for 10 years. Here B cannot get specific performance against A because his own promise to work cannot be specifically enforced against him. The reason why the court will not force A to convey the land is that it cannot ensure that he will
receive the services from B. If the court did order A to convey and B then refused to do the work, A could only claim damages; and if B were insolvent this remedy would be worth very little. Obviously this reasoning would not apply if B claimed specific performance after he had done the work; and in such a case B’s claim would succeed (Price v Strange [1978] Ch 337; cf Sutton v Sutton [1984] Ch 184). As our example shows, the question whether the requirement of mutuality is satisfied has to be determined by reference to the state of affairs at the time of the hearing (Price v Strange [1978] Ch 337) – not (as was formerly thought) to that at the time of contracting.

INJUNCTIONS AND CONTRACTUAL OBLIGATIONS

Where a contract contains a negative promise (such as a promise not to build, or not to compete), the breach of that promise may be restrained by injunction. Such an order is known as a prohibitory injunction where it directs the defendant not to break the promise in the future; and as a mandatory injunction where it directs the defendant to undo a breach committed in the past: eg to pull down a house built in breach of a restrictive covenant (As in Wakeham v Wood (1982) 43 P & CR 40).

The principles governing injunctions to some extent resemble those governing specific performance. An injunction may, for example, be refused where its grant would be oppressive to the defendant and where damages could readily be assessed and would adequately compensate the claimant (Jaggard v Sawyer [1995] 2 All ER 189; (undue hardship)). An injunction will also be refused if its practical effect would be to compel the performance of a contract which is not specifically enforceable. For example an injunction will not be granted to restrain an employee from breaking his obligation to work (Whitwood Chemical Co v Hardman [1891] 2 Ch 416) or (normally) to restrain an employer from dismissing the employee (Chappell v Times Newspapers Ltd [1975] 2 All ER 233). This would be so even if the contract contained a provision which was negative in form, such as a promise ‘not to resign’ or ‘not to dismiss’ for a given period.

A contract which is not specifically enforceable may, however, contain a narrower negative promise. In the leading case of Lumley v Wagner ((1852) 1 De GM & G 604) the defendant agreed to sing at the claimant’s theatre twice a week for three months, and she also promised not to use her talents at any other theatre during that period. She was restrained by injunction from breaking this negative promise. In such cases the effect of the injunction may be to put some pressure on the defendant to perform the positive obligation. But that is no objection to the granting of the injunction unless the pressure is so severe as to be, for practical purposes, irresistible. In one case (Warner Bros Pictures Inc v Nelson [1937] 1 KB 209) a film actress was restrained from breaking a
promise not to act for third parties: it was said that she could still earn her living by doing other work. But in a contrasting case (Page One Records Ltd v Britton [1968] 1 WLR 157: cf Warren v Mendy [1989] 3 All ER 103) a pop group had appointed the claimant as their manager for five years and promised not to make recordings for anyone else. An injunction to restrain the group from breaking this promise was refused as it would ‘as a practical matter’ force them to continue to employ the claimant. Where an employee promises not to work in any capacity except for the employer, an injunction to restrain the breach of that promise will normally be refused (Ehrman v Bartholomew [1898] 1 Ch 671); for were it granted the only ‘choice’ left to the employee would be one between remaining idle and performing his positive obligation to work. The employer can, however obtain an injunction if he undertakes that, while the injunction is in force, he will go on paying the employee (Evening Standard Co Ltd v Henderson [1987] ICR 588; cf Delaney v Staples [1992] 1 AC 687 at 692-693) and give him the opportunity of continuing to work for the employer where this is necessary to maintain the employee’s skill and reputation (Provident Financial Group plc v Hayward [1989] ICR 160).

The fear of putting too much pressure on an employee is further reflected in the rule that an injunction will be issued against him only where the contract contains an express negative promise. But where no question of employment is involved, the courts will sometimes imply a negative promise in a contract which is not specifically enforceable. If, for example, A makes a promise (positive in form) to buy all his requirements of coal from B for a specified period, a negative promise (not to buy elsewhere) can readily be implied, and be enforced by injunction (cf Metropolitan Electric Supply Co Ltd v Ginder [1901] 2 Ch 799). This may, indeed, put pressure on him to buy from B. But, in cases of sale, direct specific performance is refused, not because it is undesirable in itself (as a form of undue personal constraint), but simply because it is thought to be unnecessary (damages being regarded as an appropriate remedy). Hence the objection to indirect specific performance through an injunction is less strong in the sale than in the employment cases.

**Damages and specific performance or injunction**

Power to award damages in addition to or ‘in substitution for...specific performance’ or injunction was conferred on the Court of Chancery by an Act of 1858 and is now vested in the High Court (Supreme Court Act 1981, s 50). That court has power to grant all remedies to which a party is entitled (Supreme Court Act 1981, s 49); eg to award damages as well as, or instead of, specific relief. Normally there is therefore little point in invoking the power created by the 1858 Act, but there are still situations in which it may be to the claimant’s advantage to do so. In particular,
damages may be awarded under the Act even though there is as yet no cause of action at law: e.g. where an anticipatory breach has *not* been ‘accepted’ and specific performance is sought before the time fixed for performance (For specific performance in such a case, see *Hasham v Zenab* [1960] AC 316).

**RESTITUTION AND CONTRACTS**

**UNJUST ENRICHMENT**

A party who has wholly or in part performed his side of the contract and has not received the agreed counter-performance in full may sometimes be entitled to restitution in respect of his own performance. Where this consists of a payment of money, the payor will simply seek to get it back; where it consists of some other benefit he will claim recompense in respect of it (still often referred to as quantum meruit where the benefit is in the form of services and quantum valebat if in the form of goods supplied).

At the outset, it is important to stress that this chapter is not concerned with any aspect of the law of contract as such; it is concerned with a cause of action which may arise when a contract has failed (the type of claim considered in this chapter must also be distinguished from what is sometimes referred to as “restitutionary damages” which may be available for breach of a valid and enforceable obligation: see above, para 20-009 et seq). Before any claim for restitution may be allowed on this basis (claims in restitution may be made on other bases where there is a subsisting contract between the parties, e.g. a claim based on a mistaken payment made pursuant to a contract), it must first be established that the payments made, or work done, never were, or are no longer, regulated by a contractual obligation (*Goodman v Pocock* (18500 15 Q.B. 576; *Thomas v Brown* (1876) 1 Q.B.D. 714; *Kwei Tek Choo v British Trafers & Shippers Ltd* [1954] 2 Q.B. 459: *Re Richmond Gate Property Co Ltd* [1965] 1 W.I.R. 335; *The Trident Beauty* [1994] 1 WLR 161 and 166: “it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract”; *Costello v MacDonald* [2011] EWCA Civ 930; [2012] QB 244. For apparent exceptions to this requirement, see *Miles v Wakefield DC* [1987] A.C. 539; Tang Hang Wu 23 J.C.L. 201; *Barnes v Eastenders Group* [2014] UKSC 26; [2015] A.C. 1; cf. *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] H.C.A. 68.) i.e. the contract is void, or incomplete, or unenforceable, or it has been discharged for frustration or terminated for breach.

**Recovery of Money Paid**
An action lies to recover back money paid under a contract or purported contract.

“Total failure of consideration”. A contracting party can recover back money paid under a contract if there is a “total failure of consideration”, i.e. if no part of the performance for which he bargained has been rendered (Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 W.L.R. 574 at 587, 600; above, para 20-154 (the test is whether the performance has been rendered, not whether it has been received)).

Money paid under a void contract

In general. The law starts with the assumption that money paid under a void contract can be recovered back (e.g. Re London County Commercial Reinsurance Office [1922] 2 Ch. 67; cf. Colesworthy v Collmain Services [1993] C.C.L.R. 4; aliter if the contract or relevant term is only unenforceable: Boddington v Lawton [1994] I.C.R. 478). Thus in Bell v Lever Bros Ltd ([1932] A.C. 161; Landon 51 L.Q.R. 650; Taylor 52 L.Q.R. 27; Landon 52 L.Q.R. 478; Hamson 53 L.Q.R. 118) it is was clearly assumed that the money paid by the claimants under the compensation agreements could have been recovered back, had those agreements been void for mistake. Where a contract was void because one of the parties was a company not yet in existence when the contract was made, it was similarly held that instalments paid under it could be recovered back by the payor (Rover International Ltd v Cannon Films Ltd (No.3) [1989] 1 W.L.R. 912; Birks 2 J.C.L. 227). The same rule has been applied where money was paid under an ultra vires contract (Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 1 W.L.R. 938) and where money was paid under a contract which was void by statute (see the discussion in Westdeutsche Landesbank Girozentrale v Islington LBC at the first instance and in the Court of Appeal [1994] 4 All E.R. 890 at 921-924; [1994] 1 W.L.R. 938 at 946, 952 of the cases on contracts made void by Grants of Life Annuities Act 1777 (17 Geo. 3 c.26) s 1. This is presumably the “annuity bill” to which Sir Peter Teazle refers in Sheridan’s The School for Scandal, III.1 (first produced in 1777)).

Mistake. Where money is paid under a void contract, the payment will often be made in the mistaken belief that the contract was valid. Such a mistake was not formerly a ground on which the payor was entitled to the return of this money since the mistake was one of law and it had been held that there was no right to recover back money paid under a mistake of law (as opposed to one of fact). The authorities which had supported this view (Bilbie v Lumley (1802) 2 East 469; Brisbane v
Dacres (1813) 5 Taunt. 143; Kelly v Solari (1841) 9 M. & W. 54.) were, however, overruled by the House of Lords in Kleinwort Benson Ltd v Lincoln CC ([1999] 2 A.C. 349; Nurdin & Peacock Plc v D B Ramsden & Co Ltd [1999] 1 All E.R. 941), where moneys had been paid by a bank to local authorities under interest rate swap contracts which were believed to be valid but which were actually void. It was held that the bank was entitled to recover the moneys on the ground that they had been paid under a mistake of law (The claimant may choose to recover either on the basis that the contract is void, or for mistake of law: Deutsche Morgan Grenfell Group Plc v IRC [2006] UKHL 49; [2007] 1 A.C. 558. The potential benefit of the latter is the more extensive limitation period applied under the Limitation Act 1980, s.32(1); cf. Test Claimants in the Franked Investment Income (FII) Group Litigation v Her Majesty’s Commissioners for Customs & Excise [2012] UKSC 19; [2012 2 A.C. 337). It was further held that this right was not barred by the fact that the contract had been fully performed by both parties. The cased which supported the latter proposition where the claim was based, not on mistake, but simply on the fact that the contract was void (e.g. Westdeutsche Landesbank Girozentrale v Islington LBC [1994] 4 All E.R. 890; [1994] 1 W.L.R. 938; [1996] A.C. 669; Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC [1999] Q.B. 215) were referred to with approval, thus further supporting the view that money paid under a void contract is recoverable by the payor even though the circumstances are not such as would have given rise, if the contract had been valid, to a total failure of consideration. The reason for this conclusion was that the policy of the rule making the contract void might be defeated if full or partial performance of the contract were a bar to recovery e.g. if a local authority were precluded by such a bar from recovering ultra vires payments made in the mistaken belief that they were intra vires and hence legally due (Kleinwort Benson Ltd v Glasgow CC [1999] 2 A.C. 349 at 3897, 415-416).

Recovery of non-money benefits

Here we are concerned with cases which a party claims a reasonable recompense for some benefit (Since the basis of liability is the unjust enrichment of the other party, work done which does not benefit that party will not suffice, as in, e.g. Regalian Properties Plc v London Dockland Development Corp [1995] 1 W.L.R. 212; below, para 22-023) (other than a payment of money) conferred by him under contract or a purported contract: quantum meruit where the benefit is in the form of services and quantum valebat if in the form of goods supplied. In those cases where there is a contract between the parties, there may be an express provision for remuneration on specified events (e.g. payment only upon competed performance of an entire obligation: see below, para 22-023) and, where that is the case, the general rule is that the court cannot award any other remuneration on
those events, nor can it award any remuneration if they do not occur (Wiluszynski v Tower Hamlets LPC [1989] L.C.R 493). To allow quantum meruit claims in such cases would contradict the agreement reached by the parties, and the courts will do this only if there are special circumstances justifying such interference.

Contracts not providing for remuneration. A party can claim a sum for work done or a price for goods delivered under a contract which does not expressly provide how much he is to be paid, or which makes some, but not a full, provision for payment (Sir Lindsay Parkinson & Co Ltd v Commissioners of Works [1949] 2 K.B. 632; cf. Steven v Bromley & Son [1919 2 K.B. 722; The Gregos [1985] 2 Lloyd’s Rep. 347; The Saronoikos [1986] 2 Lloyd’s Rep. 277; Cooke v Hopper [2012] EWCA Civ 175). This will be the case where the whole agreement is implied from conduct (Paynter v Williams [1833] 1 C. & M. 810; cf. The Batis [1990] 1 Lloyd’s Rep. 345; The Kurnia Dewi [1997] 1 Lloyd’s Rep. 553), or where it is simply silent as to the rate of payment. Sometimes it may be clear from the terms of the agreement, or from the circumstances in which it was made, that the claimant was not intended to have any legal right to be paid at all. But if he was intended to have such a right the court will award a reasonable sum. Thus if a contract for the sale of goods does not fix the price, the buyer must pay a reasonable price (Sale of Goods Act 1979 s.8(2)); and if a contract for services does not fix the remuneration, a reasonable sum must be paid (Supply of Goods and Services Act 1982 s.15(1); cf. at common law Way v Latilla [1937] 2 All E.R. 759; Berezovsky v Edmiston & Co Ltd [2011] EWCA Civ 431; [2011] 1 C.L.C. 922). In such cases, the court is concerned to determine the intention of the parties. This may be contrasted with cases where there is no concluded contract, where the court is required to determine the objective market value of any benefit received. It has been said that “the exercise of ascertaining what objectively [the parties] would have contemplated was a reasonable amount, is a very different exercise from that which is required of the court in the context of a restitutionary quantum meruit” (Energy Venture Partners Ltd v Malabo Oil & Gas Ltd [2013] EWHC 2118 (Comm) at [283]; cf. Benedetti v Sawiris [2013] UKSC 50; [2013] 2 W.L.R. 351 at [9]). But since market value is the price which a reasonable recipient in the position of the defendant would have paid, and an implied term (as to price) is also reached on an objective basis, i.e. what the parties, as reasonable persons, would have agreed (see above, para. 6-033) the difference in practice may not be that great.

No concluded contract (Barker 29 J.C.L. 105; Edelman in Burrows & Peel (eds), Contract Formation and Parties (2010)). Work may be done and a quantum meruit awarded to the party who has done the work where the parties believe that there is a contract but this is not the case because there was
never a clear acceptance of an offer (Peter Lind & Co Ltd v Mersey Docks & Harbour Board [1972] 2 Lloyd’s Rep. 234; above, para 2-020). Such an award may also be made where work is done, under an agreement which lacks contractual force for want of contractual intention (Galliard Homes Ltd v Jarvis Interiors Ltd [2000] C.L.C. 411) in anticipation of a formal contract which fails to materialise for want of execution of the requisite formal document (Galliard Homes Ltd v Jarvis Interiors Ltd [2000] C.L.C. 411). This was accepted by both parties (though doubted by Evans LJ)); and where one party does work at the request of the other during negotiations which are expected to lead to a contract between them but are broken off before its conclusion (William Lacey (Hounslow) Ltd v Davis [1957] 1 W.L.R. 932; BSC v Cleveland Bridge & Engineering Co Ltd [1984] 1 All E.R. 504; Ball 99 L.Q.R. 572; Marston Construction Co v Kigass (1990) 15 Con L.R. 116; Key 111 L.Q.R. 576; Countrywide Communications Ltd v ICL Pathway Ltd [2000] C.L.C. 324; Cobbe v Yeoman’s Row Management Ltd [2008 UKHL 55; [2008] 1 W.L.R. 1752; Whittle Movers Ltd v Hollywood Express Ltd [2009] EWCA Civ 1189; [2009] 2 C.L.C. 771; Davies 126 L.Q.R. 175; Benourad v Compass Group Plc [2010] EWHC 1882 (QB) at [106]; Killen v Horseworld Ltd [2011] EWHC 1600 (QB)). But no such award will be made where the party doing the work takes the risk that the negotiations may fail. This was held to be the position where one party to an agreement “subject to contract” (see above, para 2-094) incurred expenses without any request form, and without benefitting, the other but solely for the purpose of securing (and then of performing) the contract (Regulation Properties Plc v London Dockland Development Corp [1995] 1 W.L.R. 212, where Marston Construction Co v Kigass (990) 15 Con. L.R. 116 was at 229 described as a “surprising decision”; cf. Blue Haven Enterprises Ltd v Tully [2006] UKPC 17, MSM Consulting Ltd v Tanzania [2009] EWHC 121 (QB); 123 Con L.R. 154 at [171](d).

Contract void: In Craven-Ellis v Canons Ltd ([1936] 2 K.B. 403; Denning 55 L.Q.R. 54) the claimant worked for the defendant company as managing director. His service agreement with the company was void as neither he nor those who appointed him held the necessary qualification shares (See now Companies Act 2006 ss.40, 41; above, para 12-069). Thus he could not recover his agreed pay (cf. Re Bodega Co [1904] 1 Ch. 2676; if he is paid his contractual remuneration he must pay it back.) But the Court of Appeal held that he was entitled to a quantum mercuit. The position is the same where a contract with a company is void because the company was not yet in existence or had been dissolved (See above, para. 16-073) when the contract was made (Rover International Ltd v Cannon Films Ltd (no.3) [1989] 1 W.L.R. 912; Cotonic (UK) Ltd v Dezonio [1991] B.C.I.C. 721; above, para 16-073. For pre-incorporation contracts with limited liability partnerships, see Limited Liability Partnerships Act 2000 s.5(2); above, para.16-066). A similar principle may apply where goods have been supplied under a contract of sale which is void for a mistake as to the identity of the buyer (e.g.
on the facts of *Boulton v Jones* (1857) 27 L.J. Ex. 117; for the exact nature of the appropriate remedy in such a situation, see above para. 8-045).