

25. CONTRACT LAW: REMEDIES

What are "damages"?

Damages are financial compensation for a legal wrong. In contract, the aim is to put the injured party in their anticipated post-contractual position (*Robinson v Harman* [1848]). A claim for damages can take two forms:

- (1) **Liquidated damages**—this is where the contract specifies the amount to be paid (or a formula for working it out) in the event of a particular breach. These are valid where they are a genuine attempt to estimate the likely loss, but not where they are a penalty clause designed to compel performance (*Dunlop v New Garage* [1915]). It will be regarded as a penalty clause where: (a) the specified sum is greater than any conceivable loss; (b) the breach is a failure to pay sums due and the damages specified exceed that sum; (c) the same sum is specified for both major and minor breaches.
- (2) **Unliquidated damages**—this is a claim based on the actual loss suffered. The injured party may claim for: (a) losses (including consequential losses) that are a natural consequence of the breach; and (b) other losses that were known to be a possibility by both parties at the time the contract was made (*Hadley v Baxendale* [1854]; *The Heron II* [1969]).

The court is entitled to engage in a degree of *speculation* in calculating the actual loss (e.g. loss of a chance—*Chaplin v Hicks* [1911]). Also, the injured party is required to take all reasonable steps to *mitigate* (keep to a minimum) their losses (*British Westinghouse v Underground Electric Railways* [1912]).

What is "specific performance"?

This is a discretionary **equitable remedy** that requires the party in breach to perform their obligations. It is rarely awarded (except in land transactions), and will not be awarded where:

- (1) Damages are adequate (*Cohen v Roche* [1927]).
- (2) The remedy would not be available to both parties (e.g. contracts with minors—*Flight v Bolland* [1828]).

What are "injunctions"?

- (3) It would require constant supervision (*Ryan v Mutual Tontine* [1893]).
- (4) The contract is for personal services (*Rigby v Connol* [1880]).

A prohibitory injunction may be awarded to prevent breach of an express negative obligation (e.g. a valid restraint of trade clause—*Lumley v Wagner* [1852]; *Warner Bros v Nelson* [1937]), but *not* where to do so would compel performance of other, positive obligations for which specific performance would not be granted (*Page One Records v Britton* [1967]).