# Damages for Breach of Contract

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Katy Barnett
*Melbourne, April 2025*



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# INTRODUCTION

## Chapter 1

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### § 1:1 Contract damages the presumptive remedy

As is well known to English lawyers, the presumptive remedy for breach of contract in English law is expectation damages, which have the aim of putting the claimant in the position as if the contract had been performed. The famous judicial statement by Parke B in *Robinson v Harman* is typically cited at this point:

> The rule of the common law is, that where the party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[1]

At the very least, even if they get nothing else, the claimant will therefore be entitled to nominal damages for breach of contract.

Lawyers from Civil Law jurisdictions might be baffled to learn this, as specific performance is the default remedy in Civilian and most hybrid systems. Civilian jurisdictions tend to emphasise the promise-based nature of contract, and the Roman maxim of *pacta sunt servanda*: contracts are made to be performed. Commenting upon this, Daniel Friedmann has said, when I order a pizza, I want a pizza, not damages

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**[Section 1:1]**

[1]*Robinson v Harman* (1848) 1 Ex. 850 at 855; 154 E.R. 363 at 365.

in fact the purchaser sold the goods for a price much greater than the market value, the presumption would be rebutted:

> . . . [T]he real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed but a much better position.[3]

In *Slater v Hoyle & Smith*, Scrutton LJ was highly critical of the decision in *Wertheim*. He said: "I should myself have thought the principles applying to these . . . cases were the same as those applying to non-delivery, and that the Privy Council judgment [in *Wertheim*] was erroneous as departing from those principles."[4]

It is suggested that *Wertheim* represents an anomaly for which no good explanation in principle has been given, and that it should be reformed to be in line with the other categories of breach involving goods.

Indeed, *McGregor on Damages* has suggested, in comments endorsed by this text, that English law should reject *Wertheim* and that the default position in all instances of breach of contract for sale of goods or carriage of goods should be to ignore follow-on sales (regardless of whether the breach was non-delivery, non-acceptance, delay or defect) but that the seller should be able to adduce evidence of facts to the contrary if he can show that the buyer has not bought substitute goods and is not subject to a damages claim.[5] This would render the results in *Williams Bros* and *Rodocanachi* incorrect (although the general overarching principle would remain the same). This approach was taken by the Court of Appeal in *Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG*,[6] where *Williams Bros* was not applied. Instead, the damages were limited to the loss on the sub-sale, because the parties knew that the undelivered oil was nominated to perform a sub-contract, and there was no possibility that the cargo would be put to any other use. In other words, the only loss was the damages which the sub-buyer could claim from the buyer, given the knowledge of the parties.

In *Hapag-Lloyd AG v Skyros Maritime Corp*,[7] Justice Bright did not apply *Wertheim*, although it was a case of delayed delivery, where

[3] *Wertheim v Chicoutemi Pulp Co* [1911] A.C. 301 (PC) at 308.

[4] *Slater v Hoyle & Smith* [1920] 2 K.B. 11 (KB) at 24.

[5] James Edelman (with contributions by Jason Varuhas and Simon Colton), McGregor on Damages (London: Sweet & Maxwell, 2024) 22nd edn, para.[10-187].

[6] *Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG* [2018] EWCA Civ 1720 at [72]–[73].

[7] *Hapag-Lloyd AG v Skyros Maritime Corp* [2024] EWHC 3139 (Comm). The case is currently before the Court of Appeal.





charterers of two ships delivered both ships back to owners a few days late. The charterers paid the hire rate under the charterparties for the extra period of late delivery. However, at that time, the market rate for charters was significantly higher, and so the owners sought damages reflecting the rate they could have obtained on the market at that time. While the charters were on foot, the owners had sold the ships to new owners. Even if the ships had been delivered on time, the owners would not, and indeed, could not have chartered them out for that period because it was a term of the contract of sale to the new owners that the ships would not be chartered out. Nonetheless, the owners sought damages reflecting the increased market rate, on the basis that the follow-on contract was not relevant under principles of *res inter alios acta*.

Justice Bright noted Scrutton LJ's criticisms of *Wertheim* in *Slater v Hoyle* and the inconsistency in the cases.[8] However, he also noted that *Slater v Hoyle* has not been uniformly applied.[9] Rather than simply applying the *Wertheim* rules to a case of delayed delivery, his Honour held that the *res inter alios acta* rule does not apply in two circumstances. First, the follow-on contract can be taken into account when it concerns the specific goods delivered under the main contract (meaning that the claimant was unable to enter the market). In these circumstances, it is not necessary for the parties to contemplate the second contract. Secondly, the follow-on contract can be taken into account if, when the main contract was concluded, it was in the contemplation of the parties that the follow-on contract would be satisfied with goods to be delivered under the main contract.[10] In this instance, the follow-on contract could be taken into account because it concerned the specific goods delivered under the contract (meaning that the claimant could not enter the market). The case has gone on appeal, so the ultimate position of the law in this area remains uncertain.

## § 2:14 Damages for sale of defective goods

Section 53 of the Sale of Goods Act deals with the situation where the buyer must accept defective goods in breach of warranty of quality. It provides as follows:

> (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—

[8] *Hapag-Lloyd AG v Skyros Maritime Corp* [2024] EWHC 3139 (Comm) at [84]–[109].

[9] See e.g. *Louis Dreyfus Trading Ltd v Reliance Trading Ltd* [2004] EWHC 525 (Comm) at [21]–[23]; *Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG* [2018] EWCA Civ 1720 at [72]–[73].

[10] *Hapag-Lloyd AG v Skyros Maritime Corp* [2024] EWHC 3139 (Comm) at [110]–[123].

(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.

(4A) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act).

(5) This section does not apply to Scotland.

Again, s.53(3) entrenches the common law difference in value measure (difference between the value the goods had at the time of delivery and the value they would have had if they had been of the requisite quality).

Section 53(2) entrenches the *Hadley v Baxendale* first limb rule (discussed in §§ 9:7 to 9:11) that a seller who sells defective goods is liable for all direct and naturally occurring loss.

## § 2:15 Damages for sale of defective goods—Special provisions for Scotland on damages for sale of defective goods

Section 53(5) exempts Scotland from the coverage of s.53. Scottish contracts involving the sale of defective goods are covered by s.53A:

(1) The measure of damages for the seller's breach of contract is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach.

(2) Where the seller's breach consists of the delivery of goods which are not of the quality required by the contract and the buyer retains the goods, such loss as aforesaid 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 contract.

(2A) This section does not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies (but see the provision made about such contracts in section 19 of that Act).

(3) This section applies to Scotland only.





Scotland is separately covered because references to "conditions" and "warranties" are inappropriate for Scotland (a hybrid jurisdiction), and the measure stipulated in s.53A(2) also reflects Scots law.[1]

## § 2:16 Damages for sale of defective goods—Damages for defective goods and follow-on sales

Cases involving defective goods always give rise to difficulties involving follow-on sales. A question arises as to whether they should be considered. There are two strands of case law.

The first strand of authority is represented by *Slater v Hoyle & Smith*.[1] The buyers agreed to purchase 3,000 pieces of bleached cotton cloth from the sellers at a price of 6*l* 9*s* per piece. However, the buyers were unhappy with the quality of the pieces provided and refused to accept the remaining pieces due under the contract. The sellers (claimants) sued the buyers for their refusal to accept delivery. The buyers (defendants) counterclaimed for breach of warranty in relation to the cloth that had been delivered and failure to deliver cloth of the requisite quality in relation to the remaining pieces due under the contract. In fact, the buyers had a follow-on contract to sell some of the pieces to a third-party buyer and had delivered the pieces to the third-party buyer for the contracted-for price, with no reduction in price (as if the goods had not been defective). The sellers had not known of the follow-on contract but argued that it should be considered in assessing the buyers' loss. The court confirmed (applying *Rodocanachi* and *Williams v Agius*) that circumstances peculiar to the buyer were irrelevant in calculating damages, and the fact that the buyers had sold some of the pieces for full price did not reduce the damages payable for breach of warranty.[2]

The second strand of authority is represented by *Bence Graphics International Ltd v Fasson UK Ltd*.[3] In that case, the buyer received vinyl film from the seller, from which it made labels for shipping containers. It later transpired that the vinyl film was defective and peeled off shipping containers. The buyer sought the difference in value between the defective film and the value it would have had if it had complied with the warranty. The English Court of Appeal did not award

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**[Section 2:15]**

[1]Added upon the recommendation of the Law Commission and the Scottish Law Commission, Sale and Supply of Goods (Law Com. No.160) (Scot. Law. Comm. No.104) 1987, pp.84–86.

**[Section 2:16]**

[1]*Slater v Hoyle & Smith* [1920] 2 K.B. 11.

[2]*Slater v Hoyle & Smith* [1920] 2 K.B. 11 (KB) at 14–15 (Bankes LJ); at 17–18 (Warrington LJ); and at 21–25 (Scrutton LJ). This is also consistent with the Australian case of *Clark v Macourt* [2013] HCA 56; (2013) 253 C.L.R. 1 (HCA) at [111] and [130]–[133] (Keane J).

[3]*Bence Graphics International Ltd v Fasson UK Ltd* [1988] Q.B. 87.

difference in value damages, and instead awarded the buyer the cost of having to reimburse the third parties for the defective labels (in the event, only one customer sued the buyer).

These two strands of authority could be thought to be incommensurable. However, Andrew Dyson and Adam Kramer have argued that they are distinguishable, in that the nature and the timing of the defect was different.[4] In *Slater v Hoyle & Smith*, the defect with the cotton cloth was patent and known to both parties at the time of the sale. The court expected the buyer to go onto the market and mitigate its losses by finding a seller (which it did) and the fact that it was very skilled in mitigating its loss was irrelevant. The appropriate date at which to assess the loss was therefore the date of sale. By comparison, in *Bence Graphics*, the defect was latent and not known to either of the parties as at the time of sale, or to the buyer when it on-sold the vinyl labels to third parties. There was no way in which it could mitigate its losses, and it was appropriate in that instance to assess the losses at the later date when the defect became evident, and the buyer had to mitigate by paying damages to third parties.

This overlaps with the discussion of mitigation and date of assessment in §§ 10:13 and 10:22, in which it is suggested that the kind of breach and the concomitant ability to mitigate will determine the appropriate date of assessment.

## IV. DAMAGES FOR FAILURE TO PROVIDE SERVICES AS PROMISED

### § 2:17 Introduction

The default measure for a failure to provide "pure" services is, like goods, a difference in value measure. (Services involving the repair of property are excluded from this discussion and discussed below.) The ways in which the provider of services may breach a contract for services are similar to those for goods: the services may not be provided; they may be delayed; or they may be defective.

### § 2:18 Damages for failure to provide services or late provision

Where services are not provided or provided later than required, the damages will be measured according to the difference in value between the services as contracted and the objective market price of the replacement services obtained. In this way, the principles are similar to those applied in goods, as noted in the Australian case of *Commonwealth v Amann Aviation Pty Ltd*:

> In the ordinary course of commercial dealings, a party supplying goods or rendering services will enter into a contract with a view to securing a profit, that is to say, that party will expect a certain margin of gain to be achieved in addition to the recouping of any expenses reasonably incurred by it in the discharge of its contractual obligations. It is for this reason that expectation damages are often described as damages for loss of profits. Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses. This second amount is the net profit.[1]

A market-based approach is taken (on the assumption that the profit was the aim of the contract).

[4]Andrew Dyson and Adam Kramer, "There is No 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment" (2014) 130 L.Q.R. 259, 273–275.





### § 2:19 Damages for failure to provide services or late provision—Sometimes full value of services awarded without a substitute performance

However, sometimes, the full value of the services is supplied even where there was no attempt to mitigate or obtain a substitute performance. English courts have awarded damages for the cost of hiring a substitute employee for the proportion of uncompleted work,[1] in cases where an employee deprived an employer temporarily of his services in the context of taking industrial action, even though the claimants in those cases did not in fact hire a substitute and could show no loss of profits for the period where the work was unperformed. The loss was difficult or impossible to measure, and it was difficult to attribute any specific decline in productivity or loss to the defendant, except by using a proportionate sum of the defendant's salary as a guideline as to the value of the services not provided.

Thus, for example, in *National Coal Board v Galley*,[2] the defendant refused to perform his duty as a deputy at a coal mine on 16 June 1956, despite a reasonable request by the claimant. The coal mine produced less on that day, but the defendant's failure to turn up on that day was part of a broader industrial action by many employees and members of the same trade union. However, the court found that it could not be shown that the defendant's breach of contract contributed to the loss of output of coal on that day. The defendant was simply liable for the cost

**[Section 2:18]**

[1]*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 C.L.R. 64 (HCA) at 80 (Mason CJ and Dawson J).

**[Section 2:19]**

[1]*National Coal Board v Galley* [1958] 1 W.L.R. 16 (CA); *Royle v Trafford Borough Council* [1984] I.R.L. 184; *Miles v Wakefield Metropolitan District Council* [1987] A.C. 539 (HL). See in Australia: *Zomojo Pty Ltd v Hurd (No. 4)* [2014] FCA 441 (FCA) at [8]–[16], where a managing director who breached his contract of employment with the claimant company by setting up a rival business was liable to repay his salary to the extent that he had not worked on the claimant's company's business.

[2]*National Coal Board v Galley* [1958] 1 W.L.R. 16 (CA).

of a replacement deputy for that day (subsequently, replacement deputies were found).[3]

In *Miles v Wakefield Metropolitan District Council*,[4] the position was more complex. The defendant held the office of superintendent registrar of births, deaths and marriages, and was expected to work for three hours on Saturday mornings (the most popular time for civil weddings). As part of an industrial action conducted by the defendant's trade union, the defendant refused to conduct weddings on a Saturday between August 1981 and October 1982 (although he did come into the office and conduct other administrative duties). The claimant Council deducted a sum representing the loss of his services over the time he refused to conduct weddings. Lord Templeman (with whom Lord Brightman concurred) said that the Council was entitled to continue to keep the defendant on, but to sue for damages. However, damages are difficult to calculate for this kind of loss:

> A strike may involve the employer in a loss of profits but it is impossible to show that any particular proportion of the loss is attributable to the industrial action of any individual worker. If a chauffeur goes on strike for one day, his employer may only suffer the inconvenience or enjoyment of driving his own car for once. . . . [A]n employer always suffers damage from the industrial action of an individual worker. The value of those services to the employer cannot be less than the salary payable for those services, otherwise most employers would become insolvent.[5]

Lord Templeman said that a worker who declines to work efficiently should be no more entitled to wages than a worker who declines to work at all if the object is to harm the employer. Therefore, the claimant Council was entitled to withhold wages for the Saturdays when the defendant refused to work, and the defendant could seek a quantum meruit for the value of the services which were provided.[6]

## § 2:20 Damages for defective services

In *White Arrow Express Ltd v Lamey's Distribution Ltd*,[1] the English Court of Appeal refused to award damages when the claimant had contracted for, and paid for, a premium delivery service, but the defendant supplied ordinary services. Lord Bingham MR explained that, ordinarily, a party who contracts and pays for a superior service and receives an inferior service is entitled to damages, as "[t]he measure of

[3] *National Coal Board v Galley* [1958] 1 W.L.R. 16 (CA) at 29 (Pearce LJ).

[4] *Miles v Wakefield Metropolitan District Council* [1987] A.C. 539 (HL).

[5] *Miles v Wakefield Metropolitan District Council* [1987] A.C. 539 (HL) at 560.

[6] *Miles v Wakefield Metropolitan District Council* [1987] A.C. 539 (HL) at 560. Conversely Lord Bridge of Harwich doubted the availability of a quantum meruit at 552.

**[Section 2:20]**

[1] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] C.L.C. 1251 ("*White Arrow*").





> damage . . . is the difference between the price paid (or, if it is lower, the market value of what was contracted for) and the market value of what was obtained".[2] However, in this particular instance, the claimants had not led evidence as to the difference in value between the services contracted for and the services provided.[3] Nor could the claimant show any consequential losses: the claimant's financial position had not been adversely affected, and it could not show evidence that any formal complaints had been made against it by third parties. Lord Bingham MR held that the *Robinson v Harman* formulation assumes "that the breach has injured [the claimant's] financial position; if he cannot show that it has, he will recover nominal damages only".[4]

A difference in value measure was applied in *Giedo van der Garde BV v Force India Formula One Team Ltd*.[5] Mr van der Garde and his associated corporation had contracted to be provided with the opportunity to drive racing cars for 6,000km, to enhance his chances of becoming a Formula One racing car driver, but he was only provided with the opportunity to drive a racing car for 2,004km. Stadlen J emphasised the importance of the value of the performance to the claimant.[6] In the event, he awarded the claimant the difference in value between the service that was provided and the service that was contracted for, calculated as a proportion of the contract price of the services reflecting the extent to which Mr van der Garde did not get the requisite driving distance (US$1.865m). Stadlen J would also, in the alternative, have considered awarding negotiating damages pursuant to *Wrotham Park*,[7] or damages of US$100,000 reflecting Mr van der Garde's loss of a chance to become a Formula One racing car driver.[8] Mr van der Garde eventually achieved his aim of being a Formula One driver, for different teams, but again became embroiled in litigation. He was unsuccessful in his efforts to seek an injunction in Australian courts to be reinstated to the Sauber Formula One team.[9]

Adam Kramer has criticised the calculation of the damages in *Giedo*

[2] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] C.L.C. 1251 at 1254–1255.

[3] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] C.L.C. 1251 at 1256.

[4] *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] C.L.C. 1251 at 1254.

[5] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 ("*Giedo van der Garde*").

[6] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 at [424], [425], [428], [437], and [458].

[7] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 at [539]–[553] (fee reflecting hypothetical negotiations). *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 W.L.R. 798 and negotiating damages more generally are discussed in §§ 4:1 et seq.

[8] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 at [412].

[9] See *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80; *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37; *Giedo van der Garde BV v*

*van der Garde* on the basis that the difference in value measure should not be used because goods are more tradable than services, particularly where the services are unusual, and the measure is compensating (in part) for the loss of a chance.[10] He argues that an actual loss could not be proven in *Giedo van der Garde*. On the other hand, David Winterton has argued that the measure in cases such as *White Arrow* and *Giedo van der Garde* provides a pecuniary substitute for the loss of performance (albeit that the claimant in *White Arrow* could not prove the market value of either the contracted-for services or the services actually provided).[11]

It is suggested that the difference in value measure generally provides a fair measure for the provision of defective services, but that careful consideration should be given to the nature of the services and whether there was any opportunity to mitigate by purchasing substitute services. Moreover, as discussed at §§ 2:22, 2:23, direct losses and consequential losses must be carefully separated. The difference in value is a direct loss; losses such as damage to reputation or a loss of a chance are consequential losses.

## § 2:21 Damages for defective services—Carriage of goods

Carriage contracts of goods involve not only the provision of the service itself, but the safe delivery of the good. Hence, there is some overlap with the cases for damages for breach of contract for sale of goods, and some of the cases in fact involve carriers failing to deliver goods (e.g. *Rodocanachi*[1]).

There are several ways in which a carrier might breach a contract for carriage of goods: the goods may be lost in transit or destroyed; the delivery of the goods may be delayed; or the goods may be delivered to the wrong place or not carried at all.

If the goods are lost in transit or destroyed, the default measure is the market value of the goods at the time and place where they ought to have been delivered, deducting the freight payable under the contract for safe delivery.[2] Generally, as noted at § 2:10, where there has been a failure to deliver, sub-sales are irrelevant to the calculation of damages,

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*Sauber Motorsport AG (No.2)* [2015] VSC 109.

[10]Kramer, The Law of Contract Damages, paras [2-43]–[2-47].

[11]David Winterton, Money Awards in Contract Law (Oxford: Hart Publishing, 2015) pp.27–28; David Winterton, "Claims for the value of the lost contractual performance" (2019) 45(1) UWALR 75, 83–84.

**[Section 2:21]**

[1]*Rodocanachi Sons & Co v Milburn Bros* (1886) 18 Q.B.D. 67.

[2]*Rodocanachi Sons & Co v Milburn Bros* (1886) 18 Q.B.D. 67 at 76. A claimant can recover the full value of the good, even if they only have a limited interest in the goods: see *Crouch v London and North Western Railway Co* (1849) 2 Car. & K. 789; 175 E.R. 331.





but if there is no market for such goods at the place of delivery, the value of the sub-sale may be used.[3]

If the delivery of the goods is delayed, the default measure is the difference between the market value of the goods at the time and place they should have been delivered, and the market value as at the actual date of delivery.[4] The rule for goods at sea was different, but is now the same for carriage of goods on land.[5] Sometimes a carrier may also be liable for the claimant's cost of mitigation: i.e. the expenses reasonably incurred by claimant in acquiring a near substitute when equivalent goods were not available on the market.[6] The consequential loss flowing from the cost of searching for delayed or missing goods may also be recovered.[7]

If the goods are delivered to the wrong place, or the carrier fails to deliver the goods at all, a claimant has two options. First, a claimant may mitigate by seeking a substitute carrier at the market rate, and recover the difference between the contract rate and the substitute carrier, as well as any difference between the market value of the goods at the time and place they should have been delivered and the market value at the actual date of delivery.[8] The claimant's mitigation must be reasonable.[9] Secondly, a claimant may mitigate by purchasing substitute goods at the place of delivery, and recover the difference between total value of the goods at the time and place they should have been loaded (if not delivered at all), or the value at the time and place at which they were wrongly delivered (if they were wrongly delivered) (plus freight and insurance) and the cost of the substitute goods.[10] If neither option is possible (i.e. neither a substitute cargo nor a substitute transport), then *Watts, Watts & Co Ltd v Mitsui & Co Ltd* states that the measure of damages ought not to be determined by reference to the market price of goods at the port of loading at the time of the breach (because there was

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[3]*O'Hanlan v Great Western Railway Co* (1865) 6 B. & S. 484; 122 E.R. 1274; *The Arpad* [1934] P. 189; (1934) Lloyd's Indian L.Rep. 134.

[4]*Wilson v Lancashire and Yorkshire Railway Co* (1861) 9 C.B. (N.S.) 632; 142 E.R. 248; *Collard v South Eastern Railway Co* (1861) 7 H. & N. 79; 158 E.R. 400; *Schulze v Great Eastern Railway Co* (1887) 19 Q.B.D. 30; *Haskell v Continental Express Ltd* [1950] 1 All E.R. 1033.

[5]*Koufos v C Czarnikow Ltd ("The Heron II")* [1969] 1 A.C. 350 (HL), overruling the rule in *The Parana* (1877) 2 P.D. 118.

[6]*Millen v Brash* (1882) 10 Q.B.D. 142; but cf *Romulus Films v William Dempster* [1952] 2 Lloyd's Rep. 535.

[7]*Hales v London and North Western Railway Co* (1863) 4 B. & S. 66; 122 E.R. 384; *Haskell v Continental Express Ltd* [1950] 1 All E.R. 1033 (KB) at 1046.

[8]*The "Asia Star"* [2010] SGCA 10; [2010] 2 Lloyd's Rep. 121 (SGCA).

[9]*Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] A.C. 196 (HL); *The "Asia Star"* [2010] SGCA 10; [2010] 2 Lloyd's Rep. 121 (SGCA) at [33].

[10]*Ströms Bruk Aktiebolag v Hutchinson* [1905] A.C. 515 (no substitute carrier available); *Nilsson Co v Livanos* (1941) T.L.R. 400; *The "Asia Star"* [2010] SGCA 10; [2010] 2 Lloyd's Rep. 121 (SGCA).

no market), but the difference between the price agreed to be paid by the claimant for the goods and the market value of the goods at the time and at the ultimate destination to which they should have been delivered, after deduction of the insurance premium and expenses.[11]

There is also a possibility that the owner of goods fails to deliver them to the carrier. If it is reasonable for the carrier to mitigate by obtaining a substitute cargo, damages are calculated as the difference between the agreed rate of freight, and the market rate (with a deduction in each case for the cost of earning the freight).[12]

The situation where a carrier breaches a contract and the party who suffers the loss does not have a proprietary interest in the goods the subject of the contract is dealt with in the discussion regarding third party contracts at §§ 2:46, 2:47.

## § 2:22 Damages for defective services—Contracts for services and consequential losses

Clearly, breaches of contracts for services can cause consequential losses. Sometimes, these consequential losses may be a loss of reputation, inconvenience, distress and so forth. Those kinds of non-pecuniary losses are put to the side and discussed in §§ 5:4 to 5:21 (although these losses lurk below the surface in the cases discussed). It is suggested that the reason why full cost of a replacement employee was awarded in cases like *National Coal Board v Galley* and *Miles v Wakefield Metropolitan District Council*, despite the fact that the employers failed to seek a substitute performance, is because those other kinds of loss (such as loss of reputation or severe inconvenience) were present but unquantifiable, and accordingly the court awarded the full replacement value of an employee to reflect those losses. Indeed, Lord Templeman's comments in *Miles v Wakefield Metropolitan District Council* confirm this.

Other kinds of losses might result from a breach of a contract to provide services, such as loss of consequential profits. Courts are chary of awarding these losses: for one thing, as *White Arrow* shows, it is difficult to prove and quantify them. In that case, the claimant could not show that the provision of an ordinary delivery service impacted upon its profit, nor that any customers had complained. There is a particular reluctance to impose losses upon carriers, and it is no coincidence that the progenitor of the modern test of remoteness, *Hadley v Baxendale*,[1] involved a carrier who failed to deliver a good to the factory owner in a timely fashion. The courts are particularly tender towards carriers; as Asquith LJ said in *Victoria Laundry*:

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[11] *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] A.C. 227.

[12] *Smith v M'Guire* (1858) 3 H. & N. 554; 157 E.R. 589; *Aiken Lisburn v Ernsthausen* [1894] 1 Q.B. 773; *Wallems Rederij A/S v Muller* [1927] 2 K.B. 99 (KB) at 105.

**[Section 2:22]**

[1] *Hadley v Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.





> . . . a carrier commonly knows less about a seller about the purposes for which the buyer or consignee needs the goods, or about other 'special circumstances' which may cause exceptional loss if the delivery is withheld.[2]

Modern carriers use standard form contracts in which liability for "indirect" or "consequential loss" is often strictly excluded or limited. Exclusion clauses are discussed in detail in §§ 12:1 et seq.

Even if losses of profit are provable, if the defendant's action is part of a broader industrial action by many employees, the requisite causal link between the loss of profit and the failure to provide services may not be present. Thus, in *National Coal Board v Galley*, the National Coal Board alleged that Mr Galley's failure to act as a deputy when reasonably requested contributed to the loss of output of coal on that particular day. However, as noted at § 2:19, the Court found that it could not be proven that Mr Galley's absence caused the loss of output of coal. This was because he did not work at the coal face, and because his actions were part of a much broader industrial action (many employees went on strike on that day, including workers at the coal face).

## § 2:23 Damages for defective services—Service case where consequential losses contemplated

One case where consequential losses arising from the loss of a chance were contemplated is *Giedo van der Garde*,[1] previously discussed at § 2:20. Mr van der Garde alleged that, not only had he received substandard services, but that he had also lost an opportunity to become a Formula One driver, and the income associated with that. Stadlen J found that the chances of becoming a Formula One driver and making a profit from that were necessarily speculative and capped the measurement of those losses at US$100,000. In any event, given that Mr van der Garde could recover the difference in value between the services provided and the promised services, Stadlen J did not find it necessary to also award damages for the loss of a chance. It seems, however, that the loss of a chance was a distinct consequential loss, separate from the direct loss of the sub-standard services. Consequently, if such losses were not to be awarded in addition to the direct losses, it should be linked to the limitations upon recovery such as causation, remoteness, scope of the duty, mitigation, or some other matter.

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[2] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528 at 537.

**[Section 2:23]**

[1] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373.

## V. DAMAGES FOR BREACH OF CONTRACT TO SELL SHARES AND STOCK

### § 2:24 Introduction

The principles applicable to goods are applied to contracts to sell shares and stock,[1] particularly where the shares and stock are fungible and freely available on the market. The ways in which breach may occur are similar to contracts for sale of goods: a seller may fail to deliver, delay in delivery or breach a warranty as to the quality of the shares, or a buyer may refuse to accept shares as agreed.[2] In *Shaw v Holland*, Parke B explicitly likened the sale of shares to sale of goods, and said that the measure was the difference in value between the contracted for price of the shares and the market value of the shares as at the date of breach.[3] In *Tempest v Kilner*, this rule meant that the claimant was not entitled to the subsequent increase in value of the shares after the date of breach.[4] Similarly, in *Jamal v Moolla Dawood & Co*, it was confirmed that the date of breach was the relevant measure, and that, when a buyer refuses to accept shares, what the seller does then is not relevant:

> If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not the buyer; the seller cannot recover from the buyer the loss below the market price at the date of breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.[5]

### § 2:25 Warranties of quality of the shares sold

For present purposes, the word "warranty" is used in the sense of a contractual statement of fact given by a seller about the target company as at completion of sale. In share purchase agreements, the warranties as to the quality of shares generally relate to a certain quality of the target company (often the quality used to determine the purchase price).

If a warranty is given as to the quality of the shares sold, and the warranty is breached, the presumptive measure of damages (as for goods) is the difference between the value of the shares as warranted and the actual objective market value.[1] Thus, in *Lion Nathan Ltd v CC Bottlers Ltd*, Lord Hoffmann said:

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**[Section 2:24]**

[1]*Shaw v Holland* (1846) 153 E.R. 794; 15 M. & W. 136; *Tempest v Kilner* (1845) 136 E.R. 100; 3 C.B. 249.

[2]See e.g. *Jamal v Moolla Dawood & Co* [1916] 1 A.C. 175.

[3]*Shaw v Holland* (1846) 153 E.R. 794 at 798; 15 M. & W. 136 at 145–146.

[4]*Tempest v Kilner* (1845) 136 E.R. 100 at 102; 3 CB 249 at 253.

[5]*Jamal v Moolla Dawood & Co* [1916] 1 A.C. 175 at 179 (Lord Wrenbury).

**[Section 2:25]**

[1]*Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 W.L.R. 1438 (PC) at 1441–1442; *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446; [2002] 1





> If the vendor [of the shares] had warranted that the earnings in the last two months would be $2,223,000, there would have been an analogy with a warranty of quality and the damages would prima facie have been the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth.[2]

### § 2:26 Warranties of quality of the shares sold—How to calculate the value of the shares as warranted

The value of the shares as warranted is presumed to be the actual price paid.[1] However this presumption is rebuttable, and sometimes the defendant can prove that the purchaser made a bad bargain and the company was worth less than the actual price paid.[2] It can be difficult to ascertain the value of the shares as warranted, particularly if the consideration for the sale was not in cash.[3] Generally, the value must be ascertained as on the information available as at the date of the sale.[4]

If the sale purchase agreement warrants that a company's accounts are "true and fair", accordingly, the breach is that certain items in the company accounts inflated the value of the company. The shares must then be valued on the basis of restated accounts,[5] and the measure is the difference in value between shares on the basis of the accounts as provided and the real worth of the shares using the right accounting methods.[6] Sometimes the accounts will be so defective that the shares actually had no value at the relevant time,[7] but in other cases, the breach of warranty may not have affected the value.[8]

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W.L.R. 642; *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB); [2014] Bus L.R. 1338 at [14]; *Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB) at [180] (appeal on other grounds dismissed [2016] EWCA Civ 128); *Zayo Group v Ainger* [2017] EWHC 2542 (Comm); *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883; [2023] 4 W.L.R. 33 at [49]; *Ivy Technology Ltd v Martin* [2022] EWHC 1218 (Comm) at [561]; *Millbrook Healthcare Bidco Ltd (formerly Cairngorm Acquisitions 9 Bidco Ltd) v Croll* [2023] EWHC 290 (Comm) at [138]–[142]. See Kramer, The Law of Contract Damages, §§ 9:1 et seq. for a detailed discussion of this line of case law.

[2]*Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 W.L.R. 1438 (PC) at 1441.

**[Section 2:26]**

[1]*Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446; [2002] 1 W.L.R. 642 at [18] (Longmore LJ); *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [391] (Mann J).

[2]*Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446; [2002] 1 W.L.R. 642 [18] (Longmore LJ).

[3]*Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch).

[4]*Buckingham v Francis* [1986] 2 All E.R. 738 at 740 (Staughton J); *Joiner v George* [2002] EWCA Civ 1160 (CA) at [68]–[75]; *Ng v Crabtree* [2011] EWHC 1834 (Ch) at [17] (Arnold J).

[5]*Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [398] (Mann J).

[6]*Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [397] (Mann J).

[7]See *Bottin International Investments Ltd v Venson Group Plc* [2006] EWHC 3112

## § 2:27 Warranties of quality of the shares sold—How to calculate the market value of the shares

The market value of the shares can be difficult to calculate given the fact that the warranty was breached. It is likely to depend upon the basis on which the parties arrived at the purchase price. It is highly likely to be necessary to have expert valuations, as noted in *Oversea-Chinese Banking Corporation Ltd v ING Bank NV*.[1]

Caroline Graham gives several different possibilities as to how parties may reach different purchase prices, and the warranties involved. First, she raises a sale purchase agreement with a warranty that all plant is owned by the company:

> . . . if a buyer buys a company for £1 million and . . . after completion the buyer finds out that a major item of plant was actually on lease and the effect of that is to reduce the value of the company to £950,000, the damages to which the buyer will be entitled for breach of warranty are likely to be £50,000.[2]

Conversely, she says that if a buyer buys a company for £1 million and there was a warranty to the net assets of the company:

> . . . if the purchase price were determined by reference to the net assets of the company and the value of the plant in question is £50,000, then the value of the company with the warranty breached is likely to be £950,000.[3]

Then she gives the example of a buyer who purchases a company for £1 million, with a warranty as to the company's profits:

> If . . . the purchase price had been determined by reference to the company's profits (for example, on a multiple (a price/earnings multiple) of five times the profits for the previous financial year), then if the plant in question were repossessed by the finance company but its absence did not affect the company's capacity to earn profits, its value may be unaffected. If however the buyer found that the company had to pay £20,000 per year in leasing payments if it wished to continue to use the plant, the reduction in the company's value may well be five times the amount by which the company's earnings are reduced, i.e. £100,000.[4]

Graham's examples illustrate how the market value of the shares very much depends upon how the purchase price was reached, what warranties were given in light of that, and how this may impact upon the calculation of damages.

In *Oversea-Chinese Banking Corporation Ltd v ING Bank NV*, the court confirmed that the basic measure was diminution in value of the shares as warranted where there was a share purchase agreement and a warranty as to undisclosed liabilities.[5] Oversea-Chinese Banking Corporation Ltd ("OCBC") argued that ING Bank NV ("ING") had failed to disclose certain liabilities of the target company (ING Asia Private Banking Ltd) to Lehman Brothers Finance SA. OCBC argued that if not for the failure to disclose the liability in the accounts, OCBC would have obtained an indemnity in respect of ING Asia Private Banking Ltd's liability to Lehman Bros Finance SA (in the sum of $14.5m). They sought to depart from the measure proposed in *Lion Nathan Ltd v CC Bottlers Ltd*[6] (difference in value between the value of the shares as warranted and the actual objective market value) and instead sought to recover the undisclosed liability (or the value of the indemnity they would have obtained).[7] However, there was no reason to depart from the general measure, and moreover, no evidence that the undisclosed liability had diminished the market value of the shares.[8]

Recently, in *MDW Holdings Ltd v Norvill*,[9] the defendants had warranted in a share purchase agreement that they had complied with environmental laws and regulations and that there were no circumstances which might lead the regulator to assert such laws were breached. In fact, this was untrue and the warranty had been breached. The Court of Appeal confirmed that the measure in *Lion Nathan Ltd v CC Bottlers Ltd*[10] (difference in value between the value of the shares as warranted and the actual objective market value) was appropriate. The difficulty facing the court was what contingencies were relevant in calculating the value of the shares as warranted and the objective market value. The trial judge had awarded the claimant the difference in value of the shares between a "warranty true" position and a "warranty false" position. The main question for the Court of Appeal was

(Ch) at [415] (Blackburne J) (a case of deceit; it was not necessary to decide the breach of warranty claims in light of the conclusion on deceit).

[6] *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [405] (Mann J).

**[Section 2:27]**

[1] *Oversea-Chinese Banking Corporation Ltd v ING Bank NV* [2019] EWHC 676 at [33]–[40].

[2] Caroline Graham, The Sale of Shares and Businesses: Law, Practice and Agreements (Sweet & Maxwell, 2024) 7th edn, para.[10-03].

[3] Graham, The Sale of Shares and Businesses: Law, Practice and Agreements, para. [10-03].

[4] Graham, The Sale of Shares and Businesses: Law, Practice and Agreements, para. [10-03].

[5] *Oversea-Chinese Banking Corporation Ltd v ING Bank NV* [2019] EWHC 676 (Comm) at [35].

[6] *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 W.L.R. 1438 (PC) at 1441 (Lord Hoffmann).

[7] *Oversea-Chinese Banking Corporation Ltd v ING Bank NV* [2019] EWHC 676 (Comm) at [18]–[22].

[8] *Oversea-Chinese Banking Corporation Ltd v ING Bank NV* [2019] EWHC 676 (Comm) at [39]–[40].

[9] *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883; [2023] 4 W.L.R. 33 (CA). See M Dimarco and D Winterton, "The Relevance of Hindsight in the Assessment of Damages for Breach of Warranty and Deceit" (2023) 139 L.Q.R. 525.

[10] *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 W.L.R. 1438 (PC) at 1441 (Lord Hoffmann).

whether the trial judge had been correct to take into account the risk that the claimant's reputation would be damaged in calculating the "warranty false" position, a risk which (by the time of trial) had not materialised. Lord Justice Newey declined to take into account the fact that the risk had not materialised in calculating the "warranty false" position, saying that the principles in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)*[11]—allowing the court to take into account subsequent events occurring after breach when calculating loss—were only relevant in instances of anticipatory breach.[12]

The reference to the possibility of an indemnity in that case illustrates that where a buyer may be exposed to risks in a share purchase agreement after due diligence has been completed, it is common to ask for an indemnity from the seller in relation to those risks. The nature of indemnities (and the limitations upon them) are discussed in greater detail in § 12:11.

Finally, if there is a promise to exercise due care and skill in valuing a company or shares, the principles are similar to misstatement or negligent advice cases (see at §§ 2:42 to 2:44). In *Lion Nathan Ltd v CC Bottlers Ltd*, it was found that the warranty was one to provide reasonable care in a business forecast. Lord Hoffmann said:

> In this case the vendor represented to the purchaser that $2,223,000 was a figure upon which he could rely in calculating the price. The figure was in fact used in the calculation of the price. If the vendor had made a forecast in accordance with the terms of the warranty, he would have produced a lower figure and the price would have been correspondingly lower. The damages are therefore the difference between the price agreed on the assumption of $2,223,000 earnings and what the price would have been, using the same method of calculation, if the forecast had been properly made.[13]

## VI. DAMAGES FOR FAILURE TO BUILD, MAINTAIN OR REPAIR PROPERTY AS PROMISED

### § 2:28 Introduction

There are other measures for damages for breach of contract beyond difference in value. For failures to build, maintain or repair property as promised, the default measure of damages is generally "cost-of-cure", even if the cost-of-cure is much higher than the diminution in value to the property. This default measure is subject to a qualification of whether such an award is "reasonable" in the circumstances. If such an award is unreasonable, the claimant will only be able to claim damages for difference in value. If there is no diminution in value, the claimant is

[11] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 A.C. 353 ("*The Golden Victory*").

[12] *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883; [2023] 4 W.L.R. 33 (CA) at [49].

[13] *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 W.L.R. 1438 (PC) at 1442.





then left to seek damages for "loss of amenity", a measure discussed in § 5:17.

### § 2:29 Damages for repair of a defective building or structure

For construction contracts for repair of a building, the default measure is often the cost of rectifying a defective contractual performance, known as "rectification damages" or "cost-of-cure", because otherwise the claimant is not fairly compensated for the breach. Generally, the cost-of-cure is higher (sometimes substantially higher) than the difference in value. It is clear that the default measure for breach of a construction contract is to obtain cost-of-cure, with the qualification that it must be "reasonable" in the circumstances.[1] The approach of the courts in these cases has been to presume that rectification damages are the most appropriate remedy, and only to decline rectification if the damages would be "unreasonable", and, in England and Wales at least, if the damages would not be used to effect the repairs.[2]

### § 2:30 Damages for repair of a defective building or structure—When cost-of-cure awarded

In *Radford v De Froberville*,[1] Radford sold a portion of his plot of land to De Froberville. He wished for De Froberville's portion to be divided from the main portion (where Radford's tenants lived) and hence the contract of sale contained a covenant that De Froberville would build a house on the property and erect a wall with specific dimensions and characteristics between her property and the main property. Despite consistent pressure from Radford and the tenants, she did neither, but sold the property to a third party. Radford sued De Froberville for damages for the cost of erection of a wall, so that he could use the money build one himself. At the time of making the contract (1965) the cost of building a wall was £1,200. By the time of the case (1977) the cost of building a wall had risen to £3,400. De Froberville attempted to argue that Radford was not entitled to the cost of building a wall, but only to

**[Section 2:29]**

[1] *Thornton v Place* (1832) 174 E.R. 74; 1 Mac.L. & R. 218; *H Dakin & Co Ltd v Lee* [1916] K.B. 566; *Pearson-Burleigh Ltd v Pioneer Grain Co* (1933) 1 D.L.R. 714; *Radford v De Froberville* [1977] 1 W.L.R. 1262; *Dean v Ainley* [1987] 1 W.L.R. 1729 (CA).

[2] *Ruxley Electronics and Constructions Ltd v Forsyth* [1996] 1 A.C. 344 (HL) ("*Ruxley*"); *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811; *Sunrock Aircraft Corp Ltd v Scandinavian Airlines System Denmark-Norway-Sweden* [2007] EWCA Civ 882; [2007] 2 Lloyd's Rep. 612. See Michael Elliott, "The Cost-of-cure and a Plaintiff's Proprietary Interest" (2021) 38(4) Int. Const. L. Rev. 471 for a discussion of the differences between English law and Australian law in this regard.

**[Section 2:30]**

[1] *Radford v De Froberville* [1977] 1 W.L.R. 1262. For similar approaches in recent cases, see *Brown v Ulrick* [2024] EWHC 2041 (Ch) at [55]; *St James's Oncology SPC Ltd v Lendlease Construction (Europe) Ltd* [2022] EWHC 2504 (TCC) at [335]–[342].