# CONTRACT – Remedies (lectures 18 & 19)

**MEASURES**

**LIQUIDATED DAMAGES (fixed sum):** planning for breach – certainty (liquidated), privacy, cost effective, amicable (commercial relationship preserved). The party subject to LDC may argue that it is in fact a penalty clause, which are struck out of the contract.

**The Test for a Penalty Clause** – *Dunlop Pneumatic Tyre v New Garage*

*Terminology inconclusive
*Penalty clause is 'in terrorem'
*Based on construction of particular contract, judged at time of contracting

Valid LDC = genuine pre-estimate of loss set at the time of contracting.

Penalty clause if:

1.Stipulated sum is extravagantly greater than the greatest possible loss conceivable on breach.

2.Breach is non-payment of money and stipulated sum is greater.

3.A single lump sum is payable on any of several possible breaches were some are serious but others trivial.

4.Even though loss impossible to precisely pre-estimate, sum stipulated may still be a genuine pre-estimate.

*If PC do UTCC regs 1999 apply? It will if consumer contract, not if two businesses.

**Not a Penalty Clause**

*Estimate does not coincide with actual loss – *McAlpine Capital Porjects v Tilebox*

*Acceleration of payment clause – *The Angelic Star*

*Deposits generally no-recoverable – *Workers Trust v Dojap Investments*

**UNLIQUIDATED DAMAGES (unknown amount).**

*Damages assessed by the court
*Compensation NOT punishment – *The Golden Victory*

**NATURE OF COMPENSATION**

**Expectation** (placed in the same situation as if the contract had been performed)– *Robinson v Harman*

*3 alternative measures:
1.Differnce in value
2.Cost of cure (defective performance has taken place)
3.Loss of amenity (can only claim this if the contract is for enjoyment) –***Ruxley Electronics v Forsyth***

*Application of *Ruxley* is seen in *Farley v Skinner (No2*), cf where the cts looked at the intention of the parties claiming amenity - *Birse Construction ltd v Eastern Telegraph Co Ltd, McGlinn v Waltham Contractors*

**Reliance** (puts c in position as it had not contracted)–*Anglia Television v Reed*

*C has unfettered choice between reliance and expectation loss – *CC films v quadrant films.* The burden of proof is on party paying to prove otherwise.

*Except where trying to escape a bad bargain – *c & p haulage v middleton*

*If expectation damages too speculative – *McRae v Commonwealth Disposals*

*Pre-contractual expenses available – *Anglia TV v Reed*

**Restitution** (where D has wrongly enriched himself). It prevents unjust enrichment, but there is no loss to c – *AG v Blake.*

*Account of profits are available where: exceptional circumstances, damages inadequate, c has legitimate interest in preventing the d's profit-making activity

*Successful application of *AG v Blake* was seen in *Esso v Niad;* cf with *AB Corp v CD Co* (damages were adequate), *Experience Hendrix v PPX Enterprises* (not exceptional circumstances), *WWF v WWF* (not exceptional circumstances)

**Other awards:**

*Generally there is no damages for mental distress – *Addis v Gramophone Company Ltd; Johnson v Unisys Ltd*

*Contract for pleasure/relaxation/peace of mind – *Jarvis v Swans Tours* (whole purpose); *Farley v Skinner* (major object)

*Loss of reputation (*Malik v BCCI*) and loss of chance (*Chaplin v Hicks*) both fall within expectation loss

*Quantum meruit – *Sumpter v Hedges*

**LIMITING FACTORS**

**CAUSATION** – must be a causal link between breach and loss. *Galoo Ltd v Bright Grahame Murray* states that it must be an effective cause. Is there a novus actus interveniens? *(Lambert v Lewis)* OR is it likely to happen? (*Monarch Steamship Co v AB Karlshamms)*

**REMOTENESS –** *Hadley v Baxendale*

Damages must be either:

1.Arising naturally in the usual course of things -imputed knowledge (normal losses).

OR

2.Reasonably in the contemplation of the parties (ie in special circumstances) – actual knowledge (abnormal losses). Confirmed in *Jackson v Royal* - must discuss repercussions of breach at time of contracting.

*Application of the test: *Victoria Laundry v Newman Industries; Heron II* (the loss was not unlikely due to the d's action/breach)*; Balfour Beatty v Scottish Power* (the specific type of loss was unrecoverable as not foreseeable by d)*; The Achilleas*

**MITIGATION**

*Technically no obligation to mitigate, but losses resulting from failure to mitigate is not recoverable.

What is required for mitigation?
*Reasonable steps – *British Westinghouse v Underground Electric*
*Mitigation party not expected to embark on litigation – *Pilkington v Wood*
*May have to accept breach if cost effective – *Payzu v Saunders*
*Mitigating party's conduct not weighed in'nice scales' – *Bank of Portugal v Waterlow & Sons.*

**CONTRIBUTORY NEGLIGENCE** -s4 Law Reform (Contrib Neg) Act 45

*Contrib neg generally not available but it may be where there is: breach of contractual duty to take care AND the breach is also a tort – *Vesta v Butcher.* Also *Barclay's Bank plc v Fairclough*

**EQUITABLE REMEDIES**

*Specific performance is an order of a court which requires a party to perform a specific act– *cooperative insurance society ltd v Argyll stores (holdings) ltd*

*Injunction (requires a party to do or refrain from doing specific acts)– *Evening Standard v Henderson*

*Rescission (bringing parties back to position in which they were before entering into the contract, if possible)

*Rectification (ct corders change in a written doc to reflect what it ought to have said in the first place).