supplies were not available to the buyer. In the circumstances, specific performance was a uniquely desirable and effective remedy. The decision of the judge that he should give specific performance seems entirely sensible though it is perhaps unfortunate that he did not consider the theoretical question of whether he had power to do so.

Section 52 talks of plaintiffs and defendants and not of buyers and sellers. So it may be that, in theory, a seller can sue for specific performance. However, this is not likely to be a practical question except in the most extraordinary circumstances, since a seller will nearly always be able to sell the goods elsewhere and recover compensation by way of damages for any loss that he or she suffers. There will be cases, however, where the seller would wish, if possible, to sue for the price rather than to sue for damages. This is principally because, in the English system, actions for defined sums of money are much easier, quicker and, therefore, cheaper than actions for damages. Section 49 of the 1979 Act provides:

> (1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
>
> (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

Although the action for the price is in a sense the seller's equivalent of the buyer's action for specific performance, the two remedies should be kept clearly distinct. This is for historical reasons. The action for specific performance arises historically from the jurisdiction of the Court of Chancery to grant specific performance which was always said to be discretionary and to turn on taking into account all the relevant circumstances. The action for the price was not an equitable action but basically a common law action for debt. This means that, where sellers are entitled to sue for the price, they do not have to show that they have suffered any loss; they do not have to take steps to mitigate the loss as they do in a damages action and the action is not subject to any general discretion in the court. On the other hand, the seller does not have an action for the price simply because the buyer's obligation to pay the price has crystallised and the buyer has failed to pay. The seller has to bring the case within one or other of the two limbs of s 49. **10–14**

It will be seen that s 49(1) links the right to sue for the price to the passing of property. This is another example of the point discussed in Chapter 6 that the passing of property in the English system is largely important because of the other consequences which are made dependent on it. It will be remembered that whether property has passed is quite independent of delivery. So, in principle, a seller may be able to sue for the price because property has passed even though he or she still has the goods in his or her hands. Conversely, a seller who has delivered the goods but has provided that property is not to pass until he or she has been paid, as is of course common under retention of title clauses, cannot sue for the price under s 49(1).

10–15 Section 49(2) provides an alternative basis for an action for the price where the price is payable 'on a day certain irrespective of delivery'. This clearly covers the simple case where the contract says that the price is payable on 1 January. It certainly does not cover the rather common case where the price is payable on delivery, even where the contractual date for delivery is agreed, because it can then be held that that is not a day certain irrespective of delivery; *Stein Forbes v County Tailoring* (1916).[15] What about the cases which fall in between these two extremes? It certainly seems that it will do if the parties agree a date, even though, at the time of the agreement, neither of them knows when it is, such as on Derby Day 1991 or probably on some date which will become certain but is outside their control, such as the date of the next General Election. (These are no doubt not very likely practical examples!) An important practical test arose over *Workman Clark v Lloyd Brazileno* (1908).[16] This was a ship building contract under which it was agreed that the price was to be paid in instalments which were linked to the completion of various stages of the ship. Such provisions are extremely common in ship building contracts for obvious cash flow reasons. So, a ship building contract may well provide that 20% of the price is to be paid on the laying of the keel. Obviously, at the time of the contract, no one will know exactly when the keel will in fact be laid, even if the contract contains provisions as to when it should be laid. Nevertheless, in the *Workman Clark* case, it was held that such provisions were for payment on a day certain because when the duty to pay arose, the day on which it fell due was certain. So, it would seem that in general it is sufficient that the day of payment is certain when payment falls due, provided that it is not delivery which makes it certain.

A question which has not been tested in litigation is whether the parties may extend the scope of s 49 by agreement. A seller, for instance, might well wish to provide that property was not to pass until he or she had been paid but that he or she could sue for the price once the goods had been delivered. There does not seem to be any obvious reason why the parties should not be able to make an agreement to this effect.

15 (1916) 86 LJ KB 448.
16 [1908] 1 KB 968.

ACTIONS FOR DAMAGES

The 1979 Act contains three sections which deal with damages. These are: **10–16**

50 (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.

51 (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.

53 (1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may:

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

In practice, these provisions do not add a great deal to the general law of contract and many cases are decided without reference to them. It is more satisfactory, therefore, to start by setting out some general contractual principles about damages. For this purpose, it is useful to start by considering what kinds of loss a buyer or seller may suffer as a result of the other party breaking the contract. In order to do this, English commentators have now largely adopted a distinction first drawn in a famous *American Law Review* article in 1936 between expectation loss, reliance loss and restitution loss.[17] This terminology is now beginning to be recognised by the English courts.[18]

10–17 Expectation loss is the loss of what the injured party expected to recover if the contract was carried out. The great feature of the law of contract is that on the whole it is designed to protect people's expectations and a plaintiff should therefore normally be able to get damages which will carry him or her forward into the position which he or she hoped and expected to reach. So, in principle, if I order goods which I intend to use in my business for the purpose of making a profit, I should be able to recover damages for non-delivery of the goods which will compensate me for not having made the profit. Needless to say, this broad general principle is subject to qualifications which will appear later.

Cases may arise, however, in which it is very difficult for the plaintiff to prove, in any way which would be acceptable to a court, what his or her expectation loss would be but where it is clear that the plaintiff has suffered loss as a result of the contract having been broken. The plaintiff may seek to argue that he or she has suffered what is called reliance loss, that is loss arising out of having relied on the defendant honouring the contract. A good example is the case of *McRae v Commonwealth Disposals Commission* (discussed above in Chapter 7). In this case, the plaintiff did not recover his expectation loss, that is the profit he would have made from recovering the tanker if it had existed, because this was too speculative to be established but he did recover his reliance loss, that is the cost of mounting the expedition to look for the tanker.

The general principle appears to be that the plaintiff has a free choice whether to formulate the claim in terms of expectation loss or reliance loss unless the defendant can prove that the bargain that the plaintiff had made was such a bad one from the plaintiff's point of view that it

17 Fuller and Purdue (1936) 46 Yale LJ 52.
18 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16; [1984] 3 All ER 298.

would not even have recouped the reliance loss if the contract had been performed (*CCC Films v Impact Quadrant Films* (1984)).[19]

A third form of loss which the plaintiff may have suffered is that he or she may have paid over money to the defendant in pursuance of a contract which has gone off, as for example where the purchaser has paid part of the price in advance and the seller has then failed to deliver the goods. In certain circumstances, the plaintiff will be able to sue simply to recover the money but this would not be part of a damages action but a separate action of a restitutionary kind. **10–18**

The law does not say, whether the plaintiff is formulating the claim for expectation loss or for reliance loss, it can recover all its loss. The courts have said that some loss is too remote. It is at this question that ss 50(2) and 51(2) are aimed. It will be seen that those sections lay down the same test which is that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of contract. This is the draftsman's attempt to state the general contract law in the context of a failure by the seller to deliver the goods or by the buyer to accept them respectively. This rule is contained, for general contract law, in a series of cases of which *Hadley v Baxendale* (1854)[20] is the earliest and still most famous and the *Heron II* (1969)[21] is perhaps the most important modern example. Both of those cases were concerned with delay in delivery by carriers but they lay down principles of general application. They do provide both an endorsement and a substantial addition to the test laid down in ss 50(2) and 51(2). They provide an endorsement because, indeed, a plaintiff can normally recover any loss which directly and naturally results, in the ordinary course of events. However, a plaintiff may also be able to recover loss which does not directly and naturally result provided that he or she has adequately informed the defendant before the contract is made of the circumstances which in the particular case made the loss a consequence of the defendant's breach of contract. It follows that a defendant cannot say that the loss is too remote if it flows either from the ordinary course of events or from circumstances which the defendant adequately knew about at the time the contract was made. It follows that, in principle, the more the defendant knows about the plaintiff's business, the greater the possibility that the plaintiff will be able to recover compensation for loss which flows from the defendant's breach of contract. In some cases, judges have described these results by using the language of foreseeability, though, in the *Heron II*, the House of Lords deprecated the use of that word which they thought more appropriate to the law of tort and suggested alternative formulations such as 'contemplated as a not unlikely result'.

19 [1984] 3 All ER 298.
20 (1854) 9 Exch 341.
21 [1969] 3 All ER 686.

It is important to make clear, however, that what the parties have to contemplate is the kind of loss which will be suffered and not its extent. So, if a seller fails to deliver, it is foreseeable that the buyer will have to go out and buy substitute goods. One of the ways of calculating the buyer's loss is to compare the contract price and the price that the buyer has actually had to pay. This is readily within the contemplation of the parties. It would make no difference that the price had gone up in a way which nobody could have contemplated at the time of the contract (*Wroth v Tyler* (1974)).[22]

10–19 It is often said that the plaintiff must mitigate its damages. This is strictly speaking an inaccurate way of putting the point. The plaintiff can do what it likes but would only be able to recover damages which result from reasonable behaviour after the contract is broken. This is really an application of the general principle that the plaintiff can only recover what arises in the ordinary course of events and in the ordinary course of events those who suffer breaches of contract respond in a reasonable way (or at least the law treats them as if they will). This principle can be an important limitation on the amount that the plaintiff recovers. This is illustrated by the case of *Payzu v Saunders* (1919),[23] where the defendant had agreed to sell to the plaintiffs a quantity of silk, payment to be made a month after delivery. The defendant, in breach of contract, refused to make further deliveries except for cash and the plaintiff treated this as being a repudiation and elected to terminate the contract. This they were certainly entitled to do. They then sued for damages on the basis that the market price of silk had risen and that they could claim the difference between the contract price and the market price at the date of the buyers' repudiation. This argument was rejected on the grounds that, the market having risen, it would have been cheaper for the buyers to accept the seller's offer to deliver against cash at the contract price. Of course, it will often be difficult for the plaintiff to know immediately after the contract what is the best course. In principle, if the plaintiff acts reasonably, it should be able to recover its financial loss even though, with the wisdom of hindsight, it appears that the plaintiff could have minimised the loss by doing something different (*Gebruder Metelmann v NBR (London)* (1984)).[24]

How do we apply these general principles to the specific case of contract for the sale of goods? One answer is given by ss 50(3) and 51(3) which, it will be seen, are in very similar terms. This states the market rule, to which several references have already been made. English litigation in the field of sale of goods has been dominated by commodity contracts where there is a national or international market and it is

22 [1974] Ch 30.
23 [1919] 2 KB 581.
24 [1984] 1 Lloyd's Rep 614.

possible to say with precision what the market price is during the hours when the market was open. In such a situation, it is assumed that if the seller refuses to deliver, the buyer will buy against the seller in the market or that if the buyer refuses to accept, the seller will sell against the buyer in the market and that the starting point for inquiry is the difference between the contract price and the market price. This is basically a very simple rule to apply and it is a useful example of the application of the general principle. The fact that it is the only specific case actually discussed in the Act perhaps, however, gives it more prominence than it really deserves. It should be emphasised that the rule does not apply where there is no 'available market' and even where there is an available market, the rule will not necessarily apply.[25]

Whether the market rule is the right rule to apply will depend, amongst other things, on the nature of the loss suffered by the plaintiff.[26] This is shown by the case of *Thompson v Robinson* (1955).[27] In that case, the plaintiff was a car dealer which contracted to sell a Standard Vanguard car to the defendant who wrongfully refused to take delivery. At this time, there was effective resale price maintenance for new cars so that there was no difference between the contract price and the market price and the buyer argued that the plaintiff had suffered no loss. However, the plaintiff showed that in fact there was a surplus of Standard Vanguard cars and that it had therefore lost its profit on the deal which could not be replaced by selling the car to someone else since it had more cars than it could sell. In this case, the plaintiff's loss was the loss of the retail mark up, that is, the difference between the price at which the car was bought from the manufacturer and the price at which it could be sold. Of course, if the dealer could sell as many cars as it could obtain, then it would not effectively have lost this sum, as was held in the later case of *Charter v Sullivan* (1957).[28] **10–20**

From the buyer's point of view, a most important question arises where it wishes to argue that what has been lost is a particularly valuable sub-sale. Suppose A has contracted to sell to B for £100 and B has contracted to sell to C for £150. Suppose further that A fails to deliver in circumstances where B cannot buy substitute goods in time to perform his contract with C and loses his profit on the transaction. Can he recover the profit? If we were applying the standard rules, this would appear to turn either on whether this was a loss in the usual course of things, which it might well be if the buyer was a dealer since **10–21**

25 There may be a market for goods of the contract description but not of the contract amount. For a solution of the consequential problems, see *Shearson Lehman v Machine Watson* [1990] 3 All ER 723.

26 *Sealace Shipping Co v Oceanvoice, The Alecos* [1991] 1 Lloyd's Rep 120.

27 [1955] 1 All ER 154; [1955] Ch 177.

28 [1957] 2 QB 117.

the sub-sale would then appear to be entirely usual, or where the buyer had told the seller of the sub-sale. In practice, the courts have been reluctant to go so far. The leading case is *Re Hall and Pims Arbitration* (1928).[29] In this case, the contract was for the sale of a specific cargo of corn in a specific ship. The contract price was 51s 9d per quarter and the buyer resold at 56s 9d per quarter. The seller failed to deliver and, at the date when the delivery should have taken place, the market price was 53s 9d per quarter. Clearly, the buyer was entitled at least to the difference between 51s 9d and 53s 9d per quarter but claimed that to be entitled to the difference between 51s 9d and 56s 9d, the price at which it had agreed to re-sell. It was held by the House of Lords that this was right. However, this was a very strong case for two reasons. The first was that both the sale and the sub-sale were of the specific cargo so that there would be no question of the buyer going into the market to buy substitute goods. The second was that the contract of sale between plaintiff and defendant expressly provided for resale by the buyer.

Section 50 is concerned with the case where the buyer refuses to accept the goods and s 51 with the case of the seller who fails to deliver. Of course, the seller can break the contract not only by failing to deliver but also by delivering late or making a defective delivery. This is dealt with by s 53 which was set out above. It will be seen that again this sets out reliance on the market rule. It is clear, however, that there are many other forms of loss which may arise in the usual course of things. So, defective goods may cause damage to persons or property before their defects are discovered. Late delivery may cause loss of profit where the goods were to be used to make profits. An interesting case on s 53 is *Bence Graphics International Ltd v Fasson UK Ltd* (1997).[30] In this case, the sellers sold to the buyers large quantities of cast vinyl film which was to be used by the buyers and resold as decals for the container industry. It was an express term that the film should last in a usable form for five years but, in fact, it degraded much sooner. The trial judge took the view that the film was valueless in its delivered form and that the buyer could therefore recover the whole of the price, some £500,000. The majority of the Court of Appeal disagreed. The buyer could only recover its proven loss. This included a small amount of unusable film left on its hands and potential liabilities to sub-buyers. But, in fact, very few of these sub-buyers had asked for their money back. If this state of affairs continued, it would enure to the seller's advantage

10–22 A major problem with all of these rules about damages is the extent to which the plaintiff is seeking to recover his or her actual loss or what one

29 (1928) 1 39 LT 50.
30 [1997] 4 All ER 979.

might call his or her notional loss. In general, for instance, when one is applying the market rule, it does not seem to matter whether the buyer has gone into the market and bought substitute goods or not. The buyer can recover the difference between the contract price and the market price even though he or she does not buy against the seller; conversely, the buyer cannot recover more than this where he or she has stayed out of the market until later and then had to buy back at a higher price. However, it seems that sometimes courts will look to see what actually happens. An important and difficult case is *Wertheim v Chicoutimi* (1911),[31] where the seller delivered late. At the time when the goods ought to have been delivered, the market price was 70s a ton but by the time the goods were actually delivered, the market price was 42s 6d a ton. On the principles set out above, it would seem to follow that the buyer should have been able to recover the difference between 70s and 42s 6d for every ton he had contracted to buy. In fact, the buyer had managed to re-sell the goods at the remarkably good price in the circumstances of 65s a ton. It was held that he could only recover the difference between 70s and 65s for each ton bought. At first sight, this looks reasonable since it might be said that this was the only loss which the buyer had actually suffered. On the other hand, the reasoning deprives the buyer of the profit to which his commercial astuteness at selling well over the market price would normally have entitled him. It is not surprising, therefore, that the correctness of this decision has been much debated.

PARTY PROVIDED REMEDIES

It seems, within broad limits, that parties have freedom to add on by contract additional remedies. So, we have already seen earlier that the right to terminate may be extended by contract. Two other important additional remedies which should be mentioned are liquidated damages and deposits. **10–23**

Many contracts of sale provide that, in the event of certain breaches, typically late delivery by the seller, he or she shall pay damages at a rate laid down in the contract, for instance £X for every day by which delivery is delayed. Such provisions have important practical advantages because, as noted above, it is very much easier to bring actions for defined sums of money. However, the parties do not have complete freedom as to what may be agreed in this area. Since the 17th century, the courts have distinguished between liquidated damages which are enforceable and penalties which are not. The distinction turns

31 [1911] AC 301.

on whether the sum agreed is a reasonable pre-estimate as at the time of the contract of the amount of loss which is liable to flow from the contract being broken in the way contemplated. If the sum agreed is a reasonable pre-estimate, then it is classified as liquidated damages and is recoverable. If it is more than the reasonable pre-estimate then it is classified as a penalty and is not recoverable, leaving the plaintiff to recover such unliquidated damages as he or she can in fact establish. It is important to emphasise that the test is not the plaintiff's actual loss but the plaintiff's contemplated loss as at the time of the contract. So liquidated damages can be recovered even though there is no actual loss or less actual loss than the agreed sum, provided the pre-estimate was reasonable.

A contract may provide for the payment in advance by the buyer of sums of money. Here, the law has drawn a distinction between deposits and advance payments. In certain types of contract, it is common for the payment to be made in stages, tied to the achievement of particular stages of work. So, as we saw above, in a ship building contract, it would be common for there to be a payment of part of the price when the keel is laid. The purpose of these schemes is to help the seller with cash flow. It typically occurs in major capital contracts when the seller or supplier has to spend considerable sums of money on acquiring components and on fitting them together. Suppliers, typically, are unwilling to finance the whole of the cost of this and stipulate for payment in instalments tied, as we have said, to particular stages of completion.

On the other hand, the buyer may have paid a deposit so as to give the seller a guarantee that the buyer will in fact go through with the contract. So, the buyer may have gone into the seller's shop and picked some goods and said that he or she would like to buy them and would come back tomorrow to collect them. In certain trades, it would be very common for the seller to take a deposit because sellers know from experience that many buyers do not return and they may lose the opportunity of selling the goods elsewhere.

10–24 The importance of the distinction is this. If, having paid money in advance, the buyer then breaks the contract, he or she will of course be liable to damages and, if the damages exceed what has been paid in advance, then it will simply be a question of the seller recovering the balance. But the seller's damages may be less than the deposit or advance payment. In this situation, the courts have said that the seller can keep the deposit even if the deposit is greater than the seller's actual loss whereas, if there has been an advance payment which is greater than the seller's actual loss, the seller can only keep the actual loss and must return the balance.

The amount of the deposit may be not only greater than the seller's actual loss but than any loss to the seller greater than was reasonably foreseeable at the time of the contract. In such a case, it might plausibly be argued that the deposit is in fact a penalty. In practice, however, courts have tended to keep the rules about penalties and deposits in watertight compartments. A marked change of attitude was revealed in the recent case of *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* (1993),[32] where the Privy Council was prepared to treat a deposit in a contract for the sale of land as penal where it exceeded the going rate (10%) (of course even a deposit of 10% might exceed any likely loss but it was effectively held that it was too late to question the taking of deposits at the going rate).

SELLERS' REMEDIES AGAINST THE GOODS

The seller's principal concern is to ensure that he or she is paid for the **10–25** goods. The most effective and common way of doing this is for the seller to retain ownership of the goods as long as possible. We have already discussed this in Chapter 6. The Act does, however, give the unpaid seller further rights in relation to the goods as well as his or her right to sue the buyer for the price or damages. The provisions which are contained in ss 38–48 of the Act are complex but do not appear to be of much practical importance in modern situations. The central provision is s 39 which says:

> (1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law:
>
> (a) a lien on the goods or right to retain them for the price while he is in possession of them;
>
> (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
>
> (c) a right of resale as limited by this Act.
>
> (2) Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.

32 [1933] 2 All ER 370.