HERBERT SMITH FREEHILLS
DISPUTE RESOLUTION

This is the ninth in our series of **contract disputes practical guides**, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

CONTRACT DISPUTES PRACTICAL GUIDES
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GETTING YOUR JUST DESERTS:

REMEDIES FOR BREACH OF CONTRACT

Establishing that a counterparty is in breach of contract is only the first hurdle to obtaining proper redress. It is just as important for the innocent party to show that it has suffered a loss as a result of the breach, and to prove what that loss is, or to establish that it should be entitled to some other remedy such as an injunction.

Otherwise, the innocent party is likely to be awarded only nominal damages and may even be required to pay legal costs.



Natasha Johnson, **Rachel Lidgate** and **John Ogilvie** consider the principal remedies available for breach of contract, focusing in particular on damages and how they are assessed, and provide some practical tips.

(Note that liquidated damages / limitation and exclusion clauses were discussed in issue 6 of this series, so are not covered in this guide.)

TOP TIPS IN RELATION TO REMEDIES:

- When contracting, DO consider informing the counterparty of any unusual types of loss you might suffer if there's a breach
- DO consider the impact of contractual termination rights on any damages claim
- DO consider agreeing terms relating to damages, but be mindful of the rules on penalties and limitation clauses
- DO put in place a system of recording losses and expenses caused by the breach
- DO keep a record of your attempts to mitigate
- DO consider how any post-breach transaction is structured, as that may affect whether the benefits received reduce any damages payable
- DON'T forget specific performance or an injunction may be available if damages would not be an adequate remedy

1. INTRODUCTION

The most common remedy for a breach of contract is the award of damages. This is aimed, so far as possible, at putting the claimant in the position it would have been in if the contract had been properly performed. Because of this, benefits obtained as a result of the breach must be taken into account (see section 2 below).

The claimant will not be able to recover losses which it could have avoided by taking reasonable steps to mitigate its loss (see 3 below) or which are seen in law as too remote or as otherwise falling outside the scope of the defendant's liability (see 4 below). In some circumstances, damages may be reduced to take account of the claimant's own fault (see 5 below).

A claim for damages must be distinguished from a claim for payment of a debt. Where a party has performed its obligations and is entitled to payment of a fixed sum under the contract, that sum can be claimed as a debt. A claim in debt has significant advantages in that there is no need to prove actual loss and the various restrictions on recovery of damages, such as remoteness and mitigation, do not apply.

As damages are essentially compensatory, the claimant must ordinarily show that the breach caused the loss claimed. There are, however, some situations which are more difficult to fit into this analysis (see 6 and 7 below).

Apart from a claim in debt or damages, the innocent party may be awarded certain equitable remedies, such as specific performance or an injunction (see 8 below).

2. MEASURE OF DAMAGES

Assuming there are no contractual provisions regulating the measure of damages (see issue 6 of our contract disputes practical guides series: Defining your liability in advance: Liquidated damages, limitation and exclusion clauses) the court will seek to determine the amount that will, so far as possible, put the claimant in the position it would have been in if the contract had been properly performed.

Expectation vs reliance loss

Precisely how damages will be calculated varies greatly depending on the type of contract and the circumstances. But in general terms, damages will be assessed by reference to the benefit the innocent party would have obtained from proper performance, less any gains received as a result of the breach (eg costs saved by not having to perform its side of the bargain). This is sometimes referred to as the claimant's "expectation" loss. The claimant may also be able to recover costs wasted as a result of the breach ("reliance" loss), but there can be no double counting. To take two examples:

- A buyer wrongly repudiates a contract for the supply of bespoke IT equipment just before the installation date. The supplier is (prima facie) entitled to the price it would have been paid, less any benefits resulting from the breach (eg labour costs saved). It cannot claim the wasted costs of manufacturing the IT equipment on top, as those costs are already taken into account.
- Say instead the supplier has wrongly repudiated the contract. The buyer is (prima facie) entitled to the value of the IT system, less any benefits resulting from the breach (eg not having to pay further instalments). It cannot also reclaim instalments paid to date.

A claimant can choose to claim damages on the basis of its reliance loss (ie wasted expenditure) instead of its expectation loss. In some cases this may be more straightforward, particularly where it is difficult to assess the value it would have obtained under the contract. The claimant cannot use this route to recover more than it would have received if the contract had been properly performed – so, for example, if the contract was unprofitable so that the claimant wouldn't have recouped its expenditure in full, it will not be able to recover to that extent. But it is up to the defendant to establish that.

> "Damages are meant to put the claimant back where it would have been if there had been no breach – no worse, but no better either"

As flagged above, where the claimant has incurred wasted expenditure that has not already been taken into account calculating damages for expectation loss, this can also be claimed. So in the example above where the supplier is in breach, the buyer may have incurred costs preparing for the installation – eg arranging site access for the supplier's workers. To the extent such costs are wasted, they may be recoverable in addition.

Limited expectations

Where the defendant could have performed the contract in a number of different ways, the court will assume that it would have performed in the least onerous manner open to it. That is effectively the limit of the claimant's expectation loss.

In *Comau UK v Lotus Lightweight Structure* [2014] EWHC 2122 (Comm), the claimant contracted to supply goods and services relating to the installation of a new product line at the defendant's car factory. The defendant failed to pay certain invoices in line with an agreed payment schedule. The claimant terminated the contract and sought summary judgment together with an interim payment of £500,000 in respect of its claim for loss of profits going forward.

The High Court declined to award summary judgment, saying the defendant had real prospects of successfully defending the allegation that it was in repudiatory breach. The judge noted that, if he had been persuaded on liability, he would not have awarded any interim payment as it appeared the claimant would not be awarded more than nominal damages in any event.

Under clause 12.5 of agreement, if the defendant had not been in breach of its payment obligations, it would have been entitled to terminate the contract on immediate notice. Any damages would therefore be calculated on the assumption that, if it hadn't been in breach of contract, the defendant would have exercised its rights under clause 12.5 to reduce its liability to the claimant.

Any other assumption would, the court said, ignore the limited nature of the claimant's "expectation interest", ie that it was only ever entitled to such profit as it might have gained prior to any "termination for convenience". If clause 12.5 was ignored when assessing damages, the effect would be to give the claimant the benefit of a better bargain than it actually made.

Difference in value vs cost of cure

Where the contract has been performed in part, but badly, the question will often arise as to whether damages should be calculated by reference to the cost of putting it right, or alternatively the difference in value between what the claimant obtained and what it should have obtained, ie its loss of bargain.

The answer will normally depend on what it's reasonable for the claimant to do in the circumstances. If it's reasonable to insist on having the defect corrected, the claimant will normally be entitled to damages on that basis. Otherwise, it may only be entitled to claim the difference in value.

"As in many contexts, reasonableness has a part to play. If the cost of curing a breach is wholly disproportionate, the claimant may only be able to recover the difference in value"

The classic illustration of this point comes from *Ruxley v Forsyth* [1996] AC 344. The defendant had contracted to install a swimming pool on the claimant's property. The pool was to be 7′ 6″ deep but, as built, its maximum depth was only 6′ 9″. The difference in value was found to be nil, whereas the cost of rebuilding the pool to the desired depth would have been £21,560.

The House of Lords refused to award the cost of rebuilding the pool. The judge had found that this cost was wholly disproportionate to any prospective benefit, and so was unreasonable.

Relevance of available market

One factor that is often important in assessing damages is whether or not there is an available market for the goods or services which form the subject matter of the contract. If there is, the innocent party will generally be expected to take advantage of that market, for example to sell the goods (if the buyer has wrongly rejected them) or buy replacements (if the seller has failed to supply).

In these circumstances, the claimant's damages will generally be limited to the difference between the contract price and the market price on the date the cause of action arose (plus any additional expenses incurred in having to go to the market). That will be so whether or not the claimant has in fact taken advantage of the market in question. This is sometimes referred to as the "breach date rule", and it is reflected in the provisions relating to damages for non-acceptance or non-delivery under the Sale of Goods Act 1979 set out to the right.

The expectation that the buyer will take advantage of an available market ties in with the principles relating to mitigation, discussed at section 3 below. If the innocent party had made a bad bargain, so that the market price is actually more advantageous than the contract price (ie higher, if the claimant is the seller, or lower, if the buyer), then there is generally no loss – other than perhaps expenses.

> "Where there's an available market, calculating the claimant's loss of bargain (if any) should be straightforward – it is simply a comparison of the contract price with the market price"

SALE OF GOODS ACT 1979

Section 50. Damages for non-acceptance.

1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.

Section 51. Damages for non-delivery.

1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.

If there is no available market for the goods or services in question, then the assessment of damages for loss of bargain may be trickier. Some examples from the sale of goods context may help to illustrate:

- If a buyer has wrongly rejected goods, and there is no ready market, the seller will ordinarily be entitled to the contract price less any value in the goods retained. That value might be evidenced, for example, by the price the seller has managed to achieve in an alternative sale, or by sale prices achieved for reasonably similar goods.
- If a seller has failed to supply goods, and the buyer can't obtain substitute goods in the market, the buyer will ordinarily be entitled to the value of the goods at the time of the breach less the contract price. Again, in assessing value, the court may look to actual sale prices achieved around the relevant time.

The claimant may be entitled to further damages, not limited to loss of bargain, depending on the circumstances. If for example a seller has failed to supply goods, and the buyer has lost out by not being able to use those goods in its business, it may be able to claim for that loss (subject to the rules on remoteness discussed below). This should only arise, however, if there is no available market – where there is an available market, the buyer will normally be able to take advantage of that market to source replacement goods and curtail any further losses.

"The breach date rule is just a starting point; it will be overridden where it does not properly compensate for the breach"

Hughes v Pendragon Sabre Ltd [2016] EWCA Civ 18 gives an example of how the court approached the assessment of damages where there was no available market. In that case, the Court of Appeal found that the defendant car dealer was in breach of a collateral contract to sell a limited-edition Porsche to the claimant if the defendant was allocated one of the vehicles.

The court noted that the "breach date rule", as reflected in section 51(3) of the Sale of Goods Act, applied only when there was an available market in the goods. That meant the goods were available and freely sold, with the price being settled by the laws of supply and demand. In this case, the goods were so specialised that there was not sufficient activity to evidence a market. Only about 30 of the relevant models had been supplied to the UK, and the parties' experts had not been able to find one for sale.

Accordingly, the damages had to be assessed according to the value of the goods at the time of the breach, on the best available evidence. Although the evidence about the cost of the nearest equivalent vehicle was "deficient", given the illiquid market, it seemed certain that the value of the vehicles had appreciated and the resale value was in excess of the price as new.

Since the claimant had produced evidence of similar vehicles with asking prices of some £170,000, and the other evidence was "not significantly inconsistent" with it, the court adopted that figure. Deducting £135,000, which it found would have been the contract price, the court awarded damages of £35,000.

Overriding compensatory principle

The breach date rule provides the starting point for the assessment of damages, but it may be displaced where necessary to compensate the claimant appropriately for the loss suffered. This is sometimes referred to as the "overriding compensatory principle".

So, for instance, the damages may be reduced if events which occurred after the date of the breach show the innocent party would have suffered the same loss (or a substantial part of it) in any event. See examples to the right.

The principle has also been applied to increase a claimant's damages, where the defendant's conduct after the breach means the breach date rule does not give the appropriate measure of damages. An example is given below.

In *Lakatamia Shipping Co Ltd v Nobu Su/Hsin Chi Su* [2014] EWHC 3611 (Comm), the defendants failed to repurchase forward freight agreement (FFA) positions on the date agreed under the contract. The defendants argued that damages should be limited to the difference between the contract and market value of the relevant FFA positions at the date the repurchase should have taken place.

The court disagreed, on the basis that the defendants repeatedly assured the claimants that they would complete the repurchase, and so had encouraged the claimants not to take advantage of the available market to sell the goods. That meant they could not argue that the damages should be assessed on the basis of such a sale taking place on the date of breach. The prima facie rule had to give way to the overriding compensatory principle.

In *The Golden Victory* [2007] 2 AC 535, a charterer repudiated a seven-year time charter four years early but only 14 months before it would have been cancelled in any event under a war clause.

The majority of the House of Lords held that in assessing damages for the repudiation, it was necessary to take account of events after the repudiation if they meant the contract would have been lawfully terminated before the end of the contract term. So damages were to be assessed on the assumption that the charter would have lasted another 14 months.

In *Bunge SA v Nidera BV* [2015] UKSC 43 (considered here on our Litigation Notes blog), the claimant contracted with the defendant to buy Russian wheat for shipment between 23 and 30 August 2010. The contract provided for cancellation in the event of relevant export restrictions being imposed. On 5 August, Russia introduced an embargo on wheat exports starting on 15 August, and on 9 August the sellers purported to cancel the contract.

By the time of the appeal to the Supreme Court, it was common ground that the sellers were not entitled to cancel at that stage, as the embargo had not yet commenced. So the contract had come to an end as a result of the sellers' renunciation. However, the Supreme Court held that the buyers had suffered no loss because shipment would have been subject to the export ban in any event.

Collateral benefits

It is not always easy to determine whether a benefit obtained by the innocent party must be taken into account to reduce the damages payable following a breach of contract, or alternatively will be treated as a collateral benefit which is ignored for these purposes.

The key question is whether the benefit was caused by the breach. This is not simply a "but for" test; it is not sufficient that the benefit would not have been obtained but for the breach. Nor is it sufficient if the breach merely provided the occasion for the innocent party to obtain the benefit. Determining causation in this sense is not a straightforward question; it will depend on all the circumstances. Two recent Supreme Court decisions illustrate the difficulty.

In *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32 (considered here) the Supreme Court held , overturning the Court of Appeal decision, that the loss suffered by a lender due to its accountants' breach of duty was extinguished when the loan was repaid by the borrower.

The repayment had been funded by the lender's indirect owner, who had acquired an interest in the borrower. The Court of Appeal and Supreme Court agreed that if the owner had provided funds directly to the lender, to make up the shortfall caused by the borrower's failure to repay the loan, this would have been a collateral payment that should be ignored in assessing damages. However, in the Supreme Court's view, since the repayment was made by the borrower, it could not be regarded as collateral. The fact that the funds came from the owner was not relevant.

In *Globalia Business Travel v Fulton Shipping* [2017] UKSC 43 (outlined here) the defendant charterers had claimed to be entitled to redeliver the claimants' vessel some two years early. The owners treated this as a repudiatory breach, which they accepted as terminating the charterparty. They went on to sell the vessel for almost US$24 million just prior to its redelivery.

The arbitrator found that, at the end of the charterparty two years later (following the global financial crisis), the vessel would have been worth US$7 million.

The question was whether, in the owners' claim for loss of earnings, they had to give credit for the benefit obtained in selling the vessel early. After differing decisions by the arbitrators, the High Court and the Court of Appeal, the Supreme Court ultimately found in favour of the owners.

For the benefit to be brought into account, it must have been caused either by the breach or by a successful act of mitigation. On the facts of this case, it was not caused by the breach. The termination was merely the occasion for selling the vessel; it could have been sold during the term of the charterparty. Nor was it a successful act of mitigation, as it was incapable of securing an alternative income stream.

The decision to sell the vessel was the owners' commercial decision, taken at their own risk. It had nothing to do with the charterers. If the market value had risen, the owners could not have claimed the difference from the charterers; they equally could not be required to bring into account the benefit gained by the fall in value.

3. MITIGATION

A party that is in breach of contract will not be liable for losses that the innocent party could have avoided by taking reasonable steps to mitigate its loss.

This is sometimes referred to as the claimant's duty to mitigate, though that is a bit of a misnomer. The claimant is under no duty to take reasonable steps; it simply will not be able to recover any losses it could have avoided by doing so.

The question of what steps are reasonable is necessarily fact-sensitive. In some cases, for example, the innocent party may be required to negotiate with the party in breach, eg to put right the defective performance. However, the onus is on the defendant to show that the claimant failed to act reasonably. The standard of what is reasonable for these purposes is not a high one.

The claimant will also be able to recover the costs or losses incurred as a result of taking reasonable steps to mitigate – even if those steps turn out to have increased the loss overall. Where a party has successfully taken steps to mitigate its loss, the damages recoverable will be reduced accordingly.

In *Bacciottini v Gotelee and Goldsmith* [2016] EWCA Civ (considered here), the Court of Appeal upheld an award of only £250 in damages for the defendant solicitors' failure to identify a relevant planning restriction affecting the claimants' residential purchase. The claimants had mitigated their loss by successfully applying to remove the restriction, and so could recover only the costs of the application.

In *Manton Hire v Ash Manor Cheese* [2014] EWCA Civ 548 (considered here), the defendant supplied a reach forklift truck for the claimant to use in its warehouses. The defendant's representative attended the claimant's site to take measurements of its racking arrangements. The model supplied was one of two that it recommended as suitable.

After delivery, the claimant discovered that the forklift did not fit within the racking, and took the view that it was not fit for purpose. The defendant proposed to remove the truck and have it modified to correct the problem. The claimant expressed various concerns including as to whether the proposed modifications would comply with relevant legislation and regulations. Discussions broke down and the claimant rejected the forklift.

The Court of Appeal rejected the defendant's argument that the claimant had failed to mitigate. The defendant had not put forward an offer that the claimant could reasonably have been expected to accept. The position may have been different if the defendant had put forward a detailed proposal supported by a proper specification and drawings, as well as information as to how the relevant legislative and regulatory requirements would be met.

The court pointed out that the defendant was the expert in the field, and so it was for the defendant to satisfy the claimant that its proposal was lawful and that it could deliver its proposed solution. In the circumstances, the claimant had not acted unreasonably.

4. REMOTENESS

A claimant may not be able to recover some types of loss, even though they have been caused by the defendant's breach, because they are regarded by the law as too remote. The standard test of remoteness in contract was established in the classic case of *Hadley v Baxendale* (1854) 9 Ex 341. This provides, in broad summary, that losses will be recoverable if they fall within one of two "limbs":

- losses arising naturally, in the usual course of things, from the breach itself; and
- losses arising from special circumstances known to both parties at the time of the contract.

Where a loss arises from special circumstances that were not drawn to the defendant's attention at the time of contracting, it will not be recoverable.

The essence of the rule is that the defendant should not be held liable for types of loss which, at the time of the contract, a reasonable person in his position would not have foreseen as likely to result from a breach.

So, if a seller has failed to deliver some item that the buyer intends to use profitably in its business, the seller is likely to be liable for the resulting loss of profits – at least so long as it was within the seller's reasonable contemplation that the item in question might be used to make a profit. But if the buyer loses out on an unusually lucrative contract, that may (depending on the circumstances) be seen as a separate type of loss which arises from special circumstances. If so, it will be too remote to recover unless the seller has been informed of the relevant circumstances.

The classic illustration is the case of *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. The defendants delayed in delivering a large boiler to the claimant laundry. The Court of Appeal held that the claimant could recover its "normal" loss of profits resulting from the delay; the defendants knew the claimant was a laundry and wanted the boiler for immediate use, so could reasonably have foreseen that the delay would lead to a loss of business.

But the claimant could not recover its loss of profits on certain particularly lucrative dyeing contracts the claimant could have entered into, as that was a special circumstance that was not within the defendant's knowledge.

In some cases, even though the traditional test might lead to a conclusion that a type of loss was not too remote, the claimant may still be denied recovery on the basis that the defendant cannot reasonably be regarded as having assumed responsibility for losses of that kind.

This is the alternative approach which arises from the House of Lords decision in *Transfield v Mercator (The Achilleas)* [2008] UKHL 48. It seems, however, that this approach will only apply in unusual circumstances.

"A loss will not be recoverable if the defendant couldn't be expected to have foreseen it and didn't assume reasonability for it"

In *The Achilleas* (considered here), the defendant chartered a vessel from the claimant at a (final) daily rate of US$16,750. Before the agreed date for redelivery, the claimant agreed a new four to six month charter with a third party at a daily rate of US$39,500.

The defendant was nine days late redelivering the vessel, which meant the third party would have been entitled to cancel the new charter. By that time market rates had fallen, so the claimant agreed to reduce the daily rate to £31,500.

The claimant claimed the US$8,000 per day reduction for the whole period of the new charter (nearly £1.4 million). The defendant argued that the claim should be limited to the difference between the market rate and the existing charter rate for the nine day period during which the claimant couldn't use the vessel (about £160,000).

The House of Lords held in favour of the defendant. Lord Hoffmann and Lord Hope reached their decision on the basis that the further losses, though not unlikely to occur, were not losses for which the defendant had assumed responsibility. This was for a number of reasons, including the accepted practice in the charter market that damages for late redelivery were calculated as the difference between the market rate and the charter rate for the period of late delivery.

Lord Hoffmann did, however, make clear that the traditional *Hadley v Baxendale* test was the starting point and the assumption of responsibility test should only be used where the circumstances require it.

In *John Grimes Partnership v Gubbins* [2013] EWCA Civ 37 (outlined here), a breach of contract by JGP (an engineering firm) led to a 15 month delay in completion of G's residential development. The Court of Appeal upheld an award of damages for the decline in value of the development during the period of the delay.

The court rejected JGP's argument that it could not be said to have accepted responsibility for loss arising from a diminution in value. There was nothing to take the case out of the conventional approach to remoteness of damage in contract, ie the *Hadley v Baxendale* approach.

The judge had considered whether losses arising from movement in the property market were reasonably foreseeable at the time of the contract as a consequence of any delay by JGP, and had concluded that they were.

There had been no evidence before him to show that there was some general understanding or expectation in the property world that a party in JGP's position would not be taken to have assumed responsibility for losses arising from movement in the market. This could be contrasted with the facts of *The Achilleas* itself where it was found that there was a general expectation that a charterer who returned a vessel late was liable in damages only for the period of late delivery and not for losses incurred through the owners losing a follow-on charter. The fact that a loss was suffered because of a change in market values during the wrongful delay did not render the case out of the ordinary.

5. CONTRIBUTORY NEGLIGENCE

Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides that, where a person suffers damage "as a result partly of his own fault and partly of the fault of any other person", the damages recoverable shall be reduced "to such extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage".

This provision is primarily aimed at claims in the tort of negligence. However, where the claimant would have had a claim against the defendant in negligence for the same conduct that amounts to the breach of contract, the defendant may equally be entitled to rely on contributory negligence in defending the contract claim. This may arise for example in professional negligence claims. The rationale is that, where the claimant is partly at fault, it should not be able to prevent the defendant relying on the defence of contributory negligence by bringing the claim only in contract, rather than tort.

The question of whether or not the claimant is considered to be at fault, for the purposes of a contributory negligence defence, will depend on what is expected of the particular claimant in the particular circumstances. So, for example, in the context of a solicitors' negligence claim, a sophisticated corporate client with in-house lawyers might be expected to pick up matters which an ordinary individual client would not.

Where the court finds that the claimant was partly at fault, the extent of the reduction in damages will depend on an assessment of what is just and equitable having regard to the parties' respective responsibility for the damage. That may be very difficult to predict.

6. LOSS OF A CHANCE

Where the claimant's loss depends, not on what it would have done, but on the hypothetical acts of a third party, the court may award damages for the "loss of a chance". This approach has been adopted in cases involving such varied matters as the lost chance to participate in a beauty contest, the lost chance to negotiate better terms in a property transaction, and the lost chance to bring a successful claim in litigation.

The claimant first needs to prove causation – ie that on the balance of probabilities there was a real or substantial chance that the third party would have acted in a way that meant the claimant would gain some benefit, or avoid some loss. The chance need not be more than 50%, but it cannot be merely speculative. If causation is proved, the court will go on to quantify damages, applying the relevant percentage chance to the value of the benefit that could have been gained, or loss avoided.

The question of whether a "loss of a chance" approach favours the claimant or defendant varies depending on the facts of a particular case. Such an approach may allow a claimant to recover damages, even though it cannot prove loss on the balance of probabilities. Equally, however, it may mean that a claimant is unable to recover in full, despite having proved loss on the balance of probabilities.

The court may not apply a "loss of chance" approach in valuing an asset the claimant has lost, even if the value depends on the hypothetical acts of a third party (eg an independent valuer).

In *Law Debenture Trust Corporation PLC v Elektrim SA* [2010] EWCA Civ 1142 (considered here) the court had to assess the value of a lost chance of obtaining a contingent payment, which would have been calculated according to a formula based on the "fair market value" of Elektrim's assets as determined by two leading investment banks.

A key element in the valuation of Elektrim's assets was the value of its shareholding in a company that was subject to a long running ownership dispute. The judge held that the approach taken by the notional investment bankers in valuing the shareholding would have depended critically on the legal advice they had received. He made findings as to what that advice would have said and the assessment the bankers would have reached.

The Court of Appeal endorsed the judge's approach, commenting that the case was quite different from cases that depended significantly on non-legal factors such as the outcome of a beauty contest or commercial negotiations. Here the court had to assess what a banker would have concluded as to the valuation of certain shares. It said that where something of value has been lost, "the court must do its best to estimate that value and should not too readily decide that it is a matter of chance what the true value of something as concrete as a share is likely to be".

The court rejected the submission that it should have considered the various possible conclusions the bankers might have reached and assessed the chance of each. Such an approach was "over-complicated" and no more likely to achieve an accurate result.

In *Anthony McGill v Sports & Entertainment Media Group* [2016] EWCA Civ 1063, the claimant football agent brought a claim against a rival agency for inducing a player to breach his oral contract with the claimant. The claimant claimed damages for the lost chance of earning commission on the player's transfer from Aston Villa to Bolton.

Under the relevant FA regulations, the claimant would not have been able to obtain payment of commission unless he had entered into a written agreement with the player before the transfer concluded; an oral contract was not sufficient.

The High Court dismissed the claim on the basis that the claimant had not established, on the balance of probabilities, that the player would have entered into a written agreement so as to allow the claimant to claim his promised commission.

The Court of Appeal overturned that decision. It held that the claimant could recover damages for the lost chance of earning commission, even though he could not establish more than a 50% chance that the player would have entered into a written agreement. There was a real or substantial chance that he would have done so, had the rival agent not interfered, and so the lost chance should have been assessed on a percentage basis.

The case was remitted to the High Court to determine the value of the lost chance, which could not (in light of the judge's finding on the balance of probabilities) be more than 50%.

7. LICENCE FEE DAMAGES

In some cases, instead of awarding damages calculated on the conventional basis, the court may award so-called "licence fee damages", calculated as the sum which might reasonably have been negotiated between the claimant and defendant if the defendant had sought the claimant's permission to do what it has (wrongfully) done.

Such damages are sometimes referred to as "Wrotham Park damages" after the classic case which established the remedy, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. In that case the defendant built 14 houses on a parcel of land, in breach of a restrictive covenant which prevented it building on the land unless approved by the claimant (which owned the adjoining estate). It was conceded that the value of the estate was not diminished by the development, and so a conventional damages award would not have provided a remedy. The court declined to grant a mandatory injunction to pull down the houses, as it would have been a waste of badly needed housing. Instead it awarded a sum which the claimant might reasonably have demanded for relaxing the covenant to allow the development, assessed at 5% of the defendant's anticipated profits.

The precise circumstances in which licence fee damages will be awarded remain a matter of some debate in the case law. It seems the key question is whether justice requires such an award. An inability to establish damages on the conventional basis will be a relevant factor, but it is not necessarily a pre-requisite.

In exceptional circumstances, the court may award an account of profits as a remedy for breach of contract, but this is very rare and is not considered further in this guide.

In *Morris-Garner v One Step (Support) Ltd* [2016] EWCA Civ 180, the defendants sold the claimant their business providing "supported living" services for children leaving care and vulnerable adults. The defendants subsequently breached the non-compete and non-solicitation clauses in the sale agreement by setting up a competing business.

The judge gave the claimant the option to elect (as it did) for licence fee damages. The Court of Appeal upheld that decision. It rejected the defendant's argument that licence fee damages can be awarded **only** where the injured party is unable to demonstrate identifiable financial loss, and where to do so is necessary to avoid manifest injustice. It concluded that the question for the court is whether it is just to award licence fee damages in the particular case.

The Court of Appeal said that the judge was entitled to take into account the difficulties the claimant would have in establishing damages on the ordinary basis, in particular in showing what placements it had lost or might have lost because of the competing business, and in measuring any loss of goodwill.

The Supreme Court heard an appeal against this decision in October 2017. Judgment is awaited.

8. EQUITABLE REMEDIES

In some circumstances, the court may award a non-financial remedy, in particular:

i) Specific performance: an order compelling a party to perform its contractual obligations (ie other than the payment of money – that would be simply a debt claim).

ii) An injunction: typically, an order compelling a party to refrain from doing something that would be a breach of contract (a "prohibitory" injunction). Less usually, an injunction may require a party to take positive action, eg to put right a breach (a "mandatory" injunction).

These are referred to as "equitable remedies" as, historically, they were available only from the courts of equity rather than common law. These remedies are at the court's discretion.

The court will grant an equitable remedy only if damages would not be an adequate remedy. So, for example, it will not grant specific performance of a contract to supply commoditised goods, but may do so for a contract to sell a particular piece of land, as that is unique and not capable of substitution. Damages may also be considered inadequate where they are very difficult to quantify, or where they are restricted by an exclusion clause.

"Orders for the payment of a debt or damages are the most common remedy for a breach of contract, but they are not the only one. In some circumstances, the court may compel a party to perform its obligations, or refrain from breaching them, or to put right a past breach"

In *AB v CD* [2014] EWCA Civ 229 (considered here), the claimant sought an interim injunction to restrain the defendant from terminating a licensing agreement pending the determination of the claimant's claims in arbitration proceedings. The licensing agreement contained a contractual limitation on the heads of loss that would be compensated in damages.

The Court of Appeal granted the injunction, finding that damages would not be an adequate remedy due to the limitation clause in the contract. It held that, while the agreement of the parties concerning the quantification of damages is conclusive in the context of a claim for damages, it is not conclusive in a claim for an injunction which is designed to avoid any cause to claim such damages.

However, the court was keen to emphasise that its decision did not mean an injunction would be granted in all such cases. Establishing that damages would not be an adequate remedy merely allows the court to exercise its discretion as to whether an injunction should be granted. In exercising that discretion, the fact that the restriction in question was agreed, and the likelihood and scale of any shortfall in the claimant's compensation as a result of it, may be relevant.

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