



Law Society  
of Scotland

# Consultation Response

## Remedies for breach of contract

October 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Obligations Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Law Commission's call for views on its *Discussion paper: Remedies for breach of contract*.<sup>1</sup> The Sub-committee has the following comments to put forward for consideration.

## Response to questions

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### *Chapter 1 Introduction*

- 1. Do consultees have any information or data on:**  
**(a) the economic impact of the current law relating to remedies for breach of contract; or**  
**(b) the potential economic impact of any proposed reform of that law? (Paragraph 1.48)**

We have no data on this topic.

### *Chapter 2 Retention and withholding performance*

- 2. Should the term "retention" be replaced by "suspension" or "withholding" of performance to describe the remedy under which a creditor is entitled as a temporary measure in response to the debtor's breach not to perform its**

<sup>1</sup> [https://www.scotlawcom.gov.uk/files/3114/9968/2972/Discussion\\_Paper\\_on\\_Remedies\\_for\\_Breach\\_of\\_Contract\\_DP\\_No\\_163.pdf](https://www.scotlawcom.gov.uk/files/3114/9968/2972/Discussion_Paper_on_Remedies_for_Breach_of_Contract_DP_No_163.pdf) (the Discussion Paper)

### **outstanding obligations under the contract? (Paragraph 2.6)**

We do not consider the language of “retention” to have given rise to practical difficulties that necessitate reform.

However, if statutory restatement is to be pursued, we are inclined to agree with the view that the terminology of “suspension” is probably preferable because it best indicates to users of the law the temporary nature of the remedy. At the same time we agree that “withholding” offer the advantage that it “describes what the creditor does rather than the effect of this is upon the contract” - it makes it clear that the party’s obligation is not in abeyance but a specific right unilaterally to refrain from performing it is being exercised.

### **3. In view of the present uncertainty about the meaning and scope of mutuality in the law on breach of contract, do consultees consider that adoption of the DCFR’s formulation of its equivalent concept of reciprocal obligations would provide a useful and workable clarification of the position?**

If statutory restatement is to be pursued, we would agree that the DCFR formulation presents a workable approach which could replace the current uncertainty. It provides a neutral starting point, rather than a presumption. A statutory restatement of a presumption may not be the most helpful for users unless attempts were made to outline the factors which would justify the contrary approach. Such factors would be tricky to define and doing so may still lack assistance for more unusual cases.

### **4. Alternatively, are other approaches canvassed in recent judicial decisions to be preferred? (Paragraph 2.15)**

See answer 3 above.

### **5. If mutuality is redefined, should it nonetheless remain capable of stretching across more than one contract, the inter-relationship of which arises from their both being part of a single transaction between the parties? (Paragraph 2.16)**

Yes. It is quite common for contracts to exist within a “framework”. Mutuality should therefore be regarded as arising in relation to obligations that are, in fact, inter-related, regardless of whether that is documented in a single contract or multiple contracts

In paragraph 2.7, the DCFR is cited as follows:

“It states that an obligation is reciprocal in relation to another obligation if:

- (a) performance of the obligation is due in exchange for performance of the other obligation;
- (b) it is an obligation to facilitate or accept performance of the other obligation; or
- (c) it is so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other.”<sup>5</sup>

The alleged difference from Scots law disappears if that citation is interpreted as *(a) or (b) or (c)* rather than *(a) plus either (b) or (c)*; because obligations in contracts within a framework might be “...so clearly connected to the other obligation or its subject matter that performance of the one can reasonably be regarded as dependent on performance of the other“, notwithstanding that they are in fact contained in different contracts within the framework.

**6. Do consultees consider that party A who is in breach of contract should be entitled to exercise any right or pursue any remedy arising out of party B’s breach of contract, occurring before B has terminated the contract for A’s breach? (Paragraph 2.23)**

Yes. A breach scenario can arise for a wide range of reasons and party A in the scenario provided should not be considered to have forfeited the right to pursue remedies arising out of B’s breach and occurring before termination in respect of A’s breach.

**7. If a general statutory restatement is pursued, should it provide for a creditor to withhold performance as a response to non-performance by the debtor? (Paragraph 2.29)**

Yes.

**8. Do consultees consider that any general restatement should provide that:**

- (a) the debtor’s non-performance must be material before the creditor can exercise the remedy of retention or withholding performance; or**
  - (b) the courts have power to deal with abusive or oppressive use of the remedy?**
- (Paragraph 2.35)**

If statutory restatement is to be pursued, it would be appropriate to distinguish between the seriousness of breach required in order to justify the remedy of retention and the seriousness of the breach required in order to justify the remedy of termination. We agree with the principle that the threshold should be lower in respect of the remedy of retention to reflect the less drastic nature of the remedy.

We are concerned about the potential for confusion if the language of “materiality” is retained in respect of the remedy of retention (and with a meaning that differs from its current commonly understood meaning) whereas the language of “fundamental” is adopted in place of “material” in respect of entitlement to terminate a contract.

We appreciate that, on an ordinary use of language, “material” is not the best label for breaches justifying rescission, as McBryde has pointed out,<sup>2</sup> because a breach can impact a contracting party in a manner that is not immaterial without going to the root of a contract. We appreciate that the ordinary meaning of the word “material”, as a matter of everyday language, sits more comfortably as describing the level of seriousness of breach required to withhold performance.

Practitioners currently understand a “material breach” to be a breach that “goes to the root of the contract”, justifying recession. It is such a well-rehearsed concept that to retain the label “material” but to alter its meaning is likely to give rise to confusion and uncertainty. Materiality is a concept frequently used by contract drafters. It would be confusing to create a situation where references to “material” are interpreted differently depending on whether the contract was entered into before or after the coming into force of a statutory restatement, in the absence of it being defined in the contract itself.

We consider that judicial intervention should be possible in respect of abusive or oppressive use of the remedy. This appears to be the current position and we agree with the categorisation of the current position as being “underdeveloped”. If a statutory restatement is pursued, the opportunity should be taken to expressly provide that the courts have the power to prevent abusive or oppressive use of the remedy.

### **9. Would it be useful for any legislation on suspension or withholding of performance as a remedy for breach of contract to state that it does not apply to special retention? (Paragraph 2.46)**

The proposals being made are not intended to affect special retention and therefore we agree that it is worth stating this expressly in any statutory restatement.

### ***Chapter 3 Retention and withholding performance***

### **10. Do consultees agree that “anticipated breach” is a more exact way of describing the situation in which a creditor may begin to exercise remedies for breach even although the time for the relevant performance by the debtor has not yet arrived? (Paragraph 3.6)**

<sup>2</sup> See Discussion Paper at 2.30

We do not consider the language of “anticipatory breach” to have given rise to practical difficulties that necessitate reform. We do agree, however, that if a statutory restatement is to be pursued, the terminology of “anticipated breach” is preferable to “anticipatory breach” on the basis that it is a more exact use of language to describe the situation concerned.

**11. Do consultees agree that it is desirable to distinguish clearly between the concepts of anticipated breach and material breach, and that applying the term “repudiation” to both of them is undesirable?**

We agree that, if statutory restatement is to be pursued, terms such as “anticipated breach” and “material breach” (or “fundamental breach”) could be used without the addition of the adjective “repudiatory”. In addition to the reasons provided in the Discussion Paper, the simpler the language adopted, the more accessible the law should be for individuals and business users.

**12. If so, do consultees consider that the use of the term “repudiation” would become unnecessary as a result of the suggested changes to the law canvassed elsewhere in Chapter 3? (Paragraph 3.12)**

We agree that the term “repudiation” is not likely to add anything to the other proposed terms, provided those other proposed terms are well defined in any statutory restatement.

**13. If a general statutory restatement is pursued, should it provide that the creditor may terminate before performance of a contractual obligation is due if:**  
**(a) the debtor has declared that there will be a non-performance of the obligation, or it is otherwise clear that there will be such a non-performance; and**  
**(b) that non-performance would have been fundamental? (Paragraph 3.27)**

If statutory restatement is pursued, we agree that this wording is likely to provide a workable approach.

**14. Do consultees consider that there would be any merit in postponing reform on this point in the meantime to see how the decision in *AMA* is developed?**

We do not think that reform is necessarily needed in this area due to a lack of clarity. The current common law framework is described by Lady Dorrian in *AMA* in giving the leading judgment.<sup>3</sup> Therefore we do not

<sup>3</sup> See paragraphs 46-48 of the judgment as referred to in the Discussion Paper at 3.36 onwards

see merit in waiting to see how the decision in *AMA* develops. We would suggest that issue is whether reform is desirable in order to bring about changes to the current common law framework (see question below).

**15. Alternatively, do consultees consider that it would now be desirable to give effect to our 1999 recommendation and reform the law so that, where the creditor has not yet performed its obligation and it is clear that the debtor is unwilling to receive performance, the creditor may nonetheless proceed and recover payment unless:**

**(a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or**

**(b) performance would be unreasonable in the circumstances? (Paragraph 3.47)**

We acknowledge that the unmitigated application of the *White & Carter* principle<sup>4</sup> could have absurd results on occasion. However, in our experience, the scenario of a party pressing on with unwanted performance, regardless of the debtor being unwilling to receive that performance, does not commonly arise.

Rather it seems that, in practice, the *White & Carter* principle forms a valuable part of an overall framework that encourages certainty regarding performance of contractual obligations.

We query whether the proposed reform tips the balance too far away from contractual certainty. To introduce reform to the extent that a contracting party should no longer be able to insist on performance if it could make a reasonable substitute transaction without significant effort or expense could encourage non-performance. It would appear to create wider scope for parties who would prefer not to continue with a contract to argue that they should no longer have to perform their obligations by pointing to alternative options open to the creditor.

If reform is pursued we would suggest a higher threshold for intervention is required. An option would be to approach the matter from the perspective of the creditor's legitimate interest. The potential for abuse appears to be rooted in the scenario expressed in the 1999 report and rehearsed in the Discussion Paper where a creditor has no legitimate interest at all in compelling performance and chooses to do so. The original contracting party could have been selected over others on the market for a variety of reasons. We would question whether, if the creditor can demonstrate a legitimate interest in securing performance from the other contracting party, it should be prevented from doing so in circumstances where such performance is possible.

<sup>4</sup> See Discussion Paper at 3.44

- 16. Do consultees agree that the law should provide that a creditor may respond to indications of the debtor’s unwillingness or inability to perform its obligations as and when they fall due under the contract by either:**
- (a) notifying the debtor of its concerns and that it is going to withhold performance of its own obligations, while empowering the debtor to end the withholding by sending the creditor an adequate assurance that it will perform its obligation when the time comes; or**
  - (b) seeking an adequate assurance directly from the debtor, being thereby entitled to withhold its performance until such assurance is received, and becoming entitled to terminate the contract if one is not received within a reasonable time? (Paragraph 3.51)**

If statutory restatement is to be pursued, we agree that a process of this nature could potentially provide a workable approach. However, we have concerns regarding some of the language proposed – particularly “indications” of a debtor’s unwillingness and notifying the debtor of “concerns”. A statutory provision phrased in this way could potentially undermine contractual certainty by permitting withholding of performance in response to very low-level activity.

#### ***Chapter 4 Termination***

- 17. Do consultees consider that:**
- (a) “rescission” should be replaced with “termination”?**
  - (b) “resile” should be replaced with “withdraw”? (Paragraph 4.11)**

There are differing views as to the benefits of amending the terminology as suggested. On one view the terms suggested could offer a marginal improvement as they are likely to be more intelligible to non-lawyers. However, we are not aware of particular problems caused by the use of the existing terms. There is a general common law understanding of the use of “rescission” and “resile” which offers legal certainty. If new terminology is adopted, care should be taken to ensure that the use of the new terms does not result in confusion and subsequent litigation. The legislation should also be drafted so as to preserve the underlying meaning and application of any case law which interprets the previous provisions.

- 18. Should the term “fundamental breach” or “substantial breach” be adopted in place of “material breach” as the term for the kind of breach which justifies termination of a contract? (Paragraph 4.15)**

We consider that the term “fundamental breach” should be adopted. We note that this term also corresponds to that which is used in the CISG for a breach justifying termination for breach so it should improve Scots’ law’s international marketability. If it is adopted, the CISG definition should be considered carefully, particularly as people may tend to assimilate the Scots definition to the CISG one (which would

not necessarily be negative). It also corresponds to the terms of the Unidroit PICC which refers to fundamental non-performance.<sup>5</sup>

## **19. Should persistent non-material breaches be treated as a breach justifying termination? (Paragraph 4.16)**

This does not appear to be a suitable default rule although the answer may depend on the circumstances of the case. There could easily be cases where there are very minor breaches which are awkward to remedy but do not represent a fundamental breach. At the same time series of non-material breaches could be sufficiently serious when taken as a whole to constitute a material breach which would therefore justify termination.

The downside risk of persistent non-material breaches *per se* resulting in termination when people could not work out how to exclude this possibility appears to be greater than the advantage of allowing someone to escape who has not thought to provide that persistent breach of certain terms would allow termination.

Further, requiring parties who want this remedy to provide for it has the advantage of encouraging them to think about it and therefore, perhaps, provide some guidance for the courts on what counts as persistence in a given case, which a general rule could not do.

## **20. If a general statutory restatement is pursued, should it provide for a right of partial termination where the obligations under a contract are separable? (Paragraph 4.18)**

Mutuality does indeed have a bearing on this point. Separability can only make sense where there is no mutuality between the parts which are plausibly separated. If decisions are already being taken about mutuality for the purposes of retention, a case could be made for allowing termination of particular parts if there is evidence of significant demand for it.

In the interests of simplicity, however, there should be a (rebuttable) presumption of contractual unity with respect because there could be a risk of a bit of cherry picking and disputes about which bits go together which will often be difficult to disentangle if the parties have not partitioned the elements of the contract by agreement prior to any dispute.

We note that we are not aware of any equivalent in the PICC.

<sup>5</sup> See <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/405-chapter-7-non-performance-section-3-termination/1044-article-7-3-1-right-to-terminate-the-contract>

**21. If a general statutory restatement is pursued, should it provide for a creditor to terminate the contract within a reasonable time after material (or substantial or fundamental) non-performance by the debtor? (Paragraph 4.20)**

Yes. There seems no reason to depart from the settled law on this point.

**22. We invite comment on:**

- (a) a requirement that the creditor notify termination to the debtor; and  
(b) the need for the law to specify the prospective effects of termination. (Paragraph 4.21)**

The exercise of termination is a juridical act which affects the debtor and should therefore be effected by communication to the debtor. There would seem no harm in providing that it has prospective effect. If nothing else, this provides a context (and a background law which limits) for duties of restitution in the case of termination and non-reciprocated performance.

**23. If a general statutory restatement is pursued, should it provide for an ultimatum procedure by which a non-material breach of contract could lead to termination of the contract by the creditor who had previously notified the debtor of a reasonable period of time within which the latter must perform the obligation in question?**

It should certainly not be the case that an ultimatum can convert any breach, however minor, into a material breach. If the breach is very minor, even if the debtor refuses to fix it, termination would be a disproportionate remedy.

One could read the ultimatum rule in *Rodger Builders Ltd v Fawdry*<sup>6</sup> as being limited to the case of delayed performance where time is not of the essence but the performance of the obligation to be performed is fundamental. This is similar to the position under Art 7.1.5(3)-(4) of the PICC. We would favour such a limited role for the ultimatum.

**24. If so, should it also provide that:**

- (a) during the period of the notice the creditor is entitled to withhold its performance and may claim damages for the period of delay;  
(b) the notice may provide for automatic termination by non-performance at the end of the notified period; and**

<sup>6</sup> See Discussion Paper at 4.24

**(c) if the notice period is unreasonably short, termination (whether automatic or requiring further notice to the debtor) can take place only at the end of a reasonable period of time? (Paragraph 4.26)**

(a) Yes.

(b) Yes.

(c) There may be problems with automatic termination in this case. Presumably, there are a range of times that could be considered reasonable.

In the standard case, the creditor fixes a time, which means that everyone knows where they stand provided that the time is not obviously unreasonable. It is less clear that people will know where they stand if they realise that the time was unreasonably short. Requiring the creditor to issue a second notice seems preferable for that reason.

**25. Do consultees agree that where parties have rendered conforming performances under a contract but not received the reciprocal counter-performances, there should be reciprocal restitution of the uncompleted performances after termination for breach?**

Yes. It is worth bearing in mind that this is a default rule and that, should restitution prove expensive or problematic in a particular case, it would be open to the parties to agree to leave things where they are and take that into account in any damages settlement. The rules would simply be a baseline for negotiation, but a valuable one.

**26. If so, does the system of rules set out on this matter in the DCFR provide a satisfactory approach to the issue?**

It seems a reasonable starting point. The drafting of the PICC seems a touch preferable in one respect, namely that the obligation to make restitution is triggered by a claim by one of the parties (Art. 7.3.6). It would be unfortunate for failure to comply with an obligation to make restitution to be held against a party who was not aware that this is required or desired.

**27. Alternatively, do consultees consider that the law in this area should be left to develop, particularly as to the relationship between breach of contract and unjustified enrichment? (Paragraph 4.33)**

No. The development is enrichment in this area has been very slow to date.

## ***Chapter 5 Other self-help remedies***

### **28. Should a price reduction remedy along the lines of that provided in sections 24, 44 and 56 of the Consumer Rights Act 2015 also be provided for non-consumer contracts in general?**

The interaction between rejection in terms of these and the general law can be confusing, so clarification would be helpful on this point.

In favour of price reduction, it might be observed that it is available in many other systems and it is difficult to see why consumers have much more need of this than other contracting parties. Against it, it might be observed that the choice between price reduction and damages undermines the purity of contract law's focus on the expectation interest and that it can be difficult to police the boundary between termination and very extreme price reduction. On balance, we think that this remedy is not desirable as a default rule for non-consumer cases.

### **29. Do consultees have any information or data about the use of this remedy in a consumer context? (Paragraph 5.7)**

We do not have any relevant data.

### **30. Should the debtor have a right to carry out a cure (repair or replace or repeat performance) of a prior non-performance notified to it by the creditor if: (a) performance is still possible within any relevant time limit imposed by the contract; or (b) the debtor offers a cure at its own expense, to be carried out within a reasonable time?**

No. The previous position of the SLC was convincing.

### **31. Should this right exist only if the non-performance is not so fundamental as to entitle the creditor to terminate the contract?**

If it is to be allowed at all, it should certainly be excluded in the case of fundamental breach.

### **32. If consultees consider that debtors should have such a right, do they agree that while the cure is carried out the creditor may not terminate the contract, but that it**

**may withhold its own performance and that it retains the right to claim damages for the initial non-performance if appropriate?**

If it is allowed, this must be the case.

**33. Do consultees also agree that the debtor has the obligation to take back the replaced item at its own expense, while the creditor need not pay for any use made of that item?**

Yes.

**34. Do consultees further agree that if the cure is not carried out within a reasonable time the creditor may terminate the contract and exercise any other remedy available to it in respect of the breach of contract?**

Yes.

**35. Do consultees finally agree the creditor should not be obliged to accept an offer of cure if:**

**(a) it has reason to believe that the debtor's initial performance was made with knowledge of its non-conformity and was not in accordance with good faith and fair dealing;**

**(b) it has reason to believe that the debtor will be unable to effect the cure within a reasonable time and without significant inconvenience to the creditor or other prejudice to the creditor's legitimate interests; or**

**(c) cure would be inappropriate in the circumstances? (Paragraph 5.13)**

Yes in all three situations outlined.

**36. Should any creditor have a right to seek cure from the debtor in line with the specific remedy of repair or replacement (or repeat performance of a service) now afforded to consumers under the Consumer Rights Act 2015? (Paragraph 5.20)**

It would be preferable to clarify that a court can order a party in breach to cure its defective performance as part of specific implement. There would be a case, however, for preventing termination for a reasonable time after a request for cure has been made because the request raises the reasonable expectation that the debtor will have a change to fulfil it.

## **Chapter 6 Enforcing performance**

### **37. Do consultees agree that the terminology used to describe the remedy used to enforce performance of an obligation could usefully be clarified?**

No we do not think that the terminology currently used is problematic.

### **38. If so, do consultees consider that it would be appropriate to call the remedy a “performance order”? Do consultees prefer an alternative formulation? (Paragraph 6.10)**

As in our answer to question 17, we are not aware that the current terms present particular problems. We do not consider that the proposed use of “performance order” offers an improvement on specific implement.

The main terminological issue here is in the law of civil procedure with the term *ad factum praestandum*. We consider that review of that term is therefore beyond the scope of the project and would need to be analysed in the context of civil procedure as a whole.

### **39. Are consultees aware of any issues arising in relation to actions for payment that we should consider at this time? (Paragraph 6.14)**

We are not aware of any issues.

### **40. Should civil imprisonment be retained as the ultimate sanction for wilful refusal to comply with a decree ad factum praestandum?**

**AND**

### **41. If so, should the periods for which civil imprisonment may be ordered for wilful refusal to comply with a decree ad factum praestandum and for breach of interdict be aligned in length?**

**AND**

### **42. As a means of enforcing a decree ad factum praestandum, should the courts be empowered to make such orders as may be just and equitable in all the circumstances as an alternative to civil imprisonment?**

**AND**

**43. If so, should it be possible for a court to make such orders together with the initial decree?**

**AND**

**44. Should it be open to the court to specify a penalty which is to be paid if a party fails to comply with a decree *ad factum praestandum*?**

**AND**

**45. If so, should the penalty be payable to the creditor or the state? If the former, should the amount of the penalty be determined having regard to the creditor's "legitimate interests" as defined in the general law on penalty clauses? (Paragraph 6.40)**

The same comment applies in answer to all of the above: since decrees *ad factum praestandum* are not limited to contract law and the concern here is fundamentally about how the state can get recalcitrant parties to comply with court orders, this seems beyond the scope of the project and is not something which should be regulated in legislation about remedies for breach of contract.

There is great merit in an integrated system of private law, where general issues are regulated at a general level in terms of clarity and simplicity.

A civil procedure project on court orders and enforcement of them would be desirable to address these matters.

Nevertheless we consider that, in practice, the retention of civil imprisonment is a very forceful feature that encourages compliance with an order of specific implement and therefore consider that it ought to be retained. It would appear logical to align the periods for breach of interdict and *ad factum praestandum* as they are both in essence orders of the court and there is no logic in having different periods apply.

It seems to us that civil imprisonment is a last resort and in practice most parties include an alternate crave for damages. In those circumstances it may not be necessary to allow the court to make any other "just and equitable order" to do justice between the parties as envisaged by question 42, however it would be a useful and equitable alternative in order to uphold the authority of the courts more generally. In that regard any fine imposed ought to be paid to the state (any alternate damages crave would of course remain due to a pursuer).

**46. Do consultees consider that there would be merit in replacing the current methods of enforcing non-monetary obligations with a single bespoke remedy, encompassing both positive and negative obligations?**

Yes. As above, however, it would be better pursued as part of a project on civil procedure not as part of the law of contract.

**47. If so, do consultees support our suggestion that the courts should be given a broad power to make an order which is intended to secure performance of the obligation?**

Yes. Again, it would be better pursued as part of a project on civil procedure rather than as part of the law of contract.

**48. Would consultees prefer to confer a general discretion on the courts to select an appropriate order, or to have rules to be applied by the court in order to determine the most appropriate order?**

**AND**

**49. Do consultees consider that it would be beneficial to give examples of the sort of order that might be made, particularly for more unusual possibilities such as fines or an extended right to repair and replacement? (Paragraph 6.44**

We consider that these questions require their own project with consideration of the approach taken to compelling performance in comparator systems.

## ***Chapter 7 Damages***

**50. If a general statutory restatement is pursued, should it provide that:**

- (a) damages are primarily compensation for any recoverable loss caused to the creditor by the debtor's breach of contract;**
- (b) the guiding principle in assessing damages is to put the creditor in the position that it would have been in had the contract been fully performed;**
- (c) losses which are not reasonably foreseeable to the parties at the time of contracting are irrecoverable;**
- (d) damages may be reduced to the extent that the creditor unreasonably fails to minimise its loss;**
- (e) damages are to be measured by the currency most appropriately reflecting the creditor's loss?**

We agree that statements (b), (c) and (d) should be incorporated in a restatement. However we do not think that (a) really adds anything if (b) is included. Similarly, (e) is really an application of (b) and is therefore unnecessary.

**51. If a general statutory restatement is pursued, should it provide that:  
(a) in general, loss is assessed as at the date of breach; but  
(b) exceptions to this general rule may be allowed?**

Yes as to (a). On (b) see question 52.

**52. If so, what exceptions should be allowed? (Paragraph 7.13)**

On this and on 51(b) above we suggest that more extensive comparative analysis is needed in order to properly clarify the issues.

**53. Subject to the normal remoteness and other rules, should damages recoverable for breach of contract include non-patrimonial loss or harm of any kind?**

Yes.

**54. In particular, should loss of the satisfaction of obtaining a contractual benefit, and harm in the form of pain, suffering or mental distress be included? (Paragraph 7.35)**

Yes, although they probably do not require explicit provision. In practice parties frequently combine claims on a contractual and delictual basis in order to recover patrimonial loss - for example many claims for professional negligence are plead on a "dual" basis

***Chapter 8 Gain-based damages***

**55. Do consultees consider that reasonable fee awards of damages for breach of contract should be introduced?**

Yes.

**56. If so:**

**(a) in what circumstances should such an award of damages be available; and  
(b) how should the courts calculate a reasonable fee? (Paragraph 8.43)**

The central issue here is that, by its breach, the debtor has forced the creditor into a non-consensual exchange of value.

There is a strong case for saying that the reasonable fee is part of the expectation interest since, had the debtor complied with the obligation, the creditor would have been in a position to demand a fee and *ex hypothesi* would have sought to negotiate the highest price he or she believed could be squeezed out of the creditor. That negotiation would, of course, be constrained by the willingness of the court to compel performance, which turns - at least in the case of a positive obligation - on the adequacy or otherwise of damages as a remedy. There is thus a risk of circularity in the analysis but also an opportunity to formulate with an approach which reflects a coherent view of remedies in private law.

**57. Do consultees consider that the courts should be empowered to order a debtor to account to a creditor for profits arising from the debtor's breach of contract?**

Yes.

**58. If so, do consultees consider that such an order should be available:  
(a) in response to any breach of contract; or  
(b) only where specified conditions are met?**

Such an order should only be available in exceptional cases.

**59. If consultees consider that such an order should only be available where specified conditions are met, they are asked for their views on the appropriateness of the following conditions:**

- (a) that specific implement or interdict would have been available to the creditor before the breach occurred;**
- (b) the breach having occurred, that ordinary damages would be inadequate as they would leave the creditor undercompensated as the debtor's gain from the breach would be out of proportion to the creditor's loss; and**
- (c) that no reasonable creditor would have consented to the breach in exchange for a reasonable fee.**

This is effectively a stronger version of the reasonable fee remedy so it is appropriate that it is more tightly constrained. Whether this is the intention or not, it will operate to eliminate the upside of any decision to breach and therefore could be considered as preventing breach by any economically rational party.

In light of this, and the analysis in the answer above, (a) seems a legitimate prerequisite. We consider that (b) seems very open and therefore potentially may not provide the requisite legal certainty to prove helpful. The condition set out in (c) seems appropriate.

**60. Consultees are also asked whether they think that any other conditions would be appropriate in addition to, or in substitution for, those conditions. (Paragraph 8.57)**

We have no specific suggestions to make but would suggest further reflection along the lines set out in answer to question 56.

***Chapter 9 Transferred loss claims***

**61. Do consultees consider that in general a party who breaches a contract should be liable in damages for the loss caused by that breach, even if the loss was suffered by someone other than the other party to the contract? (Paragraph 9.48)**

In general, yes. We agree that a party who breaches a contract ought to be held liable in damages for the loss caused by that breach, even if said loss occurs outside of the immediate contractual relationship.

**62. Do consultees think that it would be preferable for a third party to be able to seek damages directly from the debtor, instead of relying on the creditor to seek damages on behalf of the third party and then account to the third party for them?**

Yes. As outlined in the consultation, for many of the cases in this area there is an ongoing relationship between the third party and the creditor (ie both part of the same company). In such cases it may well be that the creditor is willing to assume some risk for the benefit of the third party. However, in instances where there is no such relationship it would be unfavourable that a third party may be incapable of compelling a creditor to raise the proceedings on their behalf. As such, facilitating direct damages claims between the third party and the debtor would be preferable here.

**63. If so, do consultees think that:**

- (a) a third party should only be able to claim damages against a debtor if it was reasonably foreseeable to the debtor that a person in the third party's position might suffer loss;**
- (b) the third party and the creditor should only be able to recover their own losses arising from the debtor's breach of contract;**
- (c) it should be left to the courts to ensure that double recovery is not permitted,**

### rather than making specific provision about it? (Paragraph 9.60)

- (a) Yes. This would be necessary to offer a degree of protection to the debtor by only allowing for those parties whom the debtor should have reasonably been aware of to recover their losses.
- (b) Yes, as this would help avoid issues of double recovery.
- (c) Yes.

### 64. Do consultees think that transferred loss claims should be available only where the following conditions are met:

- (a) that the contract in question was one to carry out work upon, or provide services in relation to, property belonging to the creditor;**
- (b) that the property was subsequently transferred to a third party; and**
- (c) that the third party's loss could have been reasonably foreseen by the debtor at the time of contracting?**

Given the way in which the case law has developed in this area, it would be best to adopt the above conditions in line with the 'narrow ground'. However, the courts should still have the option to develop the 'broader ground' where suitable (see below 65).

### 65. If so, do consultees agree that it should remain open to the courts to develop the broader ground approach to transferred loss if a suitable case arises? (Paragraph 9.62)

Yes, the courts should still be capable of developing the broader ground approach to transferred loss. This is particularly important because there are unanswered questions relating to this approach which stem from the *Panatown* judgment<sup>7</sup> – ie are consequential losses recoverable and to what extent is the carrying out of repairs a precondition to recovery?

- ### 66. Do consultees think that a transferred loss claim should not be available where:
- (a) the contracting parties have made alternative provision in the contract for the third party to have a right of action against the debtor;**
  - (b) the contracting parties have expressly excluded the operation of transferred loss claims in the contract;**
  - (c) the debtor and the third party have entered into a separate agreement giving the**

<sup>7</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] UKHL 43

### **third party a right of action against the debtor, such as a collateral warranty?**

(a) We agree that where the contracting parties have made alternative provision for the third party (ie collateral warranty) then the transferred loss claim should be excluded.

(b) Yes, this falls in line with (a), allowing the debtor to effectively limit the extent to which they are liable for the third party's losses.

(c) Yes.

### **67. Do consultees think that a transferred loss claim should be available despite the fact that:**

**(a) the third party may have available to it a non-contractual claim against the debtor;**

**(b) it is possible that the creditor could assign to the third party its claim against the debtor for breach of contract? (Paragraph 9.66)**

(a) Yes, the fact that a third party has a potential non-contractual claim should not mean that a transferred loss claim is unavailable to them.

(b) A transferred loss claim should still be made available to the third party here as it provides a direct entitlement and greater certainty. If the third party were capable of compelling the creditor to assign their claim, then the transferred loss claim would not be required here (see above at 62).

### **68. Do consultees consider that a third party should only be allowed to claim damages for breach of contract?**

As stated in the consultation, the third party may have to be confined to secondary remedies. This might mean that a third party will only be able to raise a claim for damages.

### **69. If not, what alternative remedies (such as the right to cure) should be available to third parties? (Paragraph 9.68)**

It is difficult to see how a right to cure/specific implement might work to the benefit of the third party, as it would be securing performance of a contract between the creditor and the debtor. Accordingly, it is suggested that the third party be confined to damages claims for the time being.

## **Chapter 10 Contributory negligence**

### **70. If a general statutory restatement is pursued, should it provide that a party may not exercise any of the remedies for non-performance to the extent that it caused the other party's non-performance? (Paragraph 10.42)**

Yes. We consider that the DCFR rule is clearer. However, it would remain necessary to distinguish cases where a claimant is not exercising a remedy for non-performance but is invoking an obligation of indemnity. Consider a contract under which A must indemnify B against certain risks (such as infringement of third party intellectual property) - liability under the indemnity can be drafted to arise as a consequence of the materialisation of a foreseen risk allocated between them by the parties. Such an indemnity is not linked to damages: it arises irrespective of the existence of a breach of contract. We are not aware of any reference in the DCFR to voluntary indemnity of that type.

The question arises: does it or should it matter whether the indemnity is drafted as a back up to a breach of warranty (eg that intellectual property does not infringe any third party rights) or is self-standing and independent of any breach of anything. This issue was addressed by Lady Clarke paragraph 28 in *Scottish and Southern Energy Plc v Lerwick Engineering and Fabrication Limited*<sup>8</sup> cited in the Discussion Paper at 10.28. It would seem that her ladyship would have had to come to the same conclusion even if the law were stated as in the DCFR.

This is not a reason for not restating the rule in terms of the DCFR but it should be recognised that the rule is not applicable to cases of indemnity. The purpose of indemnity is to allocate risk. If the allocation is accepted the issue of insuring the indemnity can be addressed.

There is a separate and independent issue of whether it is ever acceptable for an indemnity to be sought from a consumer - a person acting outside his trade, business or profession. An indemnity in such circumstances may well be an unfair term in a consumer contract.

### **71. Should a defence of the creditor's contributory negligence be available to the debtor in any claim for damages for breach of contract, with the effect of reducing the creditor's damages to such extent as the court thinks just and equitable having regard to the creditor's share in the responsibility for the damage? (Paragraph 10.56)**

Yes. But as in answer 70 it needs to be understood that a claim by way of contractual indemnity is not a claim for damages and would be unaffected by the reform. See also our comment in relation to answer 54. It seems odd that contributory negligence could be plead where the express or implied contractual

<sup>8</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=0cae8aa6-8980-69d2-b500-ff0000d74aa7>

standard was the same as the delictual term but not if there were a "higher" standard see *cg Preferred Mortgages Ltd v Thomson Shanks*.<sup>9</sup>

### **Chapter 11 A general statutory restatement?**

**72. If a general statutory restatement is pursued, should it provide that it does not affect:**

**(a) any special regime of remedies provided by law for particular kinds of contract;**  
**(b) parties' freedom of contract with regard to making provision about remedies in their contracts? (Paragraph 11.8)**

a) Yes.

b) Yes.

**73. If a general statutory restatement is pursued, should it provide that:**

**(a) as a general principle, remedies are cumulative except where their exercise together is incompatible;**  
**(b) the court cannot give two or more remedies which would result in benefits to the creditor exceeding its loss;**  
**(c) although a creditor may switch from one remedy to another, this is barred when:**  
**(i) an election between substantive rights is involved; or**  
**(ii) the party in breach is prejudiced by the vacillation? (Paragraph 11.11)**

Yes to all except for cii): we see no reason why vacillation should not be allowed.

**74. If a general statutory restatement is pursued, should it extend to unilateral voluntary obligations? (Paragraph 11.12)**

Whilst unilateral voluntary obligations could helpfully be reformed, it seems to us that this logically sits outside the scope of this project as differing in nature to contractual obligations.

**75. If a general statutory restatement is pursued, do consultees agree that:**  
**(a) it is unnecessary to refer to a general requirement of good faith;**

<sup>9</sup> *Preferred Mortgages Ltd v Thomson Shanks and others* 2008 CSOH 23

**(b) bespoke provision should instead be made in relation to particular remedies where the concept of good faith is relevant? (Paragraph 11.22)**

- a) Yes we agree.
- b) It is not clear what this is intended to cover.

**76. If a general statutory restatement is pursued, should it include default provisions about notices?**

**AND**

**77. If so, should it be possible to give notice orally? (Paragraph 11.25)**

We do not consider that this fits with the consultation and think that the issue would be better addressed in other legislation. Notices form part of a variety of areas outside contract law, notably leases and other property law, and it would perhaps be better to include this in a review of notices

**78. Do consultees have any comments to make on the suggested coverage of a general statutory restatement of the law on remedies for breach of contract?**

We have no further comments.

**79. Do consultees consider that it would be desirable to prepare a general statutory restatement of the law on remedies for breach of contract? (Paragraph 11.29)**

We have no further comments.

**For further information, please contact:**

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)