13

The Non-Breach Position: Proving What Would Have Happened but for the Breach

The second half of the factual causation equation: proving what would have happened but for the breach. Split into sections on what the claimant would have done, what the defendant would have done, what natural events would have occurred, and what third parties would have done. Includes such legal principles as the minimum performance rule (in relation to defendants) and the loss of chance principle (in relation to third parties).

13.1 Summary

THE NON-BREACH POSITION—what would have happened but for the breach—is necessarily more difficult to prove than the breach position—what in fact happened. It is nevertheless no less important in calculating damages, which are always relative to the non-breach position. Without knowing the non-breach position, the claimant cannot be placed in 'the same situation … as if the contract had been performed';[1] a harm that actually happens is only a recoverable loss if it would not have happened but for the breach, and a gain that is not received is only a recoverable loss if it would have been received but for the breach. The breach position of what actually happened must therefore be distinguished

[1] See further above in chapter one, section 1.3B.

from the non-breach position which concerns what might be called 'hypothetical causation'.[2]

A. Proof Depends upon the Type of Event

In general terms, and as explained further in the following sections, (i) the claimant must prove on the balance of probabilities what the claimant would have done, and what physical (non-human) events would have occurred; (ii) the claimant must prove on the balance of probabilities what the defendant would have done, although as an exception, the defendant may sometimes reduce liability by showing what it *could* have done even if that is not what it *would* have done (the *Lavarack*[3] minimum obligation rule); (iii) the claimant must prove a significant chance that a third party would have acted as the claimant alleges, and damages are then awarded on a 'loss of a chance' basis;[4] (iv) where the question is as to whether the claimant would have suffered an injury, in medical negligence failure to warn cases a special rule applies from *Chester v Afshar*.[5]

B. The 'Fair Wind' Principle

Generally speaking, as it is the defendant's fault that the court does not know what would have happened but for its breach, evidential uncertainties in establishing what would have happened should be resolved in favour of the claimant,[6] ie the burden is to an extent reversed so that it falls on the defendant to prove that the loss would not have occurred but for the breach.[7] This is sometimes described by the maxim '*omnia praesumuntur contra spoliatorem*'—everything is presumed against the wrongdoer—but that probably goes too far, and the maxim should only apply

> where the wrongdoer's acts make it difficult or impossible for the innocent party to prove its loss or where the facts needed to prove the loss are known solely by the wrongdoer and the wrongdoer does not disclose these facts to the innocent party.[8]

[2] *Första AP-Fonden v Bank of New York Mellon SA/NV* [2013] EWHC 3127 (Comm) (Blair J) at para 472.

[3] *Lavarack v Woods* [1967] 1 QB 278 (CA).

[4] For an example of care being taken to apply the different approaches to the claimant and to third parties, see *Ball v Druces & Attlee (No 2)* [2004] EWHC 1402 (QB) (Nelson J).

[5] *Chester v Afshar* [2005] 1 AC 134 (HL).

[6] *Double G Communications Ltd v New Group International Ltd* [2011] EWHC 961 (QB) (Eady J) at para 5 and the cases cited therein. But see further section 13.5B(iv) and chapter eighteen, section 18.2A(iii) below.

[7] *Phethean-Hubble v Coles* [2012] EWCA Civ 349 (tort, road traffic) Longmore LJ at para 90; *West v Ian Finlay & Associates* [2013] EWHC 868 (TCC) (Edwards-Stuart J) (construction) at para 181.

[8] *Ticketnet Corp v Air Canada* (1997) 154 DLR (4th) 271 (Ontario CA) Laskin JA at para 85.

13.2 What Would the Claimant Have Done?

A. The Test

(i) The Test is the Balance of Probabilities

The burden is on the claimant to show on the balance of probabilities what it would have done had the breach not occurred, and the doctrine of loss of a chance can have no application to such a question.[9]

Thus in a sale of goods case where the claimant seller had an option to supply up to 10 per cent above or below a specified amount, it was found on the balance of probabilities that the seller would have supplied the maximum permitted and damages were quantified on that basis.[10] Likewise the question of how many aircraft a claimant would have asked the defendant to maintain during the life of a contract was answered on the balance of probabilities.[11]

(The exception is the statutory unfair dismissal action, to which loss of chance operates on the question of what the claimant would have done by the *Polkey* principle, discussed below at section 13.3B(iv)(b).)

(ii) No Minimum or Maximum Obligation Test

The minimum obligation test, which assumes in certain circumstances that *defendants* would have done that which was most beneficial to them, does not apply to proof of what the *claimant* would have done. Thus where the question is what the claimant sellers would have supplied and there is a contractual tolerance, the court merely asks what the sellers would in fact have supplied, not assuming that they would have supplied the maximum (or minimum) allowable.[12]

(iii) Third Parties Linked to the Claimant

There is Court of Appeal authority that the actions of those third parties closely linked to the claimant are also to be proven on the balance of probabilities and not on a loss of chance basis, which is the rule applicable to third parties. In *Veitch v Avery* the question of whether the claimant's father would have lent the claimant

[9] *Sykes v Midland Bank Executor Co* [1971] 1 QB 113 (CA); *Allied Maples Group Ltd v Simmons and Simmons (a firm)* [1995] 1 WLR 1602 (CA); *Hartle v Laceys (a firm)* [1999] Lloyd's PN 315 (CA); *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 (CA) Waller LJ at 494. But for discussion of the position where the personal representative is suing and proving what the deceased would have done, see *Feltham v Bouskell* [2013] EWHC 1952 (Ch) (Hollander QC) at para 111.

[10] *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière* [1979] 2 Lloyd's Rep 98 (CA) Denning LJ at 115.

[11] *Jet2.com Ltd v SC Compania Nationala de Transporturi Aeriene Romane Tarom SA* [2012] EWHC 2752 (QB) (Mackie QC) affirmed [2014] EWCA Civ 87.

[12] *Sudan Import & Export Co (Khartoum) v Société Générale de Compensation* [1958] 1 Lloyd's Rep 310 (CA) at 317 (where the court found that the sellers would have supplied 2000 tons and not made use of the tolerance either way); *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière* [1979] 2 Lloyd's Rep 98 (CA).

money was said to be governed by the balance of probabilities 'since the son and father were for practical purposes a unity' and so the question was essentially one of 'what would the plaintiff have done'.[13] The same principle has been applied to the administratrix of the claimant's estate.[14]

(iv) Take into Account What Actually Happened

The court will take account what the claimant actually did up to the date of trial in determining what would have happened during that period, for example it will take into account the fact that the claimant committed suicide[15] (although it will have to satisfy itself that this would have happened but for the breach).

(v) Assume the Claimant Would Have Acted Legally

Broadly speaking, it must be assumed (partly as a result of the doctrine of illegality) that the claimant would have acted lawfully and not, for example, earned greater profits by committing falsehoods against third parties.[16]

B. Negligent Professionals Cases

The question of what the claimant would have done is particularly important in professional negligence cases involving advice, where the damages claim depends upon showing that things would have been different if the claimant had been properly advised, eg it would not have entered into the transaction at all (that it is a 'no-transaction' case), or would have paid less (in a 'successful transaction' case).[17]

(i) Did the Claimant Rely?

If the claimant cannot show that it would have done anything different (eg would have ignored the proper advice or was already committed to the transaction[18]) it has suffered no loss. There are examples of such a finding in cases of a failure by a solicitor to advise of the unusual clauses in the lease[19] or the risks of litigation,[20] or where the solicitor did not hold all of the purchase monies in a transaction;[21] failure by a financial advisor to advise of the possibility of moving the claimant's

[13] *Veitch v Avery* (2007) 115 Con LR 70 (CA) at para 26.
[14] Salmon LJ in *Sykes v Midland Bank Executor Co* [1971] 1 QB 113 (CA) at 130 and Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA) at 1612B–C, discussing *Otter v Church, Adams, Tatham & Co* [1953] Ch 280 (Upjohn J).
[15] *Whitehead v Hibbert Pownall & Newton (a firm)* [2009] 1 WLR 549 (CA).
[16] *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939 (CA).
[17] The terms 'no-transaction' and 'successful transaction' are discussed above in chapter three, section 3.1B(i).
[18] *AW Group Ltd v Taylor Walton* [2013] EWHC 2610 (Ch) (Hodge QC).
[19] *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113 (CA) (solicitor negligence).
[20] *Benedict White v Paul Davidson & Taylor (a firm)* [2004] EWCA Civ 1511.
[21] *Godiva Mortgages Ltd v Khan* [2012] EWHC 1757 (Ch) (Cooke).

pension into an immediate annuity rather than a broker-managed fund;[22] failure by a doctor to advise of the risk of failure of an operation;[23] and failure by a surveyor to advise of contamination.[24] In some cases the defendant will have an uphill battle trying to disprove reliance, for example where the defendant advised the claimant to commence proceedings and proceedings were then commenced.[25]

Of course, a claimant failing to show it would not have entered into the transaction does not mean it cannot show that it would not have done *anything* different. A claimant may be able to show that it would have ended up paying less to enter the transaction or in consequential costs, as a result of which that will be the measure of loss.[26] Proving this may be a mixed question as to what the claimant would have done and what the third party would have done, since it might be said that the third party would have (eg) refused to drop the price or alter the relevant clause. The claimant must prove on the balance of probabilities that it would have sought a lower price, but proof that the third party (eg vendor) would have accepted it is on the loss of chance measure, as discussed below.[27] *Allied Maples Group Ltd v Simmons & Simmons* is an example of this.[28]

(ii) The Test of Reliance and Inducement

In misadvice or misstatement cases, certain complexities emerge when considering whether the claimant would have acted differently. It has been held that:

> as long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing a Plaintiff to act, it is a cause of his loss and he relies on it, no matter how strong or how many are the other matters which play their part in inducing him to act.[29]

The meaning of this was unpacked, and the case law set out, in considerable detail by Clarke J in the misrepresentation case of *RZO AG v RBS plc*.[30] The judge confirmed that it is necessary that the claimant show that but for the representation it would not have acted differently, meaning that if the representation had not been made *at all* the claimant would have acted differently. However, it was held that it is

[22] *Beary v Pall Mall Investments* [2005] EWCA Civ 415.

[23] *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 (Hutchison J). However, compare *Chester v Afshar* [2005] 1 AC 134 (HL), which laid down a special rule for failure to warn cases where the medical procedure would have gone ahead anyway, but at a different time: see the discussion in chapter fourteen, section 14.5B(ii)(e) below.

[24] *Dancorp Developers v Auckland City Council* [1991] 3 NZLR 337 (HC of New Zealand). Or in the non-professional negligence context see *McWilliams v Sir William Arrol & Co* [1962] 1 WLR 295 (HL) (the deceased would not have worn a seatbelt even if there had been one).

[25] *Levicom International Holdings BV v Linklaters (a firm)* [2010] EWCA Civ 494 at paras 261, 282 and 284.

[26] See above in chapter three, section 3.4.

[27] See section 13.5, below.

[28] *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA).

[29] *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 582 (CA) Stephenson LJ at 589. Approved and applied in eg *Housing Loan Corp plc v William H Brown Ltd* (CA), 18 December 1998; *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2011] EWHC 2336 (Comm) (Eder J).

[30] *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2011] 1 Lloyd's Rep 123 (Clarke J) at paras 153–99.

not necessary that the claimant show it would have acted differently if it had known the truth (ie enough information to correct the falsehood), and that is not relevant save as evidence of what was important and so what the claimant would have done if the representation had not been made.

This is somewhat counterintuitive and it is not the way the law is applied generally. If it were, a lender could blame a valuer for a slight overvaluation merely because it would not have lent if it had had no valuation at all, even though it would have lent even if reasonable care had been taken and the true value had been given (eg because the true value was, like the advised value, within the lender's loan-to-value ratio policy limits). Clearly lenders and other claimants do not have such an easy ride, and the courts ask what would have happened if the defendant had taken reasonable care, which will often involve asking what would have happened if the defendant had given different advice or a different statement, and only fairly rarely asking what would have happened if the defendant had given no advice or made no statement.

A minor wrinkle discussed in *RZO v RBS* is the situation where the representation or advice makes important to the claimant a particular point that was not previously important; but for the representation or advice the claimant would have done the same, but once the representation had been given the matter was important and such a falsehood still counts as inducing the action of the claimant.[31] The test proposed in an earlier case and supported in *RZO* was that the defendant would have to show 'at least, the [relevant factor] having been brought to his attention, that [the claimant] would not have made enquiries to establish the true position but would have gone ahead anyway'.[32]

(iii) Indirect Reliance

In many cases of transactions that depend upon a valuation or other professional service, investors or others that have a cause of action against the professional (for example because the professional expressly undertook responsibility towards the investors) may want to complain of the professional's negligent valuation or information on the basis not that the claimant itself noticed and relied upon it being true and was thereby induced to invest, but that had the professional taken reasonable care the project or fund-raising would not have been carried out at all because someone other than the claimant would have pulled the plug. Furthermore, the claimant may have known that the valuation or information would have to satisfy that third party and taken comfort from that fact without looking at the valuation or information itself.

This sort of argument was approved by the House of Lords in *Harris v Wyre Forest DC*,[33] where the claimant property purchaser's claim against the defendant

[31] Ibid at para 191.

[32] *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch) (Warren J) at paras 548 and 552 (affirmed without discussing this point: [2009] EWCA Civ 169, esp at paras 100–105), cited with approval in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2011] 1 Lloyd's Rep 123 (Clarke J) at para 191.

[33] *Harris v Wyre Forest District Council*; heard with *Smith v Eric S Bush* [1990] 1 AC 831 (HL). Also *Yianni v Edwin Evans & Sons* [1982] QB 438 (Park J), approved in *Smith v Eric S Bush*.

valuer was not defeated by the fact that the claimant had not seen the valuation report; it simply relied on its knowledge that the mortgage lender had procured the report and was satisfied with it. Such an argument was also raised in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* at first instance.[34] Phillips J, obiter, agreed that if the negligent valuation induced the insurer to approve the loan (which he found it did not), and if the claimant bank relied on the insurer's approval in determining whether itself to advance the money, the bank could claim against the valuer. In American securities litigation, the 'fraud on the market' theory similarly allows a claimant in a case of a misleading statement (for example, in a prospectus) to satisfy the reliance requirement by showing that although the claimant did not read or hear the particular statements, the claimant relied on the market to value the shares and the market (being efficient) read or heard and relied on the statements.[35]

If a duty to take care and breach are found then, subject to points on the scope of duty, recovery should only require that the breach in fact caused the loss. It is not essential that the claimant read the information supplied by the defendant, or even knew about it. Where tort law is concerned, however, the difficulty will be the duty of care: usually it is only where the claimant at least relies on the defendant taking reasonable care that a duty will be found, although that will not always be the case.[36] Even in contract law, the scope of duty may provide a problem. It may be found that the duty of the defendant did not extend to advising a third party and thus it is not liable for the indirect consequences of such misadvice for the claimant. In one solicitor's negligence case, the lender failed because the only causal link from the solicitor's breach in failing to spot a restrictive covenant and the transaction was that if the solicitor had taken reasonable care the borrower (not the lender) would not have wanted to proceed, and this was held to be outside the scope of the solicitor's duty to the lender.[37]

C. Would the Claimant Have Repudiated?

In cases of termination for repudiatory breach, the claimant is sometimes said to be entitled to a general presumption that it would, but for the termination, have performed the contract, because the calculation of damages is on the premise that by

[34] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 (Phillips J) at 794–95.

[35] *Basic Inc v Levinson* (1988) 485 US 224 (Supreme Court). But see *Amgen Inc v Connecticut Retirement Plans and Trust Funds* (27.2.2013, Supreme Court). In these cases the cause of action is a claim under the tort-like common law cause of action implied from the offence under rule 10b-5 of the Securities and Exchange Commission. The same lack of a requirement of individual reliance appears to be applicable to the English claim for misleading prospectus statements under section 90A of the Financial Services and Markets Act 2000.

[36] *White v Jones* [1995] 2 AC 207 (HL) (solicitors owed a duty to the intended beneficiaries of a will); *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) (provider of a negligent reference owes a duty to the former employee who does not see the reference, as well as to the recipient).

[37] *Crosse and Crosse v Lloyd's Bank plc* [2001] EWCA Civ 366.

repudiating the defendant has waived its right to performance.[38] This is something of a non sequitur. At the very least, it is clear that this approach does not apply where repudiation by the claimant was 'predestined':

> [I]f the repudiating party can show that certain events were, at the date of acceptance of the repudiation, predestined to happen, which would have meant that the contract could not or would not have been performed, then the innocent party cannot recover damages on the normal assumption that he would have performed the contract according to its terms.[39]

It therefore seems that where the claimant in fact subsequently commits a repudiatory breach and this can be shown to have been predestined, that will be taken into account as something that would have happened even but for the defendant's earlier breach (unless the claimant's breach was somehow caused by the defendant's earlier breach).[40]

Indeed, the better approach must be that ordinary principles apply and even if a repudiatory breach was not predestined, if it is proven on the balance of probabilities that it would have occurred (and the defendant would have accepted the repudiation[41]) it must be taken into account.[42] This may be because 'predestined' merely means 'would have happened'[43] and so there is no separate 'predestiny' rule merely the balance of probabilities rule. Or it may be because the predestiny principle is simply wrong.[44] Indeed, the modern position appears to be that the burden falls on the claimant to prove that it would have performed.[45]

D. Would the Claimant Have Terminated Later for the Defendant's Further Breach?

If it can be shown that, but for the defendant's breach (A), the claimant would have terminated the contract at a later date for another breach (B) by the defendant, that

[38] *Chiemgauer Membran und Zeltbau GmbH v The New Millenium Experience Co Ltd*, 15 December 2000 (Vos J) at paras 43–44 and 47–51.

[39] Ibid at para 53, following the 'predestiny' principle from *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) Megaw LJ at 209–10 (without majority support) and *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 (CA) (discussed at text to chapter five n 79) obiter Waller LJ at 496 (in that case predestiny was found).

[40] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA).

[41] Although as to whether the defendant would have exercised its right, see section 13.3B(iv) below.

[42] *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)*, 19 April 2000 (Walker J) at paras 43–45. There is therefore something of a clash at first instance given the decision in *Chiemgauer Membran und Zeltbau GmbH v The New Millenium Experience Co Ltd*, 15 December 2000 (Vos J) which supports the 'predestiny' principle. But see n 45 below.

[43] Cf *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 (HC of Australia) obiter at paras 31–33, where a loss of chance test seemed to be applied as predestiny was not shown: there was a 20% chance of lawful termination by the services employer had it not unlawfully repudiated, but this did not ultimately affect the damages because they were calculated by reference to an unrebutted presumption that the claimant would have broken even: see text to chapter 18 nn 103 and 113 below.

[44] See the discussion in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL) Lord Carswell at para 61.

[45] *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm) (Teare J), especially at para 85. That was a case of a shipowner who had to prove that had the charterer declared laycans for its shipments (which in breach it did not do), the owner would have been able to provide the necessary vessels.

later date provides an end limit on the lost profits that can be claimed for breach A because but for breach A, profits after that date would not have been earned.[46] However, the claimant should be able to claim under breach A for lost damages that would have been recoverable upon a claim for breach B, which claim the claimant now will not have because the contract was brought to an end early, and so the end result should be similar.

In some cases, it may be proven that the claimant would have terminated for its own reasons, eg where an employee would have resigned even if not constructively dismissed.[47]

13.3 What Would the Defendant Have Done?

A. Introduction

(i) Assume that the Defendant Would Have Performed the Contract

The premise of the hypothetical question as to what would have happened but for the breach (the non-breach position) is, tautologically, that the defendant would have performed the contractual obligation that it in fact breached.[48] As Diplock LJ has observed:

> It involves assessing that what has not occurred and never will occur has occurred or will occur, ie that the Defendant has since the breach performed his legal obligations under the contract, and if the estimate is made before the contract would otherwise have come to an end, that he will continue to perform his legal obligations thereunder until the due date of its termination. But the assumption to be made is that the Defendant has performed or will perform his legal obligations and nothing more.[49]

(ii) Thus Focus on the Defendant's Obligation

It becomes important properly to identify what the defendant was obliged to do. Sometimes it will have had a free discretion within limits, but sometimes the obligation will have been expressly or impliedly subject to fetters.[50] Where a defendant promised five years of remuneration and its factory burned down after two, that was irrelevant: the promise was of five years' work and the damages were assessed on that basis.[51] (Of course, things would have been different if the contract had been or would, if still in force, have been frustrated by the fire or terminated on some option of the defendant.)

[46] *Leofelis SA v Lonsdale Sports Ltd* [2012] EWHC 485 (Ch) (Roth J), obiter, affirmed [2012] EWCA Civ 1366.

[47] *Ahsan v Labour Party* (29.7.11, EAT); *Osei-Adjei v RM Education Ltd* (24.9.13, EAT).

[48] It need not be assumed that the defendant would have performed all other contractual obligations as well. See further text to n 46 above.

[49] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) at 294. And see *SC Compania Nationala de Transporturi Aeriene Romane Tarom SA v Jet2.com Ltd* [2014] EWCA Civ 87.

[50] See below in section 13.3B(v).

[51] *Turner v Goldsmith* [1891] 1 QB 544 (CA).

Difficulties arise when faced with the common situation in which there is more than one way in which the defendant could have performed the contract, as explained in the following sections.

(iii) Third Parties Linked to the Defendant

It has been held that the loss of chance doctrine (which applies to third parties) and not the balance of probabilities test (the ordinary test for what defendants would have done) applies to the hypothetical actions of a company distinct from but in the same group as the defendant.[52] In other words, authority does not support the application of the *Veitch v Avery* principle—by which those linked to the claimant are in some cases treated like the claimant for causation purposes—to the defendant.[53]

(iv) Minimum Obligation or Balance of Probabilities Not Loss of Chance

As explained in the following sections, the loss of chance doctrine is inapplicable to determining what the defendant would have done, which is instead a mixture of the balance of probabilities test and the minimum obligation rule. (The exception is the statutory unfair dismissal action, to which loss of chance operates by the *Polkey* principle, discussed below at section 13.3 B(iv)(b).)

B. Assume that the Defendant Would Have Done What was Least Burdensome to it

(i) Introduction to the Minimum Obligation Rule

In general terms, in determining the benefits that the claimant would have received had the contract been performed the court assumes that, where the defendant had an option about how to perform the contract, the defendant would perform in the way that benefited it and not the claimant (which usually means the defendant performs in the way cheapest for it). It need not be shown that the defendant would in fact probably have exercised that choice, only that it could have done, and the court will even ignore evidence that the defendant would not have done so, because the claimant's loss is only that to which it was entitled from the defendant, not that which it would have actually received. Diplock LJ explained in the leading case of *Lavarack v Woods* that 'the assumption to be made is that the defendant has performed or will perform his legal obligations under his contract with the plaintiff and nothing more',[54] and confirmed that it must be assumed that the defendant would have exercised any options so as to perform 'in the manner least burthensome to themselves'.[55] Or as Davies LJ put it in *The Mihalis Angelos*, it must be assumed

[52] *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) (Hodge QC) at para 86.
[53] *Veitch v Avery* (2007) 115 Con LR 70 (CA). See above in section 13.2A(iii).
[54] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) at 294.
[55] Maule J in *Cockburn v Alexander* (1848) 6 CB 791 at 814, approved in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) Diplock LJ at 293, 296 and 297, and Denning LJ dissenting at

that the defendant would 'have performed his legal obligation and no more'.[56] This is sometimes called the 'minimum obligation' rule.

The reader should not stop reading here, however, because over time there has been a move to limit and confine (although not eliminate) the rule, returning in many situations to the ordinary compensatory principle that the claimant can recover for losses it can prove on the balance of probabilities that it would not have suffered but for the wrong.

(ii) Would the Defendant Have Conferred a Discretionary Benefit or Extended the Contract?

The cleanest application of the rule remains in the context in which *Lavarack* was itself decided. Thus a dismissed employee can claim damages for lost earnings to which he or she was contractually entitled (including salary, but also a discretionary bonus that had become mandatory for the particular year by the employer exercising the discretion prior to the dismissal[57]), but not for a retirement contribution the employer could have discontinued for any employee at any time,[58] nor for the loss of the chance of a raise that the employee could have expected to have followed the discontinuance of the pension scheme shortly after the dismissal (and which raise did follow for many, although not all of those still employed at that time).[59] In such situations it will be assumed against the claimant that the defendant would not have 'voluntarily subjected himself to an additional contractual obligation in favour of the Plaintiff'.[60]

Similarly, a claimant cannot usually claim for the chance that the defendant would have chosen to extend the employment, or other contract profitable to the claimant, beyond the contractual period.[61]

However, in one High Court of Australia decision, the claimant wife recovered damages for breach of an agreement with her husband for both the benefit she would have received during the six months of promised consortium, had he honoured the agreement and not repudiated it early, and damages on a loss of chance basis for the benefits she would have received had a reconciliation with her husband been effected.[62] The modern English approach, at least, is to apply a balance

288. Where there is a difference between the two, the focus must be on what was best for the defendant not what was worst for the claimant: see *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep 371 (Clarke J) at para 39.

[56] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) at 203. See also the approval of the general rule, obiter, in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC) Lord Hoffmann at 1446.

[57] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA).

[58] *Beach v Reed Corrugated Cases Ltd* [1956] WLR 807 (Pilcher J) at 817.

[59] The majority in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA).

[60] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) Russell LJ at 298.

[61] Diplock LJ in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) at 298. See also *Days Medical Aids v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWHC 44 (Comm) (Langley J) at 267(5), although the judge did not put it in exactly these terms. But see *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 (HC of Australia), discussed below in section 13.3B(vi).

[62] *Fink v Fink* (1946) 74 CLR 127 (HC of Australia).

of probabilities approach to ask what would have happened between the claimant and defendant.

(iii) Alternative Modes of Performance

Where there are contractually specified alternative modes of performance or a contractually specified range or tolerance within which performance must fall, the court will assume that the defendant would have chosen the mode least onerous to it. Where the defendant can deliver to two ports but delivers to neither, damages will be measured as if it had delivered to the nearer one.[63] Where the defendant seller should have delivered goods and had a contractual tolerance for the shipment, it is assumed that the defendant would have delivered the lowest amount contractually permitted.[64] Likewise where the defendant buyer should have accepted goods and had a contractual tolerance, it is assumed that the defendant would have bought the least amount permitted.[65] Where the defendant seller's failure to have all the documents in order delayed the vessel's berthing, but the seller loaded at a faster rate than that expressly permitted in the contract (ie chose the fastest mode of performance) and so would have finished within the period of lay-time permitted even had it started at the proper date, no loss had been caused.[66] Where a charterer repudiated, it was assumed that on the final voyage the vessel would have been underladen and gone to the nearest port so as to give the minimum hire payable to the claimant owner.[67] And where a charterer would have had an option as to the way in which it would have required the claimant shipowner to perform its contract, it must be assumed that it would have operated it in the way most favourable to it.[68]

(iv) Would the Defendant Have Lawfully Terminated the Contract Anyway?

The minimum obligation rule also seems broadly to apply to the situation where a defendant repudiates but would have had an option lawfully to terminate at that date or at a later date. In such a situation it must be assumed that it would have exercised that option. This applies where the defendant would have had a common

[63] *Abrahams v Herbert Reiach* [1922] 1 KB 477 (CA) Atkin LJ obiter at 483.

[64] *Re Thornett & Fehr* [1921] 1 KB 219 (contract to deliver '200 tons, 5 per cent. more or less', the court assuming the defendant would have delivered 190 tons); *Johnson Matthey Bankers Ltd v The State Trading Corp of India Ltd* [1984] 1 Lloyd's Rep 427 (Staughton J).

[65] *Phoebus D Kyprianou Coy v Pim & Co* [1977] 2 Lloyd's Rep 570 (Kerr J); *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL) Lord Roskill at 731.

[66] *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep 23 (CA). This decision is difficult to explain, as Toulson LJ found in *Durham Tees Valley Airport* at paras 137–43. Patten LJ's explanation at paras 74–78 appears correct: in *The World Navigator* there was a minimum loading rate specified and the defendant was entitled to take advantage of it when damages were being calculated. See also *Spiliada Maritime Corp v Louis Dreyfus Corp* [1983] Com LR 268 (Parker J) where it was assumed that the defendant would have used all lay-days.

[67] *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (Mustill J) at 272.

[68] *Kaye Steam Navigation Co Ltd v W & R Barnett Ltd* (1932) 48 TLR 440; *SIB International SRL v Metallgsellschaft Corp (The Noel Bay)* [1989] 1 Lloyd's Rep 361 (CA), especially Staughton LJ at 363.

law right to terminate for repudiatory breach[69] (assuming it has already been proven that the claimant would have repudiatorily breached, an issue discussed above in section 13.2C), and where the defendant would have a right to terminate for material breach under an express clause.[70]

It also applies where the defendant would have terminated under an express clause for some reason other than breach, as arose in *The Golden Victory*.[71] It was found by the arbitrator as a fact that the charterer would have lawfully terminated the charter under the war clause in 2003, rather than kept it up until it expired in 2005,[72] and this was common ground by the time the matter reached the House of Lords,[73] although the correctness of the finding may be doubtful (given that charterers rarely terminate on a rising market and the Second Gulf War led the market to rise) and it may be that the point can be explained on the alternative basis that it has to be presumed in the charterer's favour under the rule from *Lavarack*, as the arbitrator also apparently found.[74]

The approach in *The Golden Victory* reflects that of the Supreme Court of Canada a few years earlier in *Hamilton v Open Window Bakery Ltd*, where the court assumed that but for its wrongful repudiation of the marketing agency and distribution agreement after 16 months, the defendant would have exercised its right to terminate at the earliest possible opportunity, giving three months' notice after 18 of the 36 months of the contract had run, and so damages were limited to the profits the claimant would have made had the contract run for 21 months.[75] The principle was subsequently applied in the oil sale case of *Novasen SA v Alimenta SA*.[76]

In hire-purchase cases the usual assumption is that the debtor would have paid off all the instalments and not terminated earlier,[77] although in practice this does not matter because hire-purchase agreements include a minimum payment clause which means that a hire-purchaser will pay no less by terminating earlier than by upholding the agreement to term.

[69] *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (CA) (charterparty): 'if the Defendant has under the contract an option which would reduce or extinguish the loss, it will be assumed that he would exercise it' Lord Denning MR at 196; *Kurt A Becher GmbH & Co KG v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep 23 (CA) Staughton LJ at 32.

[70] *Total Spares and Supplies Ltd v Antares SRL* [2004] EWHC 2626 (Ch) (David Richards J) esp at para 210. See also *Leofelis SA v Lonsdale Sports Ltd* [2012] EWHC 485 (Ch) (Roth J) (trademark licence), affirmed [2012] EWCA Civ 1366.

[71] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL). See above in section1 3.2D. See also *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 2171 (Comm) (Flaux J) at paras 705 ff.

[72] *The Golden Victory* [2006] 1 WLR 533 (CA) at para 6 (Lord Mance).

[73] Ibid [2007] 2 AC 353 (HL) at para 28 (Lord Scott).

[74] Lord Mance in the Court of Appeal: [2006] 1 WLR 533 (CA) at para 6.

[75] *Hamilton v Open Window Bakery Ltd* [2004] 1 SCR 303 (SC of Canada).

[76] *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm) (Popplewell J) at para 23, although the point was sensibly not disputed (see paras 12–14) despite Hamblen J's obiter comments in *Bunge SA v Nidera BV (The Union Power)* [2013] EWHC 84 (Comm) at paras 54–55.

[77] *Yeoman Credit Ltd v Waragowski* [1961] 1 WLR 1124 (CA); *Overstone Ltd v Shipway* [1962] 1 WLR 117 (CA). See further the developments in *Financings Ltd v Baldock* [1963] 2 QB 104 (CA).

(a) Wrongful Dismissal from Employment (the Common Law Claim)

The *Lavarack* minimum obligation principle is the major limiting factor in the common law claim for wrongful dismissal (ie dismissal in breach of the contract of employment), which is where the principle originated. The recovery in a wrongful dismissal case is therefore the additional amount the claimant would have earned if the defendant had lawfully terminated the employment, which usually confines damages to the period of extra employment during any contractual dismissal process or, more usually, contractual or statutory minimum notice period.[78]

(b) Unfair Dismissal from Employment (the Statutory Action)

The position is different in relation to the statutory action for unfair dismissal which, in summary, applies a loss of chance approach to what the defendant employer would have done (in contrast with the general rule in contract law).

By way of introduction to the action: unfair dismissal awards are statutory and include a 'basic award' which is non-compensatory and depends upon the length of time the claimant has been employed and various other factors.[79] The award also includes a statutory 'compensatory award'[80] which applies largely the same principles as common law contract damages.[81] The similarities with the common law principles should not be overstated. First, the statutory award is subject to a statutory cap.[82] Secondly, the 'loss' recoverable under the statutory award is only economic loss.[83] Thirdly, the judge making a statutory award has an overriding discretion to do what is just and equitable,[84] and it has therefore been held that the ordinary principles of remoteness do not strictly apply.[85] However, the general principles of factual causation

[78] *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248 (PC); *Gunton v London Borough of Richmond-upon-Thames* [1981] Ch 448 (CA); *Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 (EAT); *Ministry of Defence v Cannock* [1995] 2 All ER 449 (EAT); *Boyo v London Borough of Lambeth* [1994] ICR 727 (CA); *Fosca Services (UK) Ltd v Birkett* [1996] IRLR 325 (EAT); *Janciuk v Winerite Ltd* [1998] IRLR 63 (EAT); *Silvy v Pendragon plc* [2001] IRLR 685 (CA); *Wise Group v Mitchell* [2005] ICR 896 (EAT). If the contract is fixed term without a right to terminate on notice, then the damages will ordinarily be for the full period of the term. Statutory minimum notice periods are found in the Employment Rights Act 1996 s 86.

[79] Employment Rights Act 1996 ss 119–22.

[80] Employment Rights Act 1996 s 123.

[81] See the definition of loss (including a factual causation test) in s 123(1) and the express incorporation of the common law mitigation rule by s 123(6).

[82] Employment Rights Act 1996 s 124. The cap at the time of writing was whichever is lower of £74,200 and 52 weeks' pay, with 'pay' as defined in Chapter II Employment Rights Act 1996.

[83] *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45 (National Industrial Relations Court); *Dunnachie v Kingston upon Hull City Council* [2005] 1 AC 226 (HL). And see further the discussion above in chapter five, section 5.4A.

[84] Employment Rights Act 1996 s 123(1). And see the discussion of Viscount Dilhorne in *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL) at 955. This includes making adjustments for failure to comply with statutory codes of practice: see Employment Rights Act 1996 s124A.

[85] *Leonard v Strathclyde Buses Ltd* [1998] IRLR 693 (Court of Session), approved in *Jones v Lingfield Leisure plc* (CA), 20 May 1999 and applied in *Balmoral Group Ltd v Rae* (EAT), 25 January 2000, although it is far from clear that the same results would not have been reached on correct application of conventional common law principles of causation and remoteness, rather than by rejecting them (ie the decision on this point may be obiter).

and mitigation are the same.[86] Fourthly, as part of this just and equitable principle, judges can reduce the award for contributory fault.[87]

A further striking difference is the approach to proving what would have happened but for the unfair dismissal. Even when considering what the defendant would have done, the *Lavarack* principle does not apply and there is no assumption that the defendant would have dismissed the employee lawfully as soon as possible. Instead, a loss of chance approach applies, whether the issue is what the defendant employer would have done (and in particular whether the employer would have lawfully dismissed the employee had the proper consultation or other procedure or decision-making process taken place); what the claimant would have done (and in particular whether he or she would have left of their own accord); or what external events such as illness or collapse of the business would have occurred.

This loss of chance principle in unfair dismissal cases comes from *Polkey v AE Dayton Services Ltd*[88] and a reduction for such a chance is known as a '*Polkey* reduction' (and, alongside the reduction for contributory fault and the reduction for the likely replacement job that the claimant will find in mitigation of loss, forms a routine reduction in unfair dismissal cases). Such a reduction is made as part of the determination of what award is just and equitable.[89] The court must consider not a hypothetical employer but 'the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly',[90] ie what the actual employer would or might have done.

Accordingly, an employee will have his or her award reduced to reflect the chance that, even if the employee had not been unfairly dismissed, it would or might have been fairly dismissed at some later point. This may be because the business would or might have closed down;[91] the employer would or might have fairly dismissed the employee for misconduct or another reason;[92] the claimant would or might have left the job voluntarily (but not where, as is more likely, the claimant would have only left for a better job than that with the defendant or than the claimant has in fact secured after the dismissal),[93] or on expiry of a work permit,[94] or due to illness;[95] or for example, a long army career would or might have ended

[86] Employment Rights Act 1996, s 123(4). And therefore the same as in non-statutory claims where the claimant is deprived of employment, for example through breach of the mutual obligation of trust and confidence: obiter in *Malik v Bank of Credit & Commerce International SA* [1998] 1 AC 20 (HL).

[87] Employment Rights Act 1996 sub-ss 122(2) and 123(6); *Nelson v British Broadcasting Corp* [1979] ICR 110 (CA).

[88] *Polkey v AE Dayton Services Ltd* [1988] ICR 442 (HL). See also *Fisher v California Cake & Cookie Ltd* [1997] IRLR 212 (EAT); *Software 2000 Ltd v Andrews* [2007] ICR 825 (EAT), especially at para 54; *Scope v Thornett* [2007] ICR 236 (CA) (where the general principle and previous authorities were discussed); *Chagger v Abbey National plc* [2010] ICR 397 (CA), especially at paras 57 and 76.

[89] *Gover v Propertycare Ltd* [2006] 4 All ER 69 (CA).

[90] *Hill v Governing Body of Great Tey Primary School* [2013] ICR 691 (EAT) at para 24.

[91] *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386 (CA).

[92] *Polkey v AE Dayton Services Ltd* [1988] ICR 442 (HL); *O'Donoghue v Redcar & Cleveland Borough Council* [2001] IRLR 615 (CA) (discriminatorily dismissed barrister would have been lawfully dismissed within six months due to antagonistic attitude).

[93] *Chagger v Abbey National plc* [2010] ICR 397 (CA) Elias LJ at para 71; *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] IRLR 604 (CA) Elias LJ at para 65.

[94] *Kings Castle Church v Okukusie* (EAT) 13 June 2012.

[95] *Seafield Holdings Ltd v Drewett* [2006] ICR 1413 (EAT).

for some other reason.[96] Because the minimum obligation principle does not apply here, if an employer in fact had a fair ground upon which it could have dismissed the employee but would not or might not have done so, the compensatory award for unfair dismissal will not be reduced on account of the fair ground for dismissal.[97]

If upon the correct observance of a redundancy procedure another job would have been offered, the court had to assess the profits that would have been earned under that job.[98]

Given the many contingencies that can arise and the fluidity of employment, it will rarely be appropriate to find that the claimant would have remained employed by the defendant for his or her full career and/or that the claimant will not (in mitigation) find a replacement job at any time in their remaining career.[99]

(v) Limits on the Defendant's Discretion

One set of situations in which the operation of the minimum obligation principle is confined is where there is a contractual limit on the defendant's discretion under its obligation. To put it another way the defendant's minimum obligation is not unfettered. Sometimes, the fetter will be express;[100] more often it will only be implied.

The minority explanation of *Abrahams v Reiach (Herbert) Ltd*[101] was that a publisher which was obliged to publish a book could not limit its damages payable to the author on the grounds that they would have published the absolute minimum number of copies that could amount to a publication, as the publisher was impliedly obliged to act reasonably.[102] The same was true of a purchaser of a large amount of clothing in *Paula Lee Ltd v Robert Zehil & Co Ltd*, which was impliedly required to make a reasonable selection of clothing when purchasing.[103] Where, in *Chaplin v Hicks*, the claimant had lost the chance that the defendant would award her a prize in the competition, the claimant was still able to recover for the lost chance because the defendant was obliged to pick a winner (rather than giving no one the prize) and indeed had an implied obligation to do so in good faith.[104] And in the case of *Lion Nathan Ltd v C-C Bottlers Ltd*, which concerned a share sale contract in which the vendor had warranted that forecasts had been prepared on a proper (careful) basis, the court would not assume that but for the breach the vendor would have produced

[96] *Ministry of Defence v Wheeler* [1998] 1 WLR 637 (CA).
[97] *Trico-Folberth Ltd v Devonshire* [1989] ICR 747 (CA).
[98] *Polkey v AE Dayton Services Ltd* [1988] ICR 442 (HL); *Red Bank Manufacturing Co Ltd v Meadows* [1992] ICR 204 (EAT).
[99] *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] IRLR 604 (CA) Elias LJ at para 50; but such a finding was made in *Chagger v Abbey National plc* [2010] ICR 397 (CA).
[100] Eg *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 (HC of Australia), especially Mason CJ and Dawson J at para 62.
[101] *Abrahams v Reiach (Herbert) Ltd* [1922] 1 KB 477 (CA).
[102] Ibid Scrutton LJ. This case is discussed further below at text to n 118.
[103] *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 (Mustill J).
[104] *Chaplin v Hicks* [1911] 2 KB 786 (CA), discussed by Diplock LJ in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) at 295. See similarly *MJB Enterprises Ltd v Defence Construction (1951) Ltd* [1999] 1 SCR 619 (SC of Canada): defendant failed to follow tender rules and picked a third party; court ignored defendant's technical right under a 'privilege clause' to reject all of the tenders, presumably because it was contrary to business sense and the defendant's interests, and found had it followed the tender rules the claimant would have won the contract and so lost the profits of that contract.

the *highest* careful forecast figure but instead assumed it would have produced the *most likely* careful figure, as the forecast is a good faith prediction of the most probable outcome (and therefore usually somewhere in the middle of the range).[105]

Thus in *Cantor Fitzgerald International v Horkulak*,[106] a manager at a swaps brokership was entitled to damages for loss of his discretionary bonus (which was very much a central part of the remuneration structure in that industry) because the employer had been obliged to exercise its discretion as regards the bonus in good faith and rationally. In such a case the claimant can recover the minimum reasonable sum that could have been awarded. Similarly in *Clark v BET plc*[107] the claimant was obliged to pay a bonus but had a discretion as to the amount, although could not exercise that discretion irrationally or capriciously, and therefore the defendant was obliged to compensate for loss of a bonus properly determined. A similar requirement that the claimant not act irrationally has also been implied into a clause giving an express right to terminate if in the claimant's sole discretion it determines that continued performance is not commercially viable.[108] Such a fetter on discretion will not always be implied, however, and will depend upon the particular contract.[109]

(vi) The Court Will Not Make Unrealistic Assumptions as to the Defendant's Business Decisions

> [O]ne must not assume that [the defendant] will cut off his nose to spite his face and so control these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects.[110]

By this principle, although a defendant might have only been obliged to pay the claimant for as long the defendant continued in business, it cannot be assumed that the defendant would have ceased its business. Indeed this would not be the least burdensome mode of performance for the defendant. If a defendant might only have been obliged to pay the claimant a pension for so long as the employee pension scheme continued, it cannot be assumed that the defendant would have stopped the pension scheme[111] (although it might be proven that the scheme would in fact have been discontinued, for example by evidence that it had been discontinued by the date of trial).

In the important Australian case of *Commonwealth v Amann Aviation Pty Ltd*,[112] Amann sought damages for loss of development of its business upon repudiation of a contract for them to provide coastline aerial surveillance services. In a renewal tender, Amann (having already sunk the front-end costs) would have been much cheaper than its competitors (indeed the profitability of the venture for Amann was

[105] *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC). See further below in section 13.3B(ix).
[106] *Cantor Fitzgerald International v Horkulak* [2008] EWCA Civ 1287.
[107] *Clark v BET plc* [1997] IRLR 348 (Timothy Walker J).
[108] *Automotive Latch Systems Ltd v Honeywell International Inc* [2008] EWHC 2171 (Comm) (Flaux J) at para 711.
[109] Compare *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB) (Coulson J).
[110] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) Diplock LJ at 294–96.
[111] *Bold v Brough, Nicholson & Hall Ltd* [1964] 1 WLR 201 (Phillimore J).
[112] *Commonwealth of Australia v Amann Aviation Pty Ltd* (1992) 174 CLR 64 (HC of Australia).

dependent upon getting renewal), and so as the court assumed that the employer would have acted in its own interests it had to assume that the employer probably would have renewed the contract.[113]

Other decisions may be partly explicable on this basis, such as the clothing supply case of *Paula Lee Ltd*.[114] The damages payable by a repudiating clothing distributor who had undertaken to buy 16,000 garments from the claimant for each of two seasons would not be assessed on the basis that the defendant would have bought 16,000 of the cheapest garments, as it never would have done this, such a collection being entirely unsellable and alienating the defendant's wholesalers (although the decision was explained by Mustill J as based on an implied obligation to make a reasonable selection).[115]

(vii) The Rule Does Not Apply to Resolve Vagueness of a Single Obligation

The biggest cut-back of the minimum obligation principle is that it only applies to optional extras (such as in *Lavarack*) or alternative modes of performance identified in a contract (such as alternative ports or a contractual tolerance) and not a single but vague obligation which admits of different levels of performance but where the range is not specified within the contract. In these latter cases the minimum obligation rule does not apply and a more practical approach is taken. The approach is found in a passage in Patten LJ's judgment in *Durham Tees Valley Airport Ltd v bmibaby Ltd*, approved by the rest of the Court of Appeal:

> The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the Defendant would have adopted. The judge conducting the assessment must assume that the Defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the Claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind.[116]

The Court therefore directed that there be an assessment of the loss of profits suffered by reason of the defendant failing to operate a two-aircraft-based operation at the claimant's airport for the relevant period on that basis, and not on the assumption that the defendant would have operated the minimum number of flights

[113] See also the discussion of in *Mulvenna v Royal Bank of Scotland plc* [2003] EWCA Civ 1112 Sir Anthony Evans at para 35.

[114] *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 (Mustill J).

[115] Note also that, according to *Page v Combined Shipping and Trading Co Ltd* [1997] 3 All ER 656 (CA), damages under the Commercial Agents (Council Directive) Regulations 1993 are based not on the minimum obligation principle but on the normal commission that would have been earned.

[116] *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2011] 1 Lloyd's Rep 68 (CA) Patten LJ at para 79, with which paragraph Toulson LJ expressly agreed at para 147 after a reasoned judgment, Mummery LJ agreeing with both judgments at para 150.

possible under the contract whilst allowing in the defendant's favour for the maximum number of groundings for maintenance, etc.

This distinction between alternative modes of performance and a single obligation was taken from the majority decision of the Court of Appeal in *Abrahams v Reiach (Herbert) Ltd*,[117] where the obligation to publish the claimant's book could not be assumed to have been satisfied by printing the minimum number of copies but rather it was held that the court must enquire as to a normal amount that would have been published in such a print run.[118] As Toulson LJ explained in *Durham Tees Valley Airport*,

> the question [*in Abrahams*] was not how the Defendants might have carried on their business in a way that would involve the least obligation towards the Plaintiff. The proper method of assessment was quite different, namely to make a reasonable computation of the amount which the Plaintiffs would have received, taking into account everything that was likely to have affected the size of the publication.

This distinction, which will not always be easy to apply, was justified and explained by Toulson LJ in *Durham Tees Valley Airport* on the basis of practicality:

> There is good practical reason for this. Where a contract imposes alternative obligations the contract itself will identify them. But where there is a single obligation expressed in broad terms, it may be conceptually very difficult to identify as a theoretical exercise what would have been a minimum performance level, as *Abrahams v Reiach* demonstrated. In that case the damages of £100 which the Court of Appeal considered appropriate would have been equivalent to the royalties on 6,000 copies. Would the printing of 6,000 copies have been a minimum contractual performance? If so, why? Why not 5,500 or 5,000? The questions are impossible to answer and it is notable, as I have said, that although Scrutton LJ stated that he considered what was the minimum number which would constitute a contractual performance, he did not state his conclusion or reasoning. It would be more possible, as the majority did, to make a broad brush assessment of the number of copies which the publishers would have been likely to print having regard to the potential saleability of the book. For that reason, the approach of Atkin and Bankes LJ affords a more practical and realistic way of assessing the true loss suffered by the breach. Indeed, the logic of the publishers' argument, as their counsel submitted, was that the authors should have recovered only nominal damages. This would not have done justice.[119]

This gives some assistance in application of the distinction. Where the contract provides a minimum level of obligatory performance or different alternatives, the defendant is entitled to the assumption that it would have done the least burdensome thing, but where there is no such express or implied specification of the minimum or of alternatives, the court must take a more realistic view rather than seeking itself

[117] *Abrahams v Reiach (Herbert) Ltd* [1922] 1 KB 477 (CA). See also *TCN Channel 9 Ltd v Hayden Enterprises Ltd* (1989) 16 NSWLR 130 (New South Wales CA) at 153.

[118] Bankes and Atkin LJJ in *Abrahams*. Scrutton LJ implied a term that the print run had to be reasonable, and so avoided the point. See the discussion in *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2011] 1 Lloyd's Rep 68 (CA) Patten LJ at paras 65–69 and 79 and Toulson LJ at paras 121–32, Toulson LJ at 135 and 144 doubting Mustill LJ's analysis of *Abrahams* in *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 at 394. See also Lord Denning MR's discussion of *Abrahams* in his dissent in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA), approved by Toulson LJ in *Durham Tees Valley Airport* [2011] 1 Lloyd's Rep 68 at para 131.

[119] *Durham Tees Valley Airport* [2011] 1 Lloyd's Rep 68 at para 132. See also para 144.

to work out what would have been the minimum the defendant could have done. Viewed in this way, the *Lavarack* principle is relatively confined.

(viii) The Rule Does Not Apply to Negative Obligations

In *Jones v IOS (RUK) Ltd*,[120] it was alleged that the defendant had breached a confidentiality agreement and, had it not done so, would have entered a joint bid with the claimant and won the tender. At the summary judgment stage, Roth J considered the *Durham Tees Valley Airport* decision[121] and held that the minimum obligation principle had no application to negative promises because there the question is not what benefits would have been provided.[122] Thus, in asking what the defendant would have done if it had not used the claimant's confidential information, the court must apply the simple balance of probabilities test.[123] Roth J had relied upon Bingham LJ's dissent in *Walford v Miles*[124] that if there were a binding lock-out agreement in that case the court would have to just determine on ordinary principles whether or not the negotiations of the claimant and defendant would have ended in an agreement.

At trial, Hodge QC supported Roth J's finding, although not expressing a view as to the positive/negative obligation distinction, and instead correctly pointing out that the case was one where the loss did not in fact turn upon the decision or action of the defendant but rather that of RIA, a separate company in the same group as the defendant but not a party to the contract, and so was a loss of chance case and did not give rise to the minimum obligation principle.[125]

It remains to consider whether the positive/negative obligation distinction has merit as regards the minimum obligation rule. At heart the problem may be, as Hodge QC observed, that the overall *Lavarack* rule is questionable and a basic balance of probabilities rule fairer: 'One may question whether such an attitude merits the application of a blanket rule of law, operating by way of an irrebuttable presumption, governing the hypothetical future actions of the contract-breaker'.[126] However, if the *Durham Tees Valley Airport* principle—which does have the authority of the Court of Appeal—is the correct basis for circumscribing the scope of the *Lavarack* rule, then Roth J is correct that it is difficult to see how the rule could be applied in negative covenant cases. In such cases the contract does not provide for alternative methods of performance or a fixed tolerance for performance (of which it might be assumed that the defendant would have chosen the least burdensome), instead merely providing for what the defendant must not do. Accordingly, on the authority of *Durham Tees Valley Airport*, in a negative covenant case the inquiry

[120] *Jones v IOS (RUK) Ltd* [2010] EWHC 1743 (Ch) (Roth J).
[121] *Durham Tees Valley Airport Ltd v bmibaby Ltd* [2011] 1 Lloyd's Rep 68 (CA), discussed in the previous section.
[122] *Jones v IOS (RUK) Ltd* [2010] EWHC 1743 at para 74.
[123] Ibid at para 75.
[124] *Walford v Miles* [1991] 2 EGLR 185 (CA) Bingham LJ at 189 refusing to apply the minimum obligation rule from *Lavarack*. See Roth J at paras 77–78 in *Jones v IOS (RUK) Ltd*.
[125] *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) (Hodge QC) at paras 83 ff.
[126] Ibid at para 86.

into what the defendant would have done is a question of fact and not a question of the minimum obligation principle.

(ix) Duty of Care Cases

Dealing first with a slightly different point: when determining whether a professional or other has *breached* its duty of care, it must be shown that no reasonable professional would have acted in the way the defendant acted. This is because there is more than one way of giving reasonable advice and reasonable professionals may disagree (without being negligent).[127] In valuation cases, where the advice is essentially as to a figure (the value of the property), this margin of discretion is particularly stark: the court will work out what the central reasonable value is and then put a 'bracket' or 'band' around that of usually 5/10/15 per cent, and only if the valuation fell outside this range within which a reasonably competent valuer could have valued the property may the valuation be found to be negligent.[128]

If the conduct does fall outside the bracket and is negligent, the question then arises at the causation and loss stage as to what value it is assumed that the valuer would have chosen if non-negligent, or, more generally, what a negligent defendant would have done if it had acted carefully. Is the defendant assumed but for the breach to have performed at the centre of the band of reasonable conduct, or is it (by the minimum obligation rule) the highest non-negligent valuation or the other non-careless performance most favourable to the defendant (ie the upper end of the band)? The answer provided by Lord Hoffmann in the *SAAMCo* case is the former, as the court must form a view as to

> the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure *most* likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean.[129]

Lord Hoffmann elaborated upon this, and the nature of giving reasonable valuations, in *Lion Nathan Ltd v C-C Bottlers Ltd*, in relation to financial forecasts of

[127] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (McNair J).

[128] *Merivale Moore plc v Strutt & Parker* [1999] 2 EGLR 171 (CA); *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2011] EWHC 2336 (Comm) Eder J at para 145 (appeal partially allowed as to other points at [2012] EWCA Civ 1407).

[129] *South Australia Asset Management Corp v York Montague Ltd* [1997] 1 AC 191 (HL) at 221–22. See also *Goldstein v Levy Gee (a firm)* [2003] EWHC 1575 (Ch) Lewison J at para 46 and *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas* [2011] EWHC 2336 (Comm) Eder J at para 146 (appeal partially allowed as to other points at [2012] EWCA Civ 1407 (CA)), and the discussion of Lord Hoffmann in *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC) at 1445–47 of choosing the figure that is the middle of a bell curve of possible figures.

a business.[130] Thus the bracket becomes irrelevant once the question of causation arises.[131] Similarly, in a case of mis-investment by a trustee, the right approach in assessing the non-breach position was to take what a prudent trustee would have done, not the least that might have been achieved in the range of outcomes the prudent trustee might have taken.[132]

Of course, the above only applies where the result of the conduct would have differed. In one case a defendant valuer was careless in *preparing* a report but had it taken care the report would nevertheless have been the same.[133]

C. Take into Account Actual Post-Breach Pre-Trial Events

In determining what the defendant would have done after the breach, the court will take into account pre-trial events it knows about. There could be no claim for a loss of a bonus where an employer did terminate an employee-wide bonus scheme shortly after dismissal for reasons unrelated to the claimant's dismissal[134] (and so would have done so even but for the breach). In another case, the defendant's actually having terminated for the claimant's repudiatory breach was also taken into account when determining what would have happened but for the defendant's breach.[135]

13.4 What Natural Events Would Have Occurred?

Pre-trial natural events (eg the development of disease, the occurrence of weather, the spread of fire) are governed by the ordinary burden of proof on the balance of probabilities.[136] Thus if at the time of trial the court does not know whether the property would have been out of use but for the breach, it may be necessary

[130] *Lion Nathan Ltd v C C Bottlers Ltd* [1996] 1 WLR 1438 (PC). Lord Hoffmann explained the usual process of an expert establishing such a figure at 1444: 'He is saying that $2,223,000 is in his opinion the most probable outcome, but that figures slightly higher or lower are almost equally probable and that on either side of them there is a range of possible figures which become increasingly less probable as they deviate from the mean'. (This describes selecting the high point of a bell curve).

[131] See also *Scotlife Homeloans (No 2) Ltd v Kenneth James & Co* [1995] EGCS 70 (Crawford QC).

[132] *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 (CA) Dillon LJ at 1268–69. Cf the competition case of *Albion Water Ltd v Dwr Cymru Cyfyngedig* [2013] CAT 6 at para 71.

[133] *Platform Funding Ltd v Anderson & Associates Ltd* [2012] EWHC 1853 (QB) (Thornton QC) at para 108.

[134] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA).

[135] *Leofelis SA v Lonsdale Sports Ltd* [2012] EWHC 485 (Ch) (Roth J), obiter, affirmed [2012] EWCA Civ 1366.

[136] As confirmed in *Hotson v East Berkshire Area Health Authority* [1987] AC 750 (HL) and *Gregg v Scott* [2005] 2 AC 176 (HL). But see *Janiak v Ippolito* [1985] 1 SCR 146 (SC of Canada). Lord Brown in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL) at para 76 was therefore wrong to say that where a shipowner is claiming for wrongful repudiation of a charterparty, and at the date of trial there is a chance that war will break out and give the charterparty a right lawfully to terminate, the shipowner's damages should be measured as the loss of a chance of profits beyond that date. The profits beyond that date depend upon whether war would later have broken out, which should be proven on the balance of probabilities

to reduce the award to allow for the chance that the loss of earnings would not have been suffered, for example due to the property being damaged or destroyed anyway.[137]

Many claims for future loss of amenity or lost profits will be reduced to allow for any chance that the amenity or profits would not have been enjoyed even but for the wrong, due to some independent reason such as an injury by a future wrongdoer or illness (whether the same as caused by the defendant or a different one) that might in the future occur or have occurred (through the general vicissitudes of the claimant's life or for a specific reason),[138] or unforeseen catastrophes in the market or other business contingencies.[139]

However, where particular third party human events are involved, the question again becomes one of loss of a chance as discussed below in this chapter: thus where loss depended upon whether, but for the defendant's carelessness, a fire would have spread past a certain point, the involvement of the fire brigade in the hypothetical made the case a loss of chance case.[140]

A. Take into Account Actual Post-Breach Pre-Trial Events

Where we know what would have happened because it has happened, then, if it would have happened even but for the breach, it must be taken into account.

The outbreak of war was the event in question in *The Golden Victory*, and the court took into account that by the date of trial it was known that war would have broken out.[141] Lord Scott confirmed that had an external event which would have frustrated the contract even but for the breach, such as legislation, taken place after the breach but before trial, this too must be taken into account when assessing damages.[142] (Of course, if the contract was marketable and would have been sold before the frustrating or similar event, then the claimant may prove that it lost the sale value of the contract, as it would not have been left holding the contract when the metaphorical music stopped, but that was not the case in *The Golden Victory*.[143])

Similarly, when considering whether an award of lost earnings should be reduced for the chance that property would have been damaged anyway, where at the time of trial the court knows the property would *not* have been damaged then it must not make such a reduction.[144] And likewise in the personal injury context, eg where

[137] *The Kingsway* [1918] P 344 (CA) Hill J at first instance at 354; Lord Normand in *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292 (HL) at 307.

[138] *Heil v Rankin* [2000] PIQR Q16 (CA)—police dog handler with post-traumatic stress disorder had a 75% chance that the condition would have become serious as a result of another incident even but for the defendant's wrong.

[139] *Leche Pascual SA v Collin & Hobson plc* [2004] EWCA Civ 700; *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd (The Kildare)* [2011] 2 Lloyd's Rep 360 (Steel J) at para 73.

[140] *J Sainsbury Plc v Broadway Malyan* (1998) 61 Con LR 31 (HHJ Humphrey Lloyd QC) at 38.

[141] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL).

[142] Ibid at para 35.

[143] Ibid Lord Scott at para 37.

[144] Lord Normand in *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292 (HL) at 307: tortious damage to ship.

but for the breach the claimant would have died anyway,[145] or been disabled.[146] An extreme example can be found in the US case of *Dillon v Twin State Gas & Electric Co*, where a defendant would not be responsible for the claimant's death by electrocution on grabbing an uninsulated wire to arrest his fall from a girder where, had the wire not been there, the claimant would have fallen to his death anyway.[147]

13.5 What Would Third Parties Have Done? (The Principle of Loss of a Chance)

A. Introduction

(i) The Loss of Chance Rule

In contrast with past facts and the hypothetical behaviour of the claimant and defendant, the hypothetical behaviour of third parties is to be determined on a loss of a chance basis (unless the parties concede otherwise[148]).[149] This means that the claimant does not have to show that on the balance of probabilities (ie to a more than 50 per cent likelihood) the third party would have behaved so as to confer a benefit or prevent a loss, it is enough if the claimant can prove that there is a 'substantial' chance, which may well be less than 50 per cent, that the third party would have behaved in this way. The claimant can then recover the fraction of the hypothetical loss that corresponds with the chance that the third party would have acted in such a way as to make it come about.

One of the leading contract cases setting down this rule is the Court of Appeal decision in the beauty contest case of *Chaplin v Hicks*.[150] The claimant was one of 50 finalists out of around 6,000 entries who submitted their photograph and details, competing in a contest for one of 12 prizes of a job for three years as an actress at an average wage of £4 per week (some of the jobs paid more, some less). The defendant breached in failing to give the claimant an alternative appointment so that she could attend before the defendant and committee who selected the final 24 competitors, whose pictures would then be published in a newspaper from which the readers would select the 12 winners. The Court of Appeal upheld the jury's award of £100

[145] *The Kingsway* [1918] 1 P 344 (CA) Scrutton LJ at 362.
[146] *Jobling v Associated Dairies Ltd* [1982] AC 794 (HL).
[147] *Dillon v Twin State Gas & Electric Co* 85 NH 449, 163 A 111 (1932) (SC of New Hampshire), although query whether the proper counterfactual is what would have happened if the wire had been insulated, not if the wire had not been there at all.
[148] Such a concession was conclusive in *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026, (2011) 139 Con LR 23 (Lewison J), paras 12–13 and 213.
[149] This rule does not only apply to contract cases. See the obiter discussion in the tort case of *Feltham v Freer Bouskell* [2013] EWHC 1952 (Ch) (Hollander QC), based on the duty of care owed by solicitors to beneficiaries in *White v Jones* [1995] 2 AC 207 (HL).
[150] *Chaplin v Hicks* [1911] 2 KB 786 (CA).

at trial (equivalent to approximately a one in six chance, as against the ratio of finalists to jobs of around 4:1).[151]

The leading case confirming and delimiting this rule and explaining how it operates is the solicitor's negligence decision of the Court of Appeal in *Allied Maples v Simmons and Simmons*.[152] The claimant was seeking to buy some department stores through an asset takeover agreement. Had the defendant solicitors noticed and advised the claimant that the vendor had, in the course of drafting and negotiations, narrowed a particular draft warranty in an asset takeover agreement, the question then arose whether the claimant would have sought to put back the wider warranty, and whether the vendor and its solicitors would have agreed. The former question was a matter for proof on the balance of probabilities,[153] but the latter was a question of loss of a chance, as Stuart-Smith LJ explained:[154]

> In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> … in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

The Court of Appeal was addressing, as a preliminary issue, whether there was a 'real and substantial chance' of the vendor having agreed to a broader warranty. They found by a majority (Millett LJ dissenting) that there was. The chance, when quantified (at a later hearing), would then be multiplied by the lost benefit to calculate the damages.

(a) Are All Cases Involving Third Parties Loss of Chance Cases?

Not every case involving a third party is a loss of chance case.[155] If the third party would have to apply objective criteria and value something then a loss of chance approach is inappropriate and the court must instead make a finding as to the valuation that would have been reached.[156]

[151] If it was the defendant who made the decision then this should not be a loss of chance case by the rule from *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA), as Walker LJ observed in *Bank of Credit and Commerce International v Ali (No 3)* [2002] All ER 750 (CA) at para 60. However, it does appear that it was not just the defendant but also a committee and then the public who made the relevant decision: see the facts in *Chaplin v Hicks* [1911] 2 KB 786 (CA) at 786–87.

[152] *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA).

[153] See also *Maden v Clifford Coppock & Carter* [2005] 2 All ER 43 (CA) Neuberger LJ at para 50.

[154] *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA) at 1609 ff and 1614. See also Millett LJ at 1623.

[155] *Law Debenture Trust Corp plc v Elektrim SA* [2010] EWCA Civ 1142 Arden LJ at para 45.

[156] Ibid.

(b) Why are Third Parties Treated Differently?

Although largely academic, because the rule is well settled, it is worth asking why hypothetical third party actions are governed by the loss of a chance rule, whereas hypothetical natural events or claimant or defendant actions are governed by the ordinary balance of probabilities rule.

The difference between natural events and human events may rest on certain physical and metaphysical assumptions: causal determinism means that all natural events are entirely predictable, if only there was enough evidence, whereas events based on human choice are, because of free will, profoundly indeterminate.[157] The loss of a chance doctrine is a way of accepting this indeterminacy.

The difference between third parties and the claimant or defendant is more difficult still. All are (or act through) human actors with free will. Claimants and defendants have no better access to knowledge about what they would have done than third parties do. However, there is an intuitive appeal to the distinction between claimants and third parties that is captured in Lord Nicholls' observation that the loss of a chance doctrine applies to the loss of an opportunity to achieve a result 'whose achievement was outside [the claimant's] control'.[158]

B. Proving Loss of a Chance

(i) The Burden of Proof

The claimant has the burden of proving (on the balance of probabilities[159]) that it lost a substantial chance, but does not have the burden of proving the precise amount of that chance, which is at large for the court's reasonable assessment and 'making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account'.[160]

(ii) A Real and Substantial Chance

If there is no real and substantial chance that the claimant would, but for the wrong, have received the benefit or avoided the harm, then no damages are awarded. There is no minimum percentage for 'real and substantial', but courts will not usually be convinced to make awards for, say, a two or three per cent chance.[161]

The same applies at the other end of the range. If the claimant would almost certainly, but for the wrong, have received the benefit or avoided the harm, then the

[157] *Gregg v Scott* [2005] 2 AC 176 (HL), Lord Hoffmann at para 79 and Lady Hale at 220, both approving Helen Reece, 'Losses of Chances in the Law' (1996) 59 *MLR* 188.

[158] *Gregg v Scott* [2005] 2 AC 176 (HL) at para 15. See further the discussion in *Feltham v Bouskell* [2013] EWHC 1952 (Ch) (Hollander QC) at paras 110–11.

[159] *North Sea Energy Holdings v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep 483 (CA) Waller LJ at 494.

[160] *Parabola Investments Ltd v Browallia Cal Ltd* [2011] 1 QB 477 (CA) Toulson LJ at paras 22–23 (deceit).

[161] See *BCCI v Ali (No 3)* [2002] All ER 750 (CA) at para 25.

court will award 100 per cent of the loss. In other words, if there is not a real and substantial chance that the harm would *not* have been suffered, the damages will not be reduced for unreal or insubstantial (eg two per cent) chance.[162] However, unless a judge is 'certain, or very close to certain' that the harm would not have been suffered or the gain would have been received he or she should discount the award of damages 'to take into account the uncertainty'.[163]

The effect is that the loss of chance approach is applied consistently (eg if the chance is 0 per cent or 100 per cent then that is applied too, although in those cases the result is the same as if the balance of probabilities approach were being applied) but the court has a de minimis threshold, which is probably partly to discourage, for example, the attack by defendants on even clear causational steps involving third parties merely to try to reduce damages by a couple of percentage points.[164]

(iii) No Minimum Obligation Rule

As explained above, when determining what a defendant would have done but for the breach, it is to an extent necessary to assume or presume that the defendant would have acted in its own interests under the minimum obligation rule.[165] For the avoidance of doubt, this does not apply when determining what a third party would have done.[166] (Thus, for example, the fact that an insurer could legally have refused the insured claimant's claim even but for the defendant broker's breach does not prevent full recovery if the insurer would have paid out or partial recovery if there was a substantial chance the insurer would have paid out.[167])

(iv) The 'Fair Wind' Principle: An Evidential Presumption in Favour of the Claimant

There is in practice something of an exception developed in lost litigation cases against negligent solicitors (but broadly applicable to other cases turning on third party actions). Because it was the defendants' fault that the claimant never got to fight the litigation, the law imposes an evidential burden on the defendants to show that 'despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out'.[168] As Parker LJ has observed, reviewing and approving this principle, 'The practical effect of that is to give the claimant a fair wind in establishing the value of what he has lost'.[169] Once the evidential burden has been raised by the defendant putting forward a credible case that the

[162] Eg *Dickinson v Jones Alexander & Co* [1993] 2 FLR 321.
[163] *Maden v Clifford Coppock & Carter* [2004] EWCA Civ 1037.
[164] See eg *Nicholson v Knox Ukiwa & Co (a firm)* [2008] PNLR 33 (Saunders J).
[165] See above in section 13.3(B)(i).
[166] *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) (Hodge QC) at para 86, obiter.
[167] See below in section 13.5B(viii).
[168] *Mount v Barker Austin (a firm)* [1998] PNLR 493 (CA) Simon Brown LJ at 510. See further *Phillips & Co v Whatley (Gibraltar)* [2007] UKPC 28 Lord Mance at para 45, relying on the principle from *Armory v Delamirie* (1722) 1 Strange 505.
[169] *Browning v Bracher* [2005] EWCA Civ 753 at para 210.

claimant would have lost, the usual burden of proving the chance of success falls back to the claimant. Of course, where the defendants had the opportunity to advise on the litigation and themselves did not advise that it was hopeless, their burden will be all the greater simply because that itself provides evidence weighing against them.[170] This reversal of the evidential burden is not a rule of law but merely arises because the fact that the defendant acted for the claimant is some evidence, without more, that the litigation was worth something and might have succeeded. The same approach has been said to apply to questions of what an insurer would have paid out had the policy been valid.[171]

(v) Evidence from the Third Party

A natural source of evidence as to what the third party would have done will be the third party himself. There have been judicial suggestions that where the third party is giving evidence there is no need for a loss of chance analysis at all,[172] but the better view is to the contrary.[173] Indeed in the leading loss of chance decision, *Allied Maples*, Stuart-Smith LJ contemplated that the third party might give evidence, although doubted its usefulness.[174]

The court is not bound to accept that a witness would have done what it at trial says it would have done,[175] as witnesses, even if telling the truth, will, with hindsight, not always be the most reliable judge of what they would have done.[176] In some cases, however, clear evidence from an impartial and reliable witness will convince a judge. In these cases the court will often find that there was no substantial chance that the third party would have taken anything but a particular course, and so the claimant will recover all or none of the loss (but not a percentage part of it).[177]

(vi) Net Loss

The chance percentage multiplier must be applied to the net gain/net decrease in loss of which it is the chance. Thus in *Hartle v Laceys,* the claimant actually sold property for £150,000 but lost a 60 per cent chance of selling earlier for net proceeds

[170] *Mount v Barker Austin* [1998] PNLR 493 (CA) Simon Brown LJ at 510.

[171] *Ramco Ltd v Weller Russell & Laws Insurance Brokers Ltd* [2009] Lloyd's Rep IR 27 (David Donaldson QC) at para 41. As to the principle in other cases, see above in section 13.1B.

[172] *Stone Heritage Developments Ltd v Davis Blank*, 31 May 2006 at paras 333–34; *Aercap Partners 1 Ltd v Avia Asset Management AB* [2010] EWHC 2431 (Comm) (Gross LJ) at para 76(v).

[173] *4 Eng Ltd v Harper* [2008] 3 WLR 892 (David Richards J) at para 57; *Tom Hoskins plc v EMW Law (a firm)* [2010] EWHC 479 (Ch) (Floyd J) at paras 126 to 128. Both of these cases partly relied on the fact that not all the possible evidence as to what the third party would have done was before the court, and therefore there remains a dispute at first instance as to whether the loss of chance approach applies where all such evidence *is* before the court, although the better view is that it does apply.

[174] *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA) at 1614.

[175] *Alliance & Leicester Building Society v Robinson* (CA), 4 May 2000, Chadwick LJ at paras 32–33.

[176] See eg *Talisman Property Co (UK) Limited v Norton Rose* [2006] EWCA Civ 1104 Moses LJ at para 41.

[177] See for example *Hicks v Russell Jones & Walker* [2007] EWHC 940 (Ch) (Henderson J), affirmed [2008] EWCA Civ 340, where counsel's evidence as to what he would have advised was accepted by the court.

of £360,000, and so the correct measure of loss was to multiply the net loss of £210,000 by 60 per cent to give £126,000.[178] Had the earlier sale gone ahead the claimant would have received £360,000 it did not receive but not received £150,000 it did receive (and would also have avoided paying debit interest on the £126,000 which it had to continue to borrow but would have been able to pay off, which loss was also recovered in this case).

(vii) Mathematics and Cumulative Chances

Often there will be more than one third party decision or action, all of which would have had to occur for the claimant to have received the benefit/avoided the loss. In such cases, and providing the events are independent, it is (at least in principle) necessary to multiply the chance of each event to find the chance of the result that depended upon them.

In one case it was necessary to multiply the 50 per cent chance of a third party not going to counsel for advice (and thus not discovering its true entitlement) by the 70 per cent chance of the third party, if it had not gone to counsel, reaching agreement with the claimant, giving a 35 per cent chance of the deal being done.[179] Similarly where there would have been a 70 per cent chance of getting judgment against the insolvent defendants in the lost litigation, and a 40 per cent chance of recovering from the defendant's insurers if judgment were obtained (no more than 40 per cent because the insurers had been late notified by their insured, the defendant), the claimant lost a 28 per cent chance of recovery.[180]

The situation is different where the multiple events are not independent. For example, in one lost insurance claim case Roch LJ in the Court of Appeal pointed out that the various arguments raised by the insurer were not independent, because 'Although the issues are discrete, success for the respondent on the major issue would have been bound to have improved his chances of success against his insurers on the other two issues'.[181] The same conclusion was reached in a solicitor negligence case where the chances of a third party agreeing to provide a guarantee and the chances of completion of a sale by a certain date were not independent, so it was better to assess the 'overall chances' of the sale completing by that date with guarantee provided.[182]

(viii) Approaches to Quantifying the Chance Where there are Several Possible Outcomes

In many cases there will be many possible outcomes dependent upon the hypothetical action of the third party. In a civil case a judge will often have a choice not just between finding for the claimant or not, but between several or even thousands

[178] *Hartle v Laceys* [1999] Lloyd's PN 315 (CA).
[179] *Talisman Property Co (UK) Limited v Norton Rose (a firm)* [2006] EWCA Civ 1104.
[180] *Phillips & Co v Whatley (Gibraltar)* [2007] UKPC 28 (PC). See also *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch) (Vos J) at paras 108–15.
[181] *Hanif v Middleweeks (a firm)* [2000] Lloyd's Rep PN 920 (CA) at para 71.
[182] *Tom Hoskins plc v EMW Law (a firm)* [2010] EWHC 479 (Ch) (Floyd J) at paras 133–34. See further Hugh Evans, 'Lies, damn lies, and loss of a chance' (2006) 22 *Professional Negligence* 99.

of possible awards. Likewise, in a negotiation there are many different outcomes. (Rather than agreeing or disagreeing, the vendor in *Allied Maples* might have exacted a price of some kind in exchange for reverting to the broader warranty, and then one has to identify which of the possible prices.) As Hobhouse LJ observed in *Allied Maples*:

> The judge will have to assess the plaintiffs' loss on the basis of the value of the chance they have lost to negotiate better terms. This involves two elements: what better terms might have been obtained—there may be more than one possibility—and what were the chances of obtaining them. Their chance of obtaining some greater improvement, although significant, may be less good than the chances of obtaining some other lesser improvement.[183]

In weighing up the lost chance, the court has to weigh up the small chance of a huge reward, the large chance of a medium reward, the small chance of a small reward, and the small chance of no reward (for example).

Some judges will explicitly break the chances down into separate chances and add them together or average them off. In *Jackson v RBS*[184] the bank of a dog-chew seller carelessly delivered to the purchaser documents revealing how much the seller was taking as middle man in the supply chain, leading the purchaser to break off the relationship with the seller. The question arose as to how long the profitable supply relationship would have continued but for this slip. The first instance judge's approach was to say that there was a 57 per cent chance it would have continued for a year, a 46 per cent chance it would have continued for two years, 29 per cent for three years and 16 per cent for four years, with no real chance it would have continued for more than four years.[185] Each percentage was multiplied by the amount that the seller proved would have been earned in that year had the relationship continued, and the total was awarded as the lost chance of profit.

Other judges will do the weighing in their head, merely identifying the most likely reward (eg the amount of damages that would probably have been recovered in lost litigation) and the chance of winning a reward, and multiplying them to find the loss.[186] This is not wrong where the most likely reward sits in the middle of a bell or similar curve, because the chance of a higher reward is balanced by the chance of a lower reward. As to the equivalence of the two approaches, note Jack J's comments in *Earl of Malmesbury v Strutt & Parker*, expressing a preference for the simpler approach:[187]

> If there was no significant chance that terms could have been negotiated including provision for a turnover rent, the claimants fail. If there would have been a, say, 60 per cent chance, the claimants are entitled to 60 per cent of the value of the chance lost. If the figure for

[183] *Allied Maples Group Ltd v Simmons and Simmons* [1995] 1 WLR 1602 (CA) at 1621.

[184] *Jackson v Royal Bank of Scotland plc* [2005] 1 WLR 377 (HL). Another vivid example of this approach is the tort case of *Langford v Hebron* [2001] EWCA Civ 361, concerning an injured amateur kickboxing champion. The court separately analysed and spelled out the chances of the claimant having won a national or European title, gone to the US and won State titles, become a world champion, maintained his world title and become a professional instructor.

[185] See the discussion in the Court of Appeal at [2000] EWCA Civ 203 at para 16.

[186] The Court of Appeal approved this approach in *Browning v Messrs Brachers* [2005] EWCA Civ 753 at para 212.

[187] *Seventh Earl of Malmesbury v Strutt & Parker* [2007] EWHC 999 (QB) (Jack J) at para 149.

> turnover split most likely to have been agreed in a negotiation in which the principle of a turnover rent was accepted was 20 per cent in favour of the claimants the hypothetical lease is to be valued on that basis. The claimants would have lost 60 per cent of the resulting figure, because they had a 60 per cent chance of obtaining it if Mr Ashworth had carried out his duty. There are other ways of looking at the problem, but they achieve the same result. Thus one could say, for example, that there was, on the basis that the principle of a turnover element was accepted by BIA, then a fifty per cent chance of achieving a turnover split of 10 per cent and a similar chance of achieving 30 per cent, so one would take 20 per cent. In my judgment, it is most helpful and realistic to decide what the most likely figure is rather than looking at the chances of a range of figures. That accords with *Browning v Bracher* [2005] EWCA Civ 753, paragraphs 122 and 212.

And there are dangers in extending the break-down approach to 'to commercial cases, especially valuation cases where permutations may be almost infinite'[188] and where a valuation is essentially the middle (and so most likely) of a curve of possible prices that a third party would have paid.[189] Once a substantial chance has been identified the court is bound to come up with a figure however rough its assessment.[190]

(ix) The Chance of Making a Loss

When damages are ordinarily calculated, any saving made by the claimant must be deducted from any lost profit to find how much better or worse off the claimant would have been but for the wrong.

The question arises as to whether the chance of suffering a loss must be set off against the chance of making a profit when calculating a loss of a chance. Logic and authority say yes. Assuming the chances of making a large loss (including, for example, the amount of legal costs a claimant may have been liable for if the litigation had gone ahead and the claimant had lost) were the same as those of making a large profit (say, if the claimant had won the lost litigation), it would clearly be unfair to allow recovery of the lost chance to profit. Thus in one case where a claimant could not prove that the chance of profiting from commodity trading was greater than the risk of making a loss, no recovery was allowed.[191]

(x) No Need to Try the Lost Litigation in the Professional Negligence Action by a Mini-trial

In trying to assess the chances of succeeding in lost litigation, a judge in the professional negligence action should not seek to go through the all the steps of the lost trial,[192] but should weigh up all the evidence now available and do the best he

[188] *Law Debenture Trust Corp plc v Elektrim SA* [2010] EWCA Civ 1142 Arden LJ at para 48.
[189] *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438 (PC).
[190] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) (Stadlen J) at 386–88 and 410–12.
[191] *E Bailey & Co Ltd v Balholm Securities Ltd* [1973] 2 Lloyd's Rep 404 (Kerr J), obiter; *ATA v American Express Bank Ltd* (CA), 17 June 1998.
[192] *Sharif v Garrett & Co (a firm)* [2002] 1 WLR 3118 (CA).

or she can.[193] It is important in doing so to take into account the chances of settlement.[194] As always, the court should evaluate what the net gain from the litigation would have been, which requires consideration of whether costs would have been recoverable.[195]

C. Examples of Application of the Loss of a Chance Rule

(i) Lost Profits on a Sale or Otherwise

See chapter eighteen, section 18.2D, below.

(ii) The Chance of Earning Commission

A broker who was deprived of the chance of seeking to sell all of a company's shares with subscribers for a reward of £400 was awarded £250.[196] A similar result obtained in a residential property sale case, where a vendor breached a sole agency agreement.[197]

(iii) The Chance of Successfully Completing Negotiations/Winning a Tender/Auction

The chance of negotiations with a third party leading to better contract terms than were entered into was the subject of the *Allied Maples* case discussed above.[198] Another good example is *Jones v IOS (RUK) Ltd*,[199] where it was concluded obiter that but for a breach of a confidentiality agreement (which breach was not found), the defendant's sister company would have entered a joint bid with the claimant and they would have won.[200] And in *4 Eng v Harper* it was concluded that there was an 80 per cent chance that, but for the defendant's deceit, the claimant would have bought a particular alternative business.[201]

[193] *Hatswell v Goldbergs (a firm)* [2001] EWCA Civ 2084 at para 50.

[194] See the discussion in *Harrison v Bloom Camillin (a firm) (No 2)* [2000] Lloyd's Rep PN 89 (Neuberger J).

[195] Eg in *Corfield v DS Bosher & Co* [1992] 1 EGLR 163 (Peter Crawford QC) where a successful outcome would have included the claimant bearing his own costs and half the arbitrator's fee.

[196] *Inchbald v Western Neilgherry Coffee, Tea & Cinchona Plantation Co Ltd* (1864) 17 CB (NS) 733.

[197] *Nicholas Prestige Homes v Sally Neal* [2010] EWCA Civ 1552. See also *Richardson v Mellish* (1824) 2 Bing 229.

[198] Above n 26. See also *Football League Ltd v Edge Ellison (a firm)* [2006] EWHC 1462 (Ch) (Rimer J); *Earl of Malmesbury v Strutt & Parker* [2007] EWHC 999 (QB) (Jack J); *Perkin v Lupton Fawcett (a firm)* [2008] EWCA Civ 418.

[199] *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) (Hodge QC) at para 87.

[200] The conclusion was academic as not only was there no breach, but the claimant won the tender in any event, jointly with another company.

[201] *4 Eng Ltd v Harper* [2009] Ch 91 (Richards J). See also *Thomas Eggar Verrall Bowles v Rice*, 21 December 1999 (Rimer J) as to the chances of winning an auction.

(iv) The Chance of Earning Tips

A claimant is entitled to claim the loss of a chance of receiving a voluntary donation from a third party as with any other type of benefit. Thus damages for a hairdresser's dismissal must include an allowance for the tips that might or would have been made during the proper period of notice.[202]

(v) The Chance of Winning a Job

A claimant may be able to prove that the defendant's breach cost it the chance of a job.[203] Indeed beauty contest case *Chaplin v Hicks* was such a case.[204]

(vi) The Chance of Being Named in a Will

The lost chance of receiving property in a will is recoverable where the solicitor preparing a will owes the would-be beneficiary a duty of care, usually in tort.[205] It may also arise in claims against solicitors who misadvise as to steps that affect whether the claimant will receive a bequest under a will.[206]

(vii) The Chances of Succeeding in a Property Development

The chance of obtaining planning permission and getting funding for a development must be assessed on a loss of a chance basis.[207]

(viii) The Chance of Being Covered by Insurance

Insurance broker negligence cases often involve claims for the lost chance that a third party insurer would have paid out on a particular insurance claim if the broker had arranged suitable insurance, properly disclosed all material issues to the insurer at the time of placement, or kept the insured informed (therefore depriving the insurer of the right to avoid for non-disclosure or breach). The likelihood that an insurer would have taken a different point available to it to refuse cover is a question

[202] *Manubens v Leon* [1919] 1 KB 208.

[203] See also *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) Lord Lowry at 327 (tortious and contractual negligent misstatement in preparation of a job reference). And see the discussion of this point in *Bank of Credit and Commerce International v Ali (No 2)* [1999] 4 All ER 83 (Lightman J) at paras 74–81.

[204] *Chaplin v Hicks* [1911] 2 KB 786 (CA).

[205] Applying the principle from *White v Jones* [1995] 2 AC 207 (HL). A loss of chance approach was apparently applied, obiter, in *Bacon v Howard Kennedy (a firm)* [1999] PNLR 1 (Bromley QC) although there was only a speculative chance that a bequest would not have been made so the award was equivalent to a 100% chance, and see similarly *Cancer Research Campaign v Ernest Brown & Co* [1998] PNLR 592 (Harman J).

[206] *Hall v Meyrick* [1957] 2 QB 455 (CA).

[207] *Joyce v Bowman Law Ltd* [2010] EWHC 251 (Ch) (Vos J).

of fact and loss of chance.[208] Uncertainty as to the sum the insurer would have paid out should be resolved in the favour of the claimant.[209]

(ix) Lost Litigation

A common category of loss of chance professional negligence cases is that of lost litigation. Since *Kitchen v RAF*[210] it has been established that lost litigation cases are evaluated on a loss of a chance basis. Thus the loss of chance approach applies where a solicitor's carelessness (failing to spot a limitation period, missing the deadline for filing and serving a defence, etc) led to a claimant losing the opportunity to present its case at trial or best present its case at trial, and therefore to earn an award by judgment[211] or settlement[212] or a higher award than was achieved,[213] or to enforce that award before the defendant went into insolvency.[214] Similarly where such carelessness led to loss of a chance to avoid a judgment or a conviction against the claimant (where it was defendant in the litigation).[215]

D. Take into Account Actual Post-Breach Pre-Trial Events

In determining what would have happened, the court will take into account pre-trial events it knows about. Thus in one case a claimant was entitled to damages for the loss of a bonus that would have been payable post-breach but pre-trial, given how well the claimant Formula One team actually did during that period.[216] In *The Golden Victory* the profits the owner would have made (before war broke out) under the existing charter with the defendant depended in part on market movements, as the charter included a profit-share provision, and the actual post-breach pre-trial market movements had to be taken into account in quantifying such lost profits.[217]

[208] *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898 (CA); *Everett v Hogg Robinson* [1973] 2 Lloyd's Rep 217 (CA); *Dunbar v A & B Painters* [1986] 2 Lloyd's Rep 38 (CA); *O & R Jewellers Ltd v Terry* [1999] Lloyd's Rep IR 436 (Le Quesne QC).

[209] *Ramco Ltd v Weller Russell & Laws Insurance Brokers Ltd* [2009] Lloyd's Rep IR 27 (David Donaldson QC) at para 41.

[210] *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 (CA).

[211] *Kitchen v RAF Association* [1958] 1 WLR 563 (CA); *Gascoine v Ian Sheridan & Co* (1994) 5 Med LR 437 (Mitchell J); *Hanif v Middleweeks (a firm)* [2000] Lloyd's Rep PN 920 (CA); *Phillips & Co v Whatley (Gibraltar)* [2007] UKPC 28 (PC); *Nicholson v Knox Ukiwa & Co* [2008] PNLR 33 (Reddihough J).

[212] For an example of loss of the chance of reaching a particular out of court settlement see *Maden v Clifford Coppock & Carter* [2005] 2 All ER 43 (CA).

[213] *Hickman v Blake Lapthorn* [2006] PNLR 20 (Jack J).

[214] *Pearson v Sanders Witherspoon* [2000] PNLR 110 (CA).

[215] *Acton v Graham Pearce & Co (a firm)* [1997] 3 All ER 909 (CA); *Feakins v Burstow* [2005] EWHC 1931 (QB) (Jack J).

[216] *Force India Formula One Team Ltd v Etihad Airways PJSC* [2009] EWHC 2768 (QB) (Sir Charles Gray) at paras 107–9.

[217] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL) Lord Brown at para 81, and see also the Court of Appeal decision [2006] 1 WLR 533 Lord Mance at paras 13 and 25.

13.6 The Future: What Would Have Happened after Trial

Damages awards are made at trial, once and for all, and must therefore, as well as measuring past losses, also measure future losses: gains that would have been made post-trial but will not be made because of the breach, and harms that will be incurred post-trial but would not have been but for the breach.[218]

A. Lost Post-Trial Profits

Thus a claimant who was induced to give up a favourable pub tenancy agreement was entitled to damages for the lost income for the nine years after trial.[219] A claimant whose telephone equipment supply contract was repudiated was entitled to lost profits for the one year up to trial and the five remaining years of the contract after trial.[220] A different telephone answering machine supplier was entitled to lost rental profits, including for the six years after trial.[221] A wrongfully dismissed employee can recover for the net loss of future earnings.[222]

B. Future Post-Trial Liability to a Third Party

Similarly, in some cases a court will seek to quantify the liability that a claimant will suffer to a third party in the future, and make the defendant liable for that sum.[223]

C. Future Post-Trial Costs

Where the cost is of repair that has not yet been carried out, proof will involve showing (as part of the reasonableness requirement) an intention to do the work.[224] The cost of the works can be estimated and discounted to the date of award.[225]

D. Discount for Chance

It has been noted above that when proving what will happen post-trial, the court discounts for the contingency of the future event.[226] The same seems to apply when proving what would have happened post-trial. A good example is provided

[218] See above in chapter one, section 1.2C(ii).
[219] *Plummer v Tibsco Ltd*, 9 March 2001 (Neuberger J).
[220] *Interoffice Telephones Ltd v Robert Freeman Co Ltd* [1958] 1 QB 190 (CA).
[221] *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 (CA).
[222] *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA).
[223] See above in chapter one, section 1.2C(ii).
[224] See above in chapter four, section 4.3B(iv).
[225] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 72 (HC of Australia) at para 26.
[226] See above in chapter twelve, section 12.2.

by *The Golden Victory*, albeit obiter. War had already broken out by the date of trial, but had it not done so the majority confirmed that it would have been necessary to evaluate the future income under the charterparty as subject to reduction for the chance that war would have broken out and the claimant would then have terminated early.[227]

E. Accelerated Receipt

In all of these cases, the award of damages for future losses is subject to a deduction for accelerated receipt.[228]

13.7 Tax

Since the House of Lords' decision on the effect of income tax in the personal injury case of *British Transport Commission v Gourley* in 1955,[229] the general approach of English law has been to take into account in calculating damages the amount of tax the claimant would have had to pay but for the breach, but will not have to pay on the damages award,[230] whether under English or foreign tax laws.[231] This applies equally to contract cases. Thus in *Shove v Downs Surgical plc*[232] the damages on a wrongful dismissal claim took account both of the income tax the claimant would have paid on the income he would have earned but for the breach, and the income tax he was in fact liable to pay on the damages award.[233]

This is the correct approach in principle, although in practice to avoid the costs of evidence and argument on tax, unless either of the parties presses the point because the tax treatment of the damages is significantly different to the tax treatment that would have been applied to the benefit lost by the breach, the court will merely assume by way of rough justice that the tax (income tax or corporation tax or capital gains tax) payable on the sum that would have been received but for the breach is the same as the tax that will have to be paid on the damages, and therefore make no adjustment for tax and awards the gross loss.[234]

[227] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL) Lord Carswell at para 66 and Lord Brown at para 76.

[228] See above in chapter one, section 1.1C(v).

[229] *British Transport Commission v Gourley* [1956] AC 185 (HL).

[230] This diverges from the approach taken in Canada and the US.

[231] See *Julien Praet et Compagnie SA v HG Poland Ltd* [1962] 1 Lloyd's Rep 566 (Mocatta J).

[232] *Shove v Downs Surgical plc* [1984] 1 All ER 7 (Sheen J).

[233] Damages on a claim for loss of office are tax free up to £30,000: Income Tax (Earnings and Pensions) Act 2003 ss 401 ff. See also the application of these principles to the professional negligence claim in *Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas (a firm)* [2012] EWCA Civ 1407 in relation to tax credits achieved as part of the wrongfully induced transaction. See also an Australian case in which tax on the damages award had to be taken into account: *Airloom Holdings Pty Ltd v Thales Australia Ltd* [2011] NSWSC 1513 (S C of New South Wales).

[234] See eg *Diamond v Campbell-Jones* [1961] Ch 22 (Buckley J); *Julient Praet et Compagnie SA v HG Poland Ltd* [1962] 1 Lloyd's Rep 566 (CA); *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95 (CA); *Deeny v Gooda Walker Ltd (No 2)* [1995] STC 439 (CA), affirmed on different points [1996] 1 WLR 426 (HL).

In practice, therefore, there is a presumption that no adjustments for tax will be made, and the burden falls on the party seeking to displace that rule to demonstrate why.[235] In some cases the presumption will remain unrebutted.[236] But where enough is at stake, the courts will tend to allow evidence to displace the rule.[237] This will arise, for example, where the claimant is insolvent and so it (or its liquidator) will not pay tax on the damages received.[238] Further, where part of an income is lost, the courts have shown a willingness to calculate the difference between the position as it was and the position as it would have been if the income had been earned, thereby assuming that the part lost would have been notionally lost during the tax year, and so would have attracted tax at the claimant's highest rate.[239]

Furthermore, the calculation of interest on damages should allow for the taxation position: even if the claimant will end up paying the same tax on the damages as would have been paid on a sum that would but for the breach have been received earlier, the interest calculation must allow for the fact that the claimant would have paid the tax earlier and so has from that date been kept out of the net and not gross sum.[240]

13.8 Inflation[241]

Inflation in prices (often measured by the consumer price index) has the effect that £1 today will not buy as much as £1 in a year's time. The effect this should have on damages varies depending upon the damages being awarded.

A. The Cost of Buying Something Has Gone Up

If what is being awarded at trial is the cost of a cure or some other step the claimant has to take (which the claimant cannot be blamed for not having taken yet), the only fair way of assessing that cost is to measure the cost of cure at the date of trial rather than at an earlier date (since the award of the earlier cost of cure will not pay for the

[235] *Finley v Connell Associates (a firm)*, 27 July 2001 (Ouseley J).

[236] Eg *Raja's Commercial College v Singh & Co Ltd* [1977] AC 312 (PC).

[237] Eg *Amstrad plc v Seagate Technology Inc* (1998) 86 BLR 34 (Lloyd QC); *BSkyB Ltd v HP Enterprise Services UK Ltd (No 2)* (2010) 131 Con LR 42 (Ramsey J). On one view the *Amstrad* case goes too far as *Gourley's* case only allows adjustment where the lost income would have been taxed and the damages award is not, but there is no principled reason to refuse to make the opposite adjustment.

[238] On the correct approach in such cases see *Finley v Connell* [2002] Lloyd's Rep 62 (Ouseley J); *Stewart v Scottish Widows and Life Assurance Society plc* [2005] EWHC 1831 (QB) (Eccles QC), appeal allowed in part on a different point [2006] EWCA Civ 999 (CA).

[239] *Lyndale Fashion Manufacturers v Rich* [1973] 1 WLR 73 (CA).

[240] See the discussion in *BSkyB Ltd v HP Enterprise Services UK Ltd (No 2)* (2010) 131 Con LR 42 (Ramsey J) at paras 78–82, in relation to the usual award of interest under s 35A of the Senior Courts Act 1981 (formerly called the Supreme Court Act 1981).

[241] See further A Burgess, 'Avoiding Inflation Loss in Contract Damages Awards: The Equitable Damages Solution' (1985) 34 *ICLQ* 317; C Proctor, 'Changes in Monetary Values and the Assessment of Damages' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Oxford, Hart Publishing, 2008).

cure at the date of trial).[242] As Nourse J held in *Jarvis v Richards & Co*, 'it would be quite wrong for Mrs. Jarvis … to be left with damages which made no allowance for the inflation of a period during which she could do nothing effective to help herself'.[243] It has been said that the claimant's duty to mitigate does not extend to protecting the defendant from the effects of inflation and that the claimant does not fail to mitigate by waiting until trial before performing the works.[244]

B. General Devaluation of Money

If what is being awarded is an indemnity for a cost already incurred by the claimant, then awarding the same sum at trial will not be fair compensation. The claimant could have bought more with it at the relevant date than at the date of trial; the money has devalued in the meantime. In practice, no allowance is made for this inflation, and what the claimant would have done with the money will usually be too remote or *res inter alios acta*. A slightly more generous interest rate might be calculated for the interim period to allow for inflation, but the primary purpose of the interest award is to compensate for loss of use of the money and not inflation.

If what is being awarded at trial is compensation for loss of future income or for future costs, then inflation is relevant because the claimant will have more buying power with the money awarded at trial than it would at the later date, although this can be disregarded as the money is going to have to be invested to provide the future income by alternative means. The main adjustment necessary is therefore not for inflation, but to allow for the claimant's advantage in having the money earlier and so being able to earn interest on it, and a reduction is therefore needed for accelerated receipt.[245] The general approach to awards of economic loss in personal injury cases is to ignore inflation save in extreme cases, on the basis that it is difficult to predict and will be balanced by the investment policy of the lump sum received by the damages award.[246]

[242] See eg *Anchorage Asphalt Paving Company v Lewis* 629 P 2d 65 (1981) (SC of Alaska), where this point was explicitly made by Matthews J at para 6; *Johnson v Perez* (1988) 166 CLR 351 (HC of Australia) Mason CJ at paras 4, 8 and 15; *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd* [2013] EWHC 2403 (TCC) (Akenhead J) at para 108. See also *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 (CA).

[243] *Jarvis v Richards & Co*, 30 July 1980 (Nourse J).

[244] Ibid. See also D Feldman and DF Libling, 'Inflation and the Duty to Mitigate' (1979) 95 *LQR* 270.

[245] See above in section 13.6E.

[246] *Taylor v O'Connor* [1971] AC 115 (HL); *Cookson v Knowles* [1979] AC 556 (HL); *Lim Poh Choo v Camden Islington Area Health Authority* [1980] AC 174 (HL); *Hodgson v Trapp* [1989] AC 807 (HL).