

# *Contents*

<i>Foreword</i> .....	<i>v</i>
<i>Preface</i> .....	<i>ix</i>
<i>Contents</i> .....	<i>xi</i>
<i>Subject-matter Table of Contents</i> .....	<i>xvii</i>
<i>Table of Cases</i> .....	<i>xxi</i>
<i>Table of Legislation</i> .....	<i>lxv</i>
<b>PART 1: INTRODUCTION.....</b>	<b>1</b>
Chapter 1. A Brief Introduction to the Contract Damages Award .....	3
1.1. Summary.....	3
1.2. The Damages Remedy .....	4
1.3. The Principles of Compensation .....	12
1.4. The Theory of Contract Damages.....	16
1.5. The Currency of the Award .....	19
<b>PART 2: TYPES OF COMPLAINT.....</b>	<b>23</b>
Chapter 2. Pure Services: Non-Supply/Defective Supply/Delayed Supply .....	25
2.1. Introduction.....	25
2.2. Services to Commercial Claimants.....	27
2.3. Services to Public Bodies .....	41
2.4. Services to Consumers .....	42
Chapter 3. Misadvice (Especially Professional Negligence) and Contractual Misstatement .....	44
3.1. Introduction to the Breach and Non-Breach Positions in Advice and Similar Cases.....	44
3.2. Extrication Cases .....	49
3.3. Adoption/Non-Extriction Cases.....	60
3.4. The Non-Breach Position: The Alternative Transaction the Claimant Would Have Entered Into.....	66
Chapter 4. Property Non-Delivery, Destruction and Defects (Damage, Sale, Construction, Misrepair) .....	77
4.1. Introduction to the Different Measures of Loss .....	77
4.2. The First Cure: Replacement on the Market.....	80
4.3. The Second Cure: Repair .....	118
4.4. Further Issues in Repair and Replacement Cases .....	135
4.5. The Measure When there is No Market Replacement and No Repair .....	142

## *Contents*

Chapter 5. Refusal/Failure to Accept Performance .....	159
5.1. Cure by Finding a Replacement Customer on the Market .....	160
5.2. Lost Volume Sales: Where Supply Outstrips Demand .....	169
5.3. No Replacement .....	171
5.4. Non-Financial Loss .....	173
Chapter 6. Temporary Loss of Use of the Claimant's Property.....	175
6.1. Introduction.....	175
6.2. The Cost of Hiring a Temporary Replacement .....	177
6.3. Lost Profits from Sale to the Market .....	178
6.4. Lost Profits from Employment of the Property .....	182
6.5. Loss of Use of Non-Profit-Earning Goods .....	191
Chapter 7. Loss of Use of Money, Including Obligations to Pay .....	198
7.1. The Cost of Borrowing Replacement Money .....	199
7.2. Lost Profits from Use of the Money.....	202
7.3. Devaluation and Exchange Rate Losses .....	205
7.4. Causing Insolvency .....	206
7.5. Other Losses .....	206
7.6. Specific Points Relating to Breach of Obligations to Pay Money .....	207
7.7. Awards of Interest Outside the Claim for Damages .....	209
Chapter 8. Claims by a Tenant or Hirer.....	213
8.1. Non-Delivery .....	213
8.2. Late Delivery .....	214
8.3. Hire of Defective Property and Damage to Hired Property .....	214
Chapter 9. Warranties and Indemnities .....	220
9.1. Introduction to Warranties .....	220
9.2. Warranties of Authority .....	220
9.3. Warranties of Quality .....	221
9.4. Warranties of Reasonable Care .....	226
9.5. Indemnities .....	231
Chapter 10. Negative Covenants.....	234
10.1. Introduction .....	234
10.2. Property-Related Restrictive Covenants .....	234
10.3. Exclusive Jurisdiction and Arbitration Clauses .....	236
10.4. Non-Compete, Non-Solicitation, Exclusivity, Business Secret and Confidentiality Clauses .....	236
<b>PART 3: FACTUAL CAUSATION AND ACTUAL LOSS.....</b>	<b>239</b>
Chapter 11. Introduction to Factual Causation.....	241
11.1. Factual 'But For' Causation .....	241
11.2. Harm That Would Have Happened Anyway .....	242

## Contents

Chapter 12. The Breach Position: Proving What Actually Happened.....	245
12.1. What Happened from Breach to Trial.....	245
12.2. What Will Happen Post-Trial (The Chance of a Loss Principle) .....	246
Chapter 13. The Non-Breach Position: Proving What Would Have Happened but for the Breach .....	248
13.1. Summary.....	248
13.2. What Would the Claimant Have Done?.....	250
13.3. What Would the Defendant Have Done? .....	256
13.4. What Natural Events Would Have Occurred? .....	269
13.5. What Would Third Parties Have Done? (The Principle of Loss of a Chance).....	271
13.6. The Future: What Would Have Happened after Trial.....	282
13.7. Tax .....	283
13.8. Inflation .....	284
<b>PART 4: LEGAL PRINCIPLES OF REMOTENESS, MITIGATION         AND LEGAL CAUSATION .....</b>	<b>287</b>
Chapter 14. Remoteness and Scope of Duty .....	289
14.1. Start with Foreseeability .....	289
14.2. The Assumption of Responsibility Basis .....	290
14.3. The Reasonable Contemplation Test of Remoteness.....	294
14.4. The Cap Rule from <i>Cory v Thames Ironworks</i> .....	309
14.5. Displacing the Reasonable Contemplation Test by the Remoteness and Scope of Duty Principles.....	313
14.6. Factors Relevant to Scope of Duty and Assumption of Responsibility .....	330
14.7. The Interaction of Scope of Duty with Contribution and Contributory Negligence.....	336
Chapter 15. Legal Causation and Mitigation and the Breach Position .....	338
15.1. Introduction.....	338
15.2. Legal Causation .....	340
15.3. The Principle of Mitigation.....	347
15.4. Burdens of Proof.....	363
15.5. Contributory Negligence.....	363
15.6. Applying Legal Causation to What Would Have Happened but for the Breach .....	368
Chapter 16. Intervening Acts and Events by Category .....	370
16.1. Introduction to this Chapter .....	370
16.2. Claimant Failure to Avoid the Danger .....	371
16.3. Failing to Terminate the Contract with the Defendant.....	375
16.4. The Claimant Sourcing or Not Sourcing a Replacement or Repair .....	381

## Contents

16.5. Speculation by the Claimant .....	384
16.6. Money Made by the Claimant Post-Breach.....	387
16.7. Impecuniosity and Other Special Characteristics of the Claimant....	393
16.8. Unreasonable Claimant Conduct .....	397
16.9. Post-Breach Dealings with the Defendant .....	399
16.10. Receipt by the Claimant of Payments or Help from Third Parties (Including Insurance and State Assistance).....	405
16.11. Payments by the Claimant to Third Parties.....	420
16.12. Passing on Risk or Selling the Property to Third Parties.....	421
16.13. Events External to the Claimant .....	425
Chapter 17. The Date of Assessment.....	440
17.1. The Principles .....	440
17.2. The Different Dates of Purchase of a Replacement on the Market.....	446
17.3. The Different Dates of Sale to the Market.....	452
17.4. Where there is No Opportunity to Resort to the Market.....	462
<b>PART 5: PARTICULAR TYPES OF LOSS REQUIRING SEPARATE EXAMINATION .....</b>	<b>463</b>
Chapter 18. Proving Business Loss: Revenue, Profit and Costs .....	465
18.1. Revenue, Profit and Capital Loss.....	465
18.2. Pleading, Proof and Evidence.....	469
18.3. The Presumption of Breaking Even.....	480
18.4. Examples of Lost Profit Awards .....	487
Chapter 19. Non-Pecuniary Loss.....	493
19.1. The Evolution of the Legal Test .....	493
19.2. Specific Issues in Non-Pecuniary Loss Awards .....	507
19.3. (Physical!) Inconvenience and Disturbance .....	515
19.4. Personal Injury.....	517
Chapter 20. Indemnity for Liability to Third Parties and Compensation for Litigation Costs.....	519
20.1. Indemnity for Third Party Liability.....	519
20.2. Costs in Relation to the Breach of Contract Dispute Itself.....	525
20.3. Costs in Previous Proceedings against the Defendant.....	525
20.4. Costs in Third Party Proceedings .....	526
<b>PART 6: OTHER MATTERS.....</b>	<b>527</b>
Chapter 21. Third Parties and Loss.....	529
21.1. Recovery by the Claimant of the Third Party's Loss for the Benefit of the Third Party ('Transferred Loss' and the <i>Albazero</i> Principle).....	529

## *Contents*

21.2. Recovery by a Claimant of its Own Loss.....	537	
21.3. Third Party Claims under the Contracts (Rights of Third Parties) Act 1999.....	546	
Chapter 22. <i>Wrotham Park</i> Hypothetical Bargain Damages .....		547
22.1. The <i>Wrotham Park</i> Decision .....	547	
22.2. The Principles .....	548	
22.3. Scope of the Principles .....	551	
22.4. Basis of the Principles .....	555	
Chapter 23. Non-Compensatory Damages.....		557
23.1. Nominal Damages .....	557	
23.2. Account of Profits/Restitutionary Damages .....	557	
23.3. Punitive/Exemplary Damages.....	564	
Chapter 24. Concurrent Claims .....		567
24.1. Against the Same Defendant .....	567	
24.2. Against Different Defendants.....	568	
<i>Index</i> .....	572	