contract as in *Hochster* v *De la Tour* (see above) or has put himself in a position where it is impossible to perform it as in *Omnium D'Enterprises and Others* v *Sutherland* (see above).

Other matters relevant to breach

Two further points arise in connection with breach of contract. The first is that the concept of contributory negligence does not apply. In *Basildon District Council* v *J E Lesser* (*Properties*) *Ltd* [1985] 1 All ER 20 the claimant sued for breach of contract in regard to the building of dwellings which had become unfit for habitation without repair. There was a defence that the damages payable should be reduced on the basis that the council's officers were guilty of contributory negligence. It was said that they should have noticed the lack of appropriate depth in foundations on seeing the building contractors' original drawings. It was decided by the High Court that the defence of contributory negligence did not apply in contract but only in tort.

It should be noted, however, that the obligation in the above case was entirely contractual. If the claimant could have sued, either in contract or in tort, as where the damage arises from a breach of contract and a tort, then even if the injured party decides to sue for breach of contract only the damages can be reduced if he is contributorily negligent (see *Forsikrings Vesta* v *Butcher* [1988] 2 All ER 43).

The Law Commission in its report made in 1993 entitled *Contributory Negligence as a Defence in Contract* recommends that the availability of apportionment of damages for breach of contract should be extended from the field of tort to cases where the claimant who complains of breach of contract has contributed to his own loss.

Second, the Drug Trafficking Act 1994, s 50 brought in what is called a 'laundering' offence under which anyone knowingly assisting with the retention, control or investment of drug-trafficking proceeds could be liable to a term of imprisonment. Banks, building societies, accountants, solicitors and other advisers are given protection by the Act if they disclose their suspicions about their client's finances if these seem to be connected with drug trafficking. However, the Act ensures that they cannot be sued for breach of contract if they pass on to the appropriate authorities their suspicions that any funds or investments may be connected with drug trafficking. Section 50 is repealed and replaced by provisions in the Proceeds of Crime Act 2002.

Impact of the introduction of the euro

The immediate problem to be looked at is that of ensuring that commercial contracts affected by the arrival of the euro in much of the EU on 1 January 1999 do not operate where required beyond that date. The main reason for this will be that, as we have seen, a wide variety of contracts governed by English law provide that where a party is unable to perform his contractual obligations through factors beyond his control (such as in this case the abolition (eventually) of the currency in which he is required to tender payment), the contract is automatically discharged by frustration – a concept which has no direct equivalent in the rest of the EU, where law is based on Roman Law – or under a *force majeure* clause. The Maastricht Treaty deals with this by providing that, in the absence of an express contrary intention by the parties, the introduction of the euro will not:

- alter any term of the contract;
- discharge or excuse performance under any contract; or
- on its own give any party the right unilaterally to alter or terminate any contract.

The parties can, by expressing a contrary intention, agree that the introduction of the euro will end the original contractual intention.

Nevertheless, for contracts continuing beyond 1 January 1999, there will have to be some renegotiation to establish the equivalence of value between the originally contracted currency and the euro.

18

REMEDIES AND LIMITATION OF ACTIONS

In this chapter we shall consider the various remedies which exist both in common law and equity to deal with losses arising from contractual relationships and the rules which govern the recovery of money compensation through damages together with the time limits which are placed on the bringing of claims.

Damages generally

This is the main remedy for breach of contract and the rules of law relating to an award of damages are considered below.

Liquidated damages

In some cases the parties foreseeing the possibility of breach may attempt in the contract to assess in advance the damages payable. Such a provision for *liquidated* damages will be valid if it is a genuine pre-estimate of loss and not a penalty inserted to make it a bad bargain for the defendant not to carry out his part of the contract. The court will not enforce a penalty but will award damages on normal principles used in the assessment of unliquidated damages (see below).

Certain tests are applied in order to decide whether or not the provision is a penalty. Obviously, extravagant sums are generally in the nature of penalties. Where the contractual obligation lying on the defendant is to pay money, then any provision in the contract which requires the payment of a larger sum on default of payment is a penalty because the damage can be accurately assessed. Where the sum provided for in the contract is payable on the occurrence of any one of several events, it is probably a penalty for it is unlikely that each event can produce the same loss. If the sum agreed by the parties is regarded as liquidated damages, it will be enforced even though the actual loss is greater or smaller.

Ford Motor Co (England) Ltd v *Armstrong*, 1915 – No genuine pre-estimate of loss (**236**)

Cellulose Acetate Silk Co Ltd v *Widnes Foundry Ltd*, 1933 – Liquidated damages where the loss is smaller (**237**)

Unliquidated damages

Assessment

Unliquidated damages are intended as compensation for the claimant's loss and not as punishment for the defendant. Thus where no loss has been suffered, as where a seller fails to deliver the goods but the buyer is able to purchase elsewhere at no extra cost, the court will award *nominal* damages, i.e. an award of a small sum, e.g. £2, to reflect the view that any loss or damage is purely technical.

Exemplary or punitive damages which exceed the actual loss suffered by an amount intended to punish the offending party are not awarded for breach of contract. The intention is that the claimant should be placed in the same situation as if the contract had been performed.

Thus in an action by an employee for wrongful dismissal, the court will base its award on 'net' wages, i.e. after deduction of income tax and national insurance contributions. An award based on 'gross' wages or salary would make the employee better off than if the contract had continued.

Beach v *Reed Corrugated Cases Ltd*, 1956 – Damages are compensatory (**238**)

Type of loss recoverable

Damages can include compensation for financial loss, personal injury and damage to property. Also there may be included a sum by way of compensation for disappointment, vexation and mental distress.

Jarvis v *Swans Tours Ltd*, 1973 – Damages for mental distress (**239**)

Remoteness

Apart from the question of *assessment*, the matter of *remoteness of damage* arises. The consequence of a breach of contract may be far reaching and the law must draw a line somewhere and say that damages incurred beyond a certain limit are too remote to be recovered. Damages in contract must therefore be proximate.

The modern law regarding remoteness of damage in contract is based upon the case of *Hadley* v *Baxendale* (see below), as further explained in *The Heron II* (see below). These cases are authority for the statement that damages in contract will be too remote to be recovered unless they arise naturally, i.e. in the usual course of things, or if they do not arise naturally they are such that the defendant, as a reasonable man, *ought* to have had them in contemplation as likely to result. Damage which does not arise naturally and which would not have been in the contemplation of the reasonable man can only be recovered if the defendant was made aware of it *and* agreed to accept the risk of the loss.

Hadley v *Baxendale*, 1854 – Where damages are too remote (**240**)

The Heron II, 1967 – Where damages are in contemplation (**241**)

Horne v *Midland Railway Co*, 1873 – Has the defendant agreed to be liable for the loss? (**242**)

Victoria Laundry Ltd v *Newman Industries Ltd*, 1949 – Where loss arises naturally from the breach (**243**)

Mitigation of loss

The injured party has a duty to *mitigate* or minimise his loss, i.e. he must take all reasonable steps to reduce it. Thus a seller whose goods are rejected must attempt to get the best price for them elsewhere and the buyer of goods which are not delivered must attempt to buy as cheaply as possible elsewhere. Loss arising from failure to take such steps cannot be recovered.

Brace v *Calder*, 1895 – There must be a mitigation of loss (244)

However, the claimant is not under a duty to mitigate his loss before there has been a breach of contract which the claimant has accepted as a breach. No doubt this is logical but it can produce startling results (see *White and Carter* (*Councils*) *Ltd* v *McGregor* (1961), Chapter 17). More recently the requirement of a 'legitimate interest' in keeping the contract going has made the position more equitable (see, for example, *Clea Shipping* (1984)).

Provisional damages for personal injury

The Administration of Justice Act 1982, s 6 makes provision for a court to award provisional damages for contractual claims for personal injury. Thus, in an action for a fracture to the hip caused to a passenger in an accident involving a negligently driven bus, the court can make an order for damages payable at once for the fracture and an award of provisional damages in case in the future chronic arthritis affects the injured passenger. If it does, but not otherwise, the provisional damages may also be recovered without another visit to the court to prove the damage.

Damages Act 1996

Section 3 of the Damages Act 1996 provides that where a claimant dies of his injuries after receiving a provisional award his dependants will not be prevented from claiming as *dependants* for loss of dependency. This is a separate claim made by the executors of the deceased on behalf of all those who were dependent on him, e.g. a wife. The claim will extend only to losses not covered by the original award. Since there is also a potential claim by the deceased's estate in such a case, the Act makes clear that dependants' claims will be preferred, if there are any, thus preventing double recovery by the dependants and then by the estate.

Structured settlements

In more recent times the courts have set up a system of structured settlements. The settlement of a damages claim is by means of a permanent income instead of a single lump sum. These settlements are confined to personal injury cases and are particularly suitable where the injuries are serious and the claimant is a young person.

An example is provided by the case of *Kelly* v *Dawes* (1990) *The Times*, 27 September. Catherine Kelly, a young nurse, was a passenger in a car which was involved in an accident by reason of the negligence of the defendant who died in the crash. She was awarded, in effect against the insurance company involved, a structured settlement with monthly payments guaranteed for her lifetime or for 10 years, whichever proved the longer, and inflation proofed. Because of a favourable tax treatment by the Inland Revenue, the payments were not subject to income tax. It follows that claimants who receive structured settlements do not have

to concern themselves with investment or inflation, and if they live longer than expected the money will still be there. They are also protected against their own extravagance and against payment of tax.

These settlements are most likely to be found in actions for tort, e.g. negligence in terms of road accidents. Nevertheless, there are situations where the claimant has a claim in contract and tort as where A is a passenger on a bus and is injured by an accident caused by the driver's negligence. The claim here is for the tort of negligence and breach of contract for which one award is made, but the structured settlement rules are applied (or may be) to the contract claim as well as the tort claim.

Interest on debt and damages

Under the provisions of the Administration of Justice Act 1982, s 15 and Sch 1, which inserted s 35A of the Supreme Court Act 1981 and s 69 of the County Courts Act 1984, the court has power to award interest on debt or damages at the end of the trial or where judgment is obtained in default, i.e. where there is no defence and no trial. Interest may also be awarded where the defendant settles after service of claim form but before judgment. Interest is not available where a person settles *before* service of claim form no matter how long he has kept the other party waiting. High Court judgments carry interest at a rate that is fixed from time to time by statutory instrument. Since 1 April 1993 the rate has been fixed at 8 per cent per annum (Judgment Debts (Rate of Interest) Order 1993 (SI 1993/564)).

County court judgments of £5,000 or more also carry interest and once again the rate is 8 per cent per annum. County court judgments under £5,000 do not carry any interest unless the debt attracts contractual or statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 (see below).

Recovery of debt

Where one party has performed his part of the contract but the other has failed to pay, e.g. following a supply of goods complying with the contract requirements, the claim of the supplier is for *debt* rather than *damages*. The main point to be considered here is the possibility of recovering interest on unpaid debts. The topic may be considered by looking at the business procedure which involves the use of a default interest clause in the contract and then by looking at statutory provisions.

Default interest clauses

A default interest clause can be included in support of any obligation to pay a sum of money by a given date. A rate of 3 or 4 per cent over the Bank of England base rate is common and this is payable from the stated due date until payment. The court would enforce such a clause, but any attempt to make an interest charge except during the period for which the debt was due may very well be unenforceable as a penalty.

Late payment of commercial debts legislation

The Late Payment of Commercial Debts (Interest) Act 1998 gives creditors a statutory right to claim interest from debtors on debts relating to commercial contracts for the supply of goods

and services. The Act was brought into force by stages. However, on 7 August 2002 the final phase of the implementation was made and the Act now applies to ALL businesses and public sector bodies.

Application of the Act

The Act applies to contracts for the supply of goods or services where the purchaser and the supplier are acting in the course of a business. It does not apply to consumer credit agreements or to any contract that operates by way of a security, for instance a mortgage, pledge, or charge.

What is the rate of interest?

Interest is calculated at 8 per cent above the Bank of England base rate. To simplify matters and avoid an ever changing rate, interest is calculated at 8 per cent above the base rate in force on 30 June for interest that starts to run between 1 July and 31 December or the base rate in force on 31 December for interest that starts to run between 1 January and 30 June. Thus where the base rate is, say, 4 per cent on the applicable date, the late payment rate will be 12 per cent. The Act gives suppliers an entitlement to simple interest only and not compound interest, i.e. interest on interest. From 1 January 2006, and in view of the then Bank of England base rate, the rate is 12.5 per cent.

From when does interest run?

Interest starts to run from the day after the due date for payment or, where no such date has been agreed, when 30 days have elapsed from the delivery of the goods or the carrying out of the services or notice being given to the purchaser of the amount of the debt, whichever is the later.

Recovering the costs

In addition to interest, a business can claim reasonable debt recovery costs, but only where the contract concerned was made on or after 7 August 2002.

The costs that are allowed are as follows:

- debt of less than £1,000: recovery costs £40;
- debt between £1,000 and £10,000: recovery costs £70;
- debt of more than £10,000: recovery costs £100.

A major problem in enforcement

A major problem in terms of the enforcement of the Act by small and medium enterprises against the larger organisations and public authorities is the fear that enforcement will lead to the loss of contracts. Some assistance is given by the Late Payment of Commercial Debts Regulations 2002 (SI 2002/1674). The regulations give a right to trade and other bodies representing SMEs to challenge on their behalf express contractual terms in regard to payment and interest that are unfair to SMEs (see below).

Express terms for payment of interest

The Act does not rule out contractual terms that have been agreed by the parties for payment of interest but unless they are 'substantial' the court will regard them as void and apply the provisions of the Act. It does not follow that because the contractual provision is less generous than the Act that it will be regarded as void but, among other things, the strength of the bargaining power of the parties is relevant. This may render void a less generous clause

imposed on a small or medium-sized enterprise by a conglomerate. However, the conglomerate's less generous clause may be binding where the supplier has received an inducement to accept the term, such as a longer-term contract to supply goods or services.

EU developments

EU industry ministers have reached agreement on a European-wide Directive to combat late payment of debt. Progress is now being made towards the adoption of the Directive. The Directive entitled *Combating the Late Payment of Commercial Debt* is to provide interest at 6 per cent above the Bank of England or European Central Bank base rate in the event of late payment. The parties will retain freedom of contract to decide when debts should be paid, but interest would start to accrue 30 days after the date for payment. Member states may introduce provisions more favourable to creditors. *The advantage of the Directive will be that small and medium entities in the UK can be sure of rights similar to those in the UK wherever they do business in the EU.*

Equitable remedies

Damages are the common law remedy for breach of contract. However, in some situations equity will provide more suitable remedies and these will now be considered.

A decree for specific performance

This is an equitable remedy which is sometimes granted for breach of contract, where damages are not an adequate remedy or where specific performance is regarded by the court as a more appropriate remedy (see *Beswick* v *Beswick* (1967), Chapter 10). It is an order of the court and constitutes an express instruction to a party to a contract to perform the actual obligations which he undertook in a contract. For all practical purposes the remedy is now confined to contracts for the sale of land, though it may be a more appropriate remedy in the case of a contract to pay an annuity because the exact value of the annuity will depend on how long the annuitant lives and this cannot be known at the time of the breach (see *Beswick* v *Beswick* (1967), Chapter 10). It is not normally granted in the case of contracts for the sale of goods because other goods of a similar kind can be purchased and the difference assessed in money damages. In addition, it should be noted that specific performance will not be granted if the court cannot adequately supervise its enforcement. Thus contracts of a personal nature, such as employment, which rely on a continuing relationship between the parties, will not generally be specifically enforced because the court cannot supervise performance on the day-to-day basis which would be necessary. However, if constant supervision by the court is not required, a decree of specific performance may be made of a personal service undertaking. Thus in *Posner* v *Scott-Lewis* [1986] 3 All ER 51 Mervyn-Davies, J decided that the tenants of a block of flats could enforce by specific performance an undertaking in their leases that the defendant landlords would employ a resident porter to keep the communal areas clear. The court had only to ensure that the appointment was made. The claimants were not asking the court to supervise the porter's day-to-day work. Furthermore, specific performance will not be awarded either to or against a minor because a minor's contracts cannot in general be enforced against him and those which can, i.e. beneficial contracts (see Chapter 11), are in

the nature of contracts of personal service. Equity requires equality or mutuality as regards its remedies and this does not exist in the case of minors' contracts.

An injunction

This is an order of the court used in this context to direct a person not to break his contract. The remedy has a somewhat restricted application in the law of contract and will be granted to enforce a negative stipulation in a contract where damages would not be an adequate remedy. Being an equitable remedy it is only ordered on the same principles as specific performance, so that it will not normally be awarded where damages are an adequate remedy (but see *Garden Cottage Foods Ltd* v *Milk Marketing Board* (1983), Chapter 16). Its main use in the contractual situation has been as an indirect means of enforcing a contract for personal services but a clear negative stipulation is required. The court will not imply one.

Warner Brothers Pictures Incorporated v *Nelson*, 1937 – Enforcing a negative stipulation (**245**)

Whitwood Chemical Co v *Hardman*, 1891 – A negative stipulation will not be implied (**246**)

Freezing injunction

This remedy, which can be of assistance to a party suing for breach of contract, has developed considerably over recent times. It was formerly known as a Mareva injunction but is now called a freezing injunction under the Civil Procedure Rules 1998 that followed the Woolf reforms of civil procedure. In general terms a court will not grant an injunction to prevent a person disposing of his property merely to assist a person suing, for example, for a debt, to recover his money. However, the freezing injunction is an exception to that general rule and is granted to restrict removal of assets outside the jurisdiction, often by a foreign defendant, where this is a real and serious possibility. The injunction took its original name from the second case in which it was awarded, i.e. *Mareva Compania Naviera SA* v *International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509. However, the power of the High Court to issue a freezing injunction is now recognised by s 37 of the Supreme Court Act 1981 which makes it clear that the power applies to domestic as well as foreign defendants, whether the latter are residents in this country or not (*The Siskina* [1977] 3 All ER 803). However, the power is only to freeze assets within the jurisdiction of the English court. It cannot be used to freeze assets abroad. An order of a local court must be obtained (*Babanaft International Co SA* v *Bassante* (1988) 138 NLJ 203). It is, however, a valuable addition to existing contractual remedies, particularly when business is now so often conducted on an international scale.

A search order

This is an order that may be issued under the Civil Procedure Rules 1998. It permits the representatives of a claimant to enter the defendant's premises to inspect and remove vital material or evidence where it is contemplated that there is a risk that the defendant might destroy or otherwise dispose of them. It was previously referred to as an Anton Pillar order from the title of the case in which it was first granted.

Rescission

This is a further equitable remedy for breach of contract. The rule is the same when the remedy is used for breach as it is when it is used for misrepresentation. If the contract cannot be

completely rescinded, it cannot be rescinded at all; it must be possible to restore the status quo. All part payments must be returned. In this connection the fact that a claimant has rescinded the contract does not prevent that claimant from bringing an action for debts owed under the contract prior to rescission. These are not regarded as abandoned by the order of rescission (see *Stocznia Gdanska SA* v *Latvian Shipping Co* [1998] 1 All ER 883).

Refusal of further performance: a self-help remedy

If the person suffering from the breach desires merely to get rid of his obligations under the contract, he may refuse any further performance on his part and set up the breach as a defence if the party who has committed the breach attempts to enforce the contract against him.

Claims for restitution: quasi-contract

Quasi-contract is based on the idea that a person should not obtain a benefit or an unjust enrichment as against another merely because there is no obligation in contract or another established branch of the law which will operate to make him account for it. The law may in these circumstances provide a remedy by implying a fictitious promise to account for the benefit or enrichment. This promise then forms the basis of an action in quasi-contract.

In practice the following two areas are important.

Claims on a *quantum meruit*

This remedy means that the claimant will be awarded as much as he has earned or deserved. The remedy can be used contractually or quasi-contractually as follows.

(a) Contractually. Here it may be used to recover a reasonable price or remuneration where there is a contract for the supply of goods or services but the parties have not fixed any precise sum to be paid. This area is also covered by statute law in the case of a sale of goods by s 8 of the Sale of Goods Act 1979, and in the case of a supply of goods, e.g. a new distributor in a car repair contract, or the mere supply of a service by s 15 of the Supply of Goods and Services Act 1982.

(b) Quasi-contractually. A claim on this basis may be made where, for example, work has been done under a void contract. The claimant cannot recover damages for breach because no valid contract exists, but he may in some circumstances recover on a *quantum meruit.*

Craven-Ellis v *Canons Ltd*, 1936 – A claim on a *quantum meruit* (**247**)

Total failure of consideration: actions for money had and received

Of particular importance here is the action for total failure of consideration. A total failure will result in the recovery of all that was paid. A common reason for total failure of consideration arises where A, who has no title, sells goods to B and B has to give up the goods to the true owner. B can then recover the whole of the consideration from A, his action being based upon the quasi-contractual claim of money had and received.

It should be noted that the action is based on failure of consideration and not its absence. Thus money paid by way of a gift cannot be recovered in quasi-contract. As we have seen, the

decision in *Rowland* v *Divall* (1923) would appear to have been based on total failure of consideration (see Chapter 14).

Payments made under a mistake

This is a further aspect of restitution by use of an implied promise in the recipient to repay the sum(s) involved.

Payment under a mistake of fact

A claim lies (derived from the old action for money had and received) where money has been paid under a mistake of fact. The error may arise from an error in calculation as where defective arithmetic causes a debtor to pay more than he owes the creditor or where there is duplication of an item again in the debtor's accounts so that he pays it twice.

Payment under mistake of law

Until recent times, there was no claim for money paid under mistake of law. However, the House of Lords overturned this old rule in *Kleinwort Benson Ltd* v *Lincoln City Council* [1998] 4 All ER 513 where their Lordships ruled that money paid under a contract which was *ultra vires* or beyond the legal powers of the Council was nevertheless recoverable by the claimant who had made the payment.

Limitation of actions

Contractual obligations are not enforceable for all time. After a certain period the law bars any remedy in the main because evidence becomes less reliable with the passage of time. Time is the greatest enemy of the truth! The Limitation Act 1980 lays down the general periods within which an action may be brought. They are as follows.

(a) An action on a simple contract may be brought within six years from the date when the cause of action accrued.

As we have already noted, where the parties are broadly of equal bargaining power the above period of six years can be reduced by a term of the contract, in the relevant case to nine months after the provision of a service (see *Granville Oil and Chemicals Ltd* v *Davis Turner & Co Ltd* (2003) (unreported), Chapter 9). The case is not on its facts applicable to deeds.

(b) An action upon a contract made by deed may be brought within 12 years from the date when the cause of action accrued.

Where the claimant's claims include a claim for damages in respect of personal injury, the period is three years.

A person may suffer personal injury the extent of which only comes to light more than three years after the breach of contract which caused it. For example, A is a passenger on B's coach and B's careless driving causes an accident as a result of which A suffers injury consisting of bruising of the face. Four years later A goes blind as a result of the accident. Under the Limitation Act 1980, A has three years from his knowledge of the blindness to sue B and the court's permission is not required. The court may extend this period at its discretion, though in this case application must be made to the court for the extension.

A right of action 'accrues' from the moment when breach occurs, not from the date when the contract was made. Thus, if money is lent today for four years, the creditor's right to recover it will not expire until 10 years from today.