England & Wales

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A. Compensatory Damages

In England and Wales, damages are compensatory for both contractual and non-contractual causes of action; they are intended to put the innocent party (the "claimant") in the position that it would have been in had the wrong not occurred.[1]

[1] *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas 25 at para. 39 (defining damages as "… that sum of money which will put the party who has been injured, or who has

In practice, rigorous full compensation for loss is viewed as overly harsh on the party in breach (the "defendants") due to the often unpredictable and unexpected losses that can flow from an initial wrong.[2] Consequently, limits are placed on what losses claimants may recover, and these limits vary depending on the cause of action (particularly whether the claim is brought in tort or contract).

1. Contracts

In claims for breach of contract, the general principle that damages are intended to place a claimant (so far as money can) in the position it would have been in had the contract been properly performed reflects the compensatory nature of damages.[3] The purpose is to compensate for the "loss of bargain".

If the claimant's loss is caused wholly or partly by the fact it entered into a loss-making contract, the claimant is not permitted to escape the consequences of that decision. Any recoverable damages will be restricted accordingly.

The purpose of a conventional claim for damages is to address a claimant's "expectation losses", by putting the wronged party in the position it would have been if the contract had been performed as intended. Expectation losses can be measured in a number of ways: (i) the costs of rectifying the breach so that the innocent party receives the intended benefit under the contract; (ii) the difference in value to the innocent party between the expected performance and the defendant's actual performance (i.e. the value of goods or savings/revenues/profits that would have been achieved if the contract had been performed); (iii) the difference in cost to the contractor between actual and expected performance; and (iv) loss of amenity.

Of the above measures, (ii) is the most commonly used in practice. To

suffered, in the same position as he would have been in if he had not sustained the wrong…").

[2] *Victoria Laundry v Newman* [1949] 2 K.B. 528 (C.A.) ("This purpose [compensatory damages] if relentlessly pursued, would provide him [the claimant] with a complete indemnity for all loss de factor resulting from a particularly breach, however improbable, however unpredictable.").

[3] *See Robinson v Harman* (1848) 1 Ex. 850 at para. 855 and consistently cited with approval since.

calculate such losses, claimants deduct the ordinary costs of performing the contract, the expenses incurred in the preparation for performance of the contract.[4] The general (rebuttable) presumption is that these "ordinary costs" would have been recouped out of profits/savings/revenue, had the contract been performed.[5]

As an alternative to claiming "expectation losses", a wronged party can also elect to claim for wasted expenditure ("reliance losses") including pre-contract expenditure, provided that these costs were reasonably in the contemplation of the parties as likely to be wasted if the contract were broken. If it is not possible to quantify the expectation losses, such wasted costs can be sometimes be claimed as a proxy for the "loss of bargain."[6] These claims are still vulnerable to a possible defense that the wasted expenditure is a consequence of a bad bargain.

In order to prevent double recovery, a claimant is generally prevented from pursuing claims on both the expectation basis and the reliance basis. A claimant should not be able to recover the gross profits expected under the contract as well as the wasted expenditure incurred in reliance on the contract which they intended to meet from the gross profits. There are some circumstances in which wasted expenditure costs may be recovered in addition to the value of goods or lost savings/revenues/profits. To make a recovery, the wasted expenditure must be shown to have been incurred (i) after entering into the contract; (ii) in reasonable reliance on the contractual promise; and (iii) in circumstances where the defendant could reasonably be taken to have assumed responsibility for reimbursing those costs.

These concepts are frequently interwoven with decisions and considerations relating to clauses about the limitation or exclusion of liability. Concepts of causation, mitigation, and remoteness can also

[4] *See Cullinane v British "Rema" Manufacturing Co 9* [1954] 1 Q.B. 292 (C.A.) at para. 308 regarding lost profits.

[5] *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (Q.B.) at 190.

[6] *Anglia Television Ltd v Reed* [1972] 1 Q.B. 60 (C.A.); *Yam Seng Pte Ltd*, EWHC 111 (Q.B.) at 190; *and Soteria Insurance Limited (formerly CIS General Insurance Limited) v IBM United Kingdom Limited* [2022] EWCA Civ 440.

operate to restrict or prevent contractual damages awards.

2. Tortious claims

In tortious actions, the compensatory principle is that damages are to put the innocent party in the same position as if the tort had not been committed. Where a claimant's property has been damaged, the standard measure of damages is the reasonable costs of repair.[7] If property has been destroyed or misappropriated, it is the market value of the goods.[8]

In addition to pecuniary losses, compensatory damages in tort actions are available for the following non-money-based losses:[9]

- pain, suffering, and loss of amenity;[10]
- physical inconvenience and discomfort;[11]
- social discredit;[12] and
- mental distress.[13]

With the exception of social discredit, damages for these non-pecuniary losses are also potentially recoverable in claims for breach of contract. As contract claims are primarily concerned with commercial matters, such non-pecuniary damages are far more common in tort actions.

B. Non-Compensatory Damages

1. Account of profits

Account of profits is a damages award that aims to strip the defendant of the profit it has made rather than to compensate the claimant for any loss suffered. Damages are not compensatory as there is no requirement for the claimant to have suffered any loss. The rationale for the award is

[7] *Darbishire v Warran* [1963] 1 W.L.R 1067 (C.A.) at para. 1071.

[8] *Axton Publishing Co v Sutherland Publishing Co* [1939] A.C. 178 at 190.

[9] *Simmons v Castle* [2013] 1 W.L.R 1239 (C.A.) at 48.

[10] "Pain and suffering" is physical injury, whereas loss of amenity refers to any reduction in the enjoyment of life by preventing the pursuit of former activities.

[11] This loss relates to wrongs that interfere with the claimant's person short of physical injury but cause physical inconvenience. Such claims include false imprisonment, nuisance arising from noise or smell, and negligence due to the discomfort of living in a damaged property.

[12] Damages for social discredit are nearly always recovered in the tort of defamation, which exists to protect reputations. Such losses can also be recovered in malicious prosecution and false imprisonment, *see Lonrho v Fayed (No. 5)* [1993] 1 W.L.R 1489 (C.A.) at 1504E.

[13] Mental distress, on its own, may not found the basis of a claim. *Behrens v Bertram Mills Circus* [1957] 2 Q.B. 1 at 28. Damages for mental distress may only be recovered as a subsidiary head of loss to an existing claim. Damages for mental distress are usually recovered in tortious claims such has defamation, deceit, invasion of privacy, and nuisance. Corporate entities may not recover damages for this head of loss.

deterrence[14] and is typically only awarded in exceptional circumstances where there has been an intellectual property infringement, breach of a fiduciary duty,[15] deliberate wrongdoing, or other equitable wrong such as breach of confidence.[16] An account of profits may also be available for breach of contract where the claimant has a legitimate interest in preventing the defendant's profit-making activity.[17] Typically, a legitimate interest will only exist where the court finds that there are express or implied undertakings in the contract that the defendant would not profit from a breach or put itself in a position of conflict.

2. Negotiating Damages

Negotiating damages (also referred to as "license fee" damages) is an award usually made in claims for breaches of property rights, in particular rights to use of land, intellectual property, or confidential information. Damages are awarded on what the defendant would have paid as a license fee in order to enjoy the property right infringed. It is irrelevant that the hypothetical license fee negotiation may be highly unrealistic or would never in fact have been agreed. Negotiating damages are not typically appropriate for breach of contract claims.[18]

3. Nominal Damages

Courts may award a token sum (traditionally £2)[19] for breach of contract, where the claimant has proven that the breach occurred but has not suffered a recoverable loss.

4. Punitive Damages

Punitive damages (better known as "exemplary" damages) are only available to claimants in tort actions and are irrecoverable in contract cases.[20] Punitive damages are awarded where the conduct of the defendant is so outrageous that it merits punishment, such as in

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[14] *Canadian Aero Service v O'Malley* (1973) 40 D.L.R. (3d) 371 (Sup. Ct. Can.) at 384.

[15] *Attorney General v Blake* [2001] 1 A.C. This was an exceptional case where a convicted former spy breached the confidentiality provisions of his employment contract by publishing a book. The court ordered an account of profits of the royalties he was due to collect.

[16] *Attorney General v Guardian Newspapers (No. 2) ("Spycatcher")* [1990]1 A.C. 109 (H.L.).

[17] *Blake*, A.C. 268. In this case the state had a legitimate interest in preventing a formal former spy from breaching the confidentiality provisions of his employment contract as there was an implied undertaking that he would not use his position in the secret service to make a personal profit.

[18] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20.

[19] *The Football League Ltd v Edge Ellison* [2007] P.N.L.R 2 at 38.

[20] *Addis v Gramophone; Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch.) at 232.

cases of malice, fraud, or cruelty.[21] Cases in which punitive damage are available are restricted to the following categories:[22]

- oppressive, arbitrary or unconstitutional conduct by a government official;[23]
- cynical conduct calculated to result in a profit even accounting for any compensation payable to the innocent party;[24] and
- where the award of exemplary damages is expressly permitted by statute (i.e. copyright infringement).

C. Consequential Damages

1. Contract

There are strict roles of remoteness in contract law. Losses resulting from a breach of contract may either be direct or indirect (indirect loss also being commonly referred to as "consequential" loss).[25]

Direct losses are recoverable as a matter of contract law. Direct losses are those which arise directly and naturally from the breach[26] or are "not unlikely"[27] or a serious possibility[28] to result from a contractual breach. Direct losses typically include predictable financial losses, additional costs, and/or loss of profits.

By contrast, indirect or "consequential" losses are not generally recoverable under contract law unless they arise from a special circumstance. Indirect losses are only recoverable if the paying party knew, or should have known, the special circumstance at the time the contract was made.

A claim for either direct or indirect loss will only succeed if it is

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21 *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 (C.A.) at 68-71.

22 *Rookes v Barnard* [1964] 1 A.C. 1129.

23 Examples include unconstitutional action resulting in wrongful arrest and false imprisonment (*Attorney General for St Christopher, Nevis and Anguilla v Reynolds* [1980] A.C. 637 (P.C.)) and police misconduct resulting in false imprisonment, malicious prosecution, or wrongful arrest.

24 Examples include: (i) libel, where the publication is for profit and the publisher is aware the libel has no solid foundation (*Broadway Approvals v Odhams Press* [1965] 1W.L.R 1038 at 1041); (ii) landlords tortiously engineering the removal of a tenant for profit (*Mafo v Adams* [1970] 1 Q.B. 548 (C.A.); *Design Progression Ltd v Thurloe Properties Ltd* [2005] 1 W.L.R. 1); and (iii) the unlawful setting of high prices for goods or services in breach of competition law (*Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch. 390).

25 *Hadley v Baxendale* (1854) 9 Ex 341.

26 *Id.*

27 *The Heron II* [1969] 1 A.C. 350 at 383. "Not unlikely" means a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

28 *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18.

reasonable to assume that the defendant accepted responsibility for the type of loss at the time the contract was made.[29]

2. Tort

The rules of remoteness in tort are broader than in contract and are satisfied if the wrongful conduct is a cause of the claimant's harm—if such harm would not have occurred without it. This is the so-called "but for" test. For cases involving negligence, reasonable foreseeability of the harm sets the extent of liability; a reasonably foreseeable harm is harm that a reasonable person in the position of the defendant would appreciate a "real risk" of occurring and take action to guard against. It need not be a high risk, but it must be more than a "fantastic or far-fetched possibility" or a "mere possibility which would never influence the mind of a reasonable man."[30]

3. Burden of proof

The burden of proof is on the claimant to establish, on the balance of probabilities, that it has suffered the losses claimed. A claim will not fail simply because a claimant is not able to precisely quantify its loss. Instead, the court will assess damages based on the available evidence.[31] The court recognizes that some claims (in particular claims for loss of profits) rely on hypothetical assumptions of what would have happened but for the defendant's breach of contract. For such claims, the court does not expect the claimant to perform the impossible and will attempt to assess the loss without applying with usual balance of probability test.[32] This principle has limits–the court may always conclude that a claimed loss is simply too speculative.[33]

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[29] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61 Lord Hoffmann at 21; Lord Hope at 30. In practice defendants will rarely be able to invoke this rule to avoid liability and it is likely to only apply in exceptional circumstances. *See* CHITTY ON CONTRACTS, 30-153 (2008).

[30] *See Overseas Tankship (UK) v Miller SS Co (The Wagon Mound (No. 2)* [1967] A.C. 617 (P.C.).

[31] *See Morris-Garner*, UKSC 20 at 38.

[32] *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch. 529 at 95–96.

[33] *Jackson v Bank of Scotland* [2005] UKHL 3, [2005] 1 W.L.R. 377 at 37.

4. Contractual limits and exclusions

Contracting parties are generally free to agree to exclude or limit their liability subject to important statutory limitations primarily intended to protect parties contracting on the counterparty's standard written terms and those contracting as consumers (i.e. not in the course of business).[34] The Courts of England and Wales strictly interpret contractual wording intended to exclude liability, so it is important that the meaning and intended effect of exclusion wording is clear.

5. Mitigation

Claimants are required to take reasonable steps to mitigate the losses that flow from a breach of contract. Any loss avoided by any mitigation (regardless of whether the mitigation went beyond what was reasonable in the circumstances) is not recoverable as damages. The costs of any reasonable mitigation are also recoverable as damages.[35]

D. Liquidated Damages

Liquidated damages is the term used for a sum of money that parties to a contract have agreed should be paid by the contract breaker in the event of a breach of a particular contractual provision. For the agreed sum to be recoverable as damages, it must not be out of all proportion to the legitimate interest of the receiving party in ensuring that the relevant provision is performed.[36] If the agreed sum does not satisfy this test, it will be unenforceable as a penalty. If the agreed sum is enforceable, it can be recovered regardless of what loss the claimant may actually have suffered.[37]

E. Pre- and Post-Judgment Interest

Prejudgment interest may be recovered as damages on any claim in either contract or tort in the same way as any other loss and subject to the usual principles governing the recoverability of damages.[38]

Courts award prejudgment interest on either debts or damages by: (i) giving effect to a contract provision that specifies the interest

[34] *See, for example*, the Unfair Contracts Terms Act 1977, and the Consumer Rights Act 2015.

[35] A full summary of the rules on mitigation for breach of contract are set out in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm.) at 31 – 38.

[36] *Cavendish Square Holding BV v Makdessi and Parking Eye Ltd v Beavis* [2015] UKSC 67.

[37] *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdoy* Castaneda [1905] A.C. 6.

[38] *Sempra Metals v Inland Revenue Commissioners* [2008] A.C. 561.

payable; (ii) under a statutory power; or (iii) under their inherent equitable jurisdiction.

If contract parties have expressly agreed on the rate of interest, the court must apply it.[39] Where business-to-business contracts make no provision for the payment of interest, there is an implied term that simple interest on debts will run at 8% over the Bank of England base rate from 30 days after the delivery of the invoice.[40]

By statute, courts have a general discretionary power to award prejudgment interest on an award for either debt or damages for any period between when the cause of action arose and the date of judgment[41] at the rate necessary to do justice.[42] In practice, interest on debt/damages awards is always ordered except on non-money based losses.[43] In commercial claims, a typical prejudgment interest award is for simple interest at between 1% - 3% over the Bank of England base rate per year.[44] When setting the interest rate, the court is guided by the principle that the purpose is to compensate the claimant fairly for being deprived of money that it should have had[45] and will adopt a "broad brush approach" (i.e. not attempt a minute assessment of what interest rate would exactly compensate the claimant).[46]

Courts have an inherent power to award interest on equitable remedies such as orders for specific performance of a contract, recission of a contract or an order for an account of profits.

Post-judgment interest is fixed by statute at 8% per year for all High Court judgment debts and (unless ordered otherwise) runs from the date of judgment until the date of payment.[47]

F. Attorney's Fees

The general rule in England and Wales is that the successful party is entitled to recover all its costs "of and incidental" to the action from

[39] Senior Courts Act, section 35A(4); County Courts Act, section 69(4).

[40] *See* Late Payment of Commercial Debts (Interest) Act 1998. The implied term will only apply to debts for payment of the contract purchase price and does not apply to damages (section 3).

[41] Senior Courts Act, section 35A(1); County Courts Act, section 69.

[42] *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd* [2006] EWHC 2896 (Comm.).

[43] *See, for example, Saunders v Edwards,* [1987] 1 WLR 1116, where the court declined to award interest on damages for disappointment and inconvenience.

[44] In the Commercial Court, there is a presumption that the interest rate will be 1% over the prevailing Bank of England base rate.

[45] *Kuwait Airways Corporation v Kuwait Insurance SAK* [2000] EWHC 191 (Comm.).

[46] *Fiona Trust and Holding Corporation v Yuri Privalov* [2011] EWHC 664 (Comm.).

[47] Judgments Act 1838, section 17.

the paying party,[48] including its legal expenses. Courts have a wide discretion to make whatever costs order is appropriate in the circumstances, including whether costs should be recoverable, the amount of the costs, and when they should be paid.[49]

The standard basis on which the receiving party's costs (including legal expenses) may be recovered in that the court will only allow the recovery of costs that are: (i) reasonably incurred; (ii) reasonable in amount; and (iii) proportionate to the matter in issue. Any doubt, whether costs were reasonable and/or proportionate, is also resolved in favor of paying party (i.e. will be disallowed).[50] Individual costs may be reasonably incurred, but the overall figure may, nevertheless, be disproportionate and reduced.[51] The "touchstone" in high value litigation where parties have spared no cost is to allow the recovery of the lowest amount reasonably expected to conduct and present the case proficiently – not the amount that was in the best interest of the receiving party to incur.[52]

Courts may award costs on the indemnity basis (either in whole or in part) where the paying party's conduct is unreasonable to a high degree and/or other circumstances takes the situation out of the norm.[53] Where costs are assessed on the indemnity basis the claimed costs: (i) are not required to be proportionate to the matters in issue; and (ii) any doubt regarding whether the costs were reasonably incurred or reasonable in amount are resolved in favor of the receiving party.[54] A receiving party awarded costs on the indemnity basis can expect to recover a higher percentage of its total costs than under the standard basis.

[48] *See* Civil Procedure Rule 44.2(2); Senior Courts Act 1981, section 51.

[49] Civil Procedure Rule 44.2.

[50] Civil Procedure Rule 44.3(2). The court takes into account the wide range of factors set out in Rules 44.3(5) and 44.4(3) when considering both reasonability and proportionality. These include the value of the claim, complexity, time spent on additional work generated by the paying parties' conduct, the conduct of the parties before and during the litigation, and the public importance of the proceedings.

[51] *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220.

[52] *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm.).

[53] *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879. *Esure Services Ltd v Quarcoo* [2009] EWCACiv 595 clarified that relevant "conduct" of the paying party would show lack of probity deserving moral condemnation that was outside the ordinary and reasonable conduct of proceedings.

[54] Civil Procedure Rule 44.3(3).

G. Unjust Enrichment

Unjust enrichment is an equitable cause of action available where a claimant can establish that: (i) the defendant has been enriched or received a benefit; (ii) the enrichment is unjust; and (iii) the enrichment was at the expense of the claimant.[55] There are no closed categories of what the courts will accept as "enrichment,"[56] which may be either positive (the receipt of money or other benefit such as goods and services) or negative (avoiding expenditure that would otherwise have been needed).

How the "enrichment" is valued depends on the circumstances of the case. For goods and services where no price was agreed, this will be at a reasonable rate determined by the court (quantum meruit for services and quantum valebat for goods).

The remedy for a claim of unjust enrichment is restitution - an award that seeks to reverse the unjust enrichment and restore the relevant benefit to the claimant. The exact award will depend on the nature of the unjust enrichment.[57]

While the enrichment must be unjust, there is no requirement for a civil wrong to have been committed by the defendant. For example, the courts have recognized claims for unjust enrichment where money has been paid to the defendant by mistake.[58]

H. Public Policy Prohibitions

Legal rights may become unenforceable if they arise from circumstances that are illegal or contrary to public policy.

Illegality may be raised as a defense by the defendant, or the court may refuse to enforce the claim of its own motion.[59] Illegality includes quasi-illegal acts, such as those involving dishonesty and corruption; and breaches of statutory rules intended to protect the public but which do not amount to criminal offenses.[60] When considering illegality, the court considers the following three factors:

- the underlying purpose of the relevant prohibition and whether the purpose would be enhanced by denying the claim;
- whether there is any other relevant public policy impacted by denying the claim; and

[55] *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33.
[56] *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678.
[57] Where the claim is for the return of money, the remedy is for "money had and received."
[58] *See, for example, United Overseas Bank v Jiwani* [1977] 1 All ER 733.
[59] *Bilta (UK) Ltd v Nazir (No.2))* [2015] UKSC 23 at 100.
[60] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55.

- whether denying the claim is proportionate to the illegality.[61]

The relevant illegality may arise by statute, in which case the court must consider if the contract parties intended the act or purpose of the contract made illegal by the statute. A contract will not be unenforceable merely because its object is the commission of civil wrong or a breach of contract.[62] However, certain contracts are themselves illegal and void by statute. Contracts that fix prices are prohibited by statute and void.[63]

Contracts may also be unenforceable as contrary to public policy despite having no element of illegality or legal wrong. Aspects of public policy that have previously been relied on to render a contract unenforceable are:

- contracts damaging to good government in relation to either domestic affairs[64] or foreign affairs;[65]
- contracts that interfere with the machinery of justice;[66] and
- contracts damaging to marriage or morality.[67]

[61] *Patel v Mirza* [2016] UKSC 42. In *Stoffel & Co v Grondona*, [2020] UKSC 42 at 26, the court stated that the first two considerations are analyzed at a high level of generality and the third giving close scrutiny to the details of the case.

[62] *Id*. at 30.

[63] *See, for example,* Competition Act, Section 2(1).

[64] Reported cases involve contracts for the sale of public offices, the sale of honors, agreements to assign or mortgage the salary of a public official, and contracts causing a public official to neglect their duty or influence how it was performed.

[65] Reported cases include contracts involving trade with an enemy state and contracts governed by a foreign law where the contract is unenforceable for illegality in that jurisdiction.

[66] Reported cases include agreements not to disclose criminal actions; agreements to fund legal actions where the funder has no interest without just cause or excuse (known as "maintenance"); and agreements not to appear or give evidence at a criminal trial.

[67] Reported cases include agreements to recover rent from lodgings knowingly let for the purpose of prostitution; agreements to produce a marriage between two parties (i.e. a marriage brokage contract); agreements whose object is to prevent a party from marrying; and agreements that would deprive a party to the contract of their sole means of support.