1.3. Terms of Contracts

The first step in determining the terms of a contract is to establish what the parties said or wrote. Statements made during the course of negotiations may traditionally be classed as representations or terms and if one turns out to be wrong, the plaintiff's remedy will depend on how the statement is classified:

A representation is a statement of fact made by one party which induces the other to enter into the contract. If it turns out to be incorrect the innocent party may sue for misrepresentation. Breach of a term of the contract entitles the injured party to claim damages and, if he has been deprived substantially what he bargained for, he will also be able to repudiate the contract.
If a statement is not a term of the principal contract, it is possible that it may be enforced as a collateral contract.

How can the courts decide whether a statement is a term or a mere representation? It was established in *Heilbut, Symons & Co v Buckleton* [1913] AC 30, that intention is the overall guide as to whether a statement is a term of the contract. In seeking to implement the parties' intentions and decide whether a statement is a term or a mere representation, the courts will consider the following four factors:

(A) Timing

The court will consider the lapse of time between the making of the statement and the contract's conclusion: if the interval is short the statement is more likely to be a term. See: *Routledge v McKay* [1954] 1 WLR 615, *Schawel v Reade* [1913] 2 IR 64.

(B) Importance of the Statement

The court will consider the importance of the truth of the statement as a pivotal factor in finalising the contract. The statement may be of such importance that if it had not been made the injured party would not have entered into the contract at all. See: *Bannerman v White* (1861) CB(NS) 844, *Couchman v Hill* [1947] 1 All ER 103.

(C) Reduction of terms to writing

The court will consider whether the statement was omitted in a later, formal contract in writing. If the written contract does not incorporate the statement, this would suggest that the parties did not intend the statement to be a contractual term. See: *Routledge v McKay* [1954] 1 WLR 615

(D) Special Knowledge/skills

The court will consider whether the maker of the statement had specialist knowledge or was in a better position than the other party to verify the statement's accuracy. See: *Oscar Chess v Williams* [1957] 1 All ER 325, *Dick Bentley Productions v Harold Smith Motors* [1965] 2 All ER 65.

In *Oscar Chess Ltd v Williams* [1957] 1WLR 370, Williams sold his can to Oscar Chess Ltd a car dealer. Williams had honestly given a later year as the year of manufacture. It was a second hand car which he had got from his mother. The car dealer later found out that the car had been manufactured at an earlier period. He therefore sued Williams for a reduction in the price they had paid on the ground that it was an older car. The court held that the statement made by Williams as to the year of manufacture was only a 'representation' ant a 'term' of the contract of sale. Also the car dealer could have verified the year of manufacture and since they had not done so before they bought the car, they should bear the loss, and that Williams could not be sued.

The court reached a different conclusion in *Dick Bentley Productions v Harold Smith Motors* (1965) 2 All ER 65. There, a car dealer had sold a car stating that the car had done only a specified mileage whereas in actual fact the car had done very much more and someone had altered the mileage meter of the car. The court held that since the seller was a car dealer, the statement as to the low mileage was a 'term' of the contract and the money paid had to be refunded.

Conditions and Warranties

Traditionally terms have been divided into two categories: conditions and warranties.

(A) CONDITIONS

A condition is a major term which is vital to the main purpose of the contract. A breach of condition will entitle the injured party to repudiate the contract and claim damages. The injured party may also choose to go on with the contract, despite the breach, and recover damages instead. See: *Poussard v Spiers* (1876) 1 QBD 410

***Poussard v Spiers* (1876) 1 QBD 410**
Madame Poussard entered a contract to perform as an opera singer for three months. She became ill five days before the opening night and was not able to perform the first four nights. Spiers then replaced her with another opera singer.

Held:
Madame Poussard was in breach of condition and Spiers were entitled to end the contract. She missed the opening night which was the most important performance as all the critics and publicity would be based on this night.

(B) WARRANTIES

A warranty is a less important term: it does not go to the root of the contract. A breach of warranty will only give the injured party the right to claim damages; he cannot repudiate the contract. See:*Bettini v Gye* (1876) 1 QBD 183.

***Bettini v Gye* (1876) QBD 183**

Bettini agreed by contract to perform as an opera singer for a three month period. He became ill and missed 6 days of rehearsals. The employer sacked him and replaced him with another opera singer.

Held:
Bettini was in breach of warranty and therefore the employer was not entitled to end the contract. Missing the rehearsals did not go to the root of the contract.

(C) INTERMEDIATE TERMS

It may be impossible to classify a term neatly in advance as either a condition or a warranty. Some undertakings may occupy an intermediate position, in that the term can be assessed only in the light of the consequences of a breach. If a breach of the term results in severe loss and damage, the injured party will be entitled to repudiate the contract; where the breach involves minor loss, the injured party's remedies will be restricted to damages. These intermediate terms have also become known as innominate terms. See: *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 1 All ER 474

Hong Kong Fir Shipping Co -v- Kawasaki Kisen Kaisha Ltd; CA 20-Dec-1961
The plaintiffs had recently acquired the ship the 'Hong Kong Fir' and contracted to charter it to the defendants, but being late in delivering it, the defendants cancelled the charterparty contract. The plaintiffs said the repudiation was wrongful, and that the ship was fit to charter.

Held: "authority over many decades and reason support the conclusion in this case that there was no breach of a condition which entitled the charterers to accept it as repudiation and to withdraw from the charter. It was not contended that the maintenance clause is so fundamental a matter as to amount to a condition of the contract. It is a warranty which sounds in damages." and "If what is done or not done in breach of the contractual obligation does not make the performance a totally different performance of the contract from that intended by the parties, it is not so fundamental as to undermine the whole contract."

The legal position about 'terms' and 'representations' may be summed up as follows;

a) Whether a statement is a 'term' or a 'mere representation' will depend on the facts of each case and the circumstances in which the statement was made and the status of the persons making the representations. If the statement was made by a professional (a lawyer) or a businessmen (ex. A car dealer) the court will attach greater importance to that statement and may conclude, that it was a 'term' that became a part of the contract.
b) A term is more important and more serious than a representation. A breach of a term may be sufficient ground to set aside the contract while a breach of a representation will not have such a result. Damages may be claimed.

Implied Terms

It is generally presumed that the parties to a contract would have discussed the terms and conditions of the contract between them and all the relevant terms will be incorporated into the contract. Also today, most business contracts are evidenced in writing and there are standard terms used in such contractual documents.

Despite all this, it can happen than an important term can be accidentally omitted or left out in a contract between two parties. In such a case, a term will be implied by the law, if it is necessary to carry out the obvious intention of the parties. Terms will be implied by a court only if it is essential or necessary to give efficacy to the contract which both the parties contemplated: *The Moorcock* (1889) 14 PD 64

In the case of *Miller v Cannon Hill Estates Ltd* (1931) 2 KB 113, M agreed to buy from C a house which was being constructed at the time the contract was signed. The courts held that even if the contract had not included a term as to the condition of the house to be sold, a term should be implied that the house to be sold, a term should be implied that the house should have been constructed in a proper manner by using proper material.

It is a well known rule of contract law that the courts will not make a contract for the parties. If a contract is defective because important terms are missing, the parties to the contract must suffer the consequences. They cannot go to a court of law and ask the court to include terms they have omitted by their own neglect. Nor can a term be implied which will override or be contracry to an express term in the contract.

Exemption clauses

A clause may be inserted into a contract which aims to exclude or limit one party's liability for breach of contract or negligence. However, the party may only rely on such a clause if (a) it has been incorporated into the contract, and if, (b) as a matter of interpretation, it extends to the loss in question. Its validity will then be tested under (c) the Unfair Contract Terms Act No. 26 of 1997.

A. Incorporation

The person wishing to rely on the exclusion clause must show that it formed part of the contract. An exclusion clause can be incorporated in the contract by signature, by notice, or by a course of dealing.

1. **Signed Douments**

If the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its terms. This is so even if he has not read the document and regardless of whether he understands it or not. See:*L'Estrange v Graucob* [1934] 2 KB 394.

However, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect. See: *Curtis v Chemical Cleaning Co* [1951] 1 KB 805.

Curtis v Chemical Cleaning **[1951] 1 KB 805** Court of Appeal

The claimant took her wedding dress to the cleaners. She was asked to sign a form. She asked the assistant what she was signing and the assistant told her that it excluded liability for any damage to the beads. The form in fact contained a clause excluding all liability for any damage howsoever caused. The dress was returned badly stained.

Held:
The assistant had misrepresented the effect of the clause and therefore could not rely on the clause in the form even though the claimant had signed it.

2. Unsigned documents

The exclusion clause may be contained in an unsigned document such as a ticket or a notice. In such a case, reasonable and sufficient notice of the existence of the exclusion clause should be given. For this requirement to be satisfied:

(i) The clause must be contained in a contractual document, ie one which the reasonable person would assume to contain contractual terms, and not in a document which merely acknowledges payment such as a receipt. See: *Parker v SE Railway Co* (1877) 2 CPD 416, *Chappleton v Barry UDC* [1940].
(ii) The existence of the exclusion clause must be brought to the notice of the other party before or at the time the contract is entered into. See: *Olley v Marlborough Court* [1949] 1 KB 532.
(iii) Reasonably sufficient notice of the clause must be given. It should be noted that reasonable, not actual notice is required. See: *Thompson v LMS Railway* [1930] 1 KB 41.

What is reasonable is a question of fact depending on all the circumstances and the situation of the parties. The courts have repeatedly held that attention should be drawn to the existence of exclusion clauses by clear words on the front of any document delivered to the plaintiff, eg "For conditions, see back". It seems that the degree of notice required may increase according to the gravity or unusualness of the clause in question.

3. Previous dealings

Even where there has been insufficient notice, an exclusion clause may nevertheless be incorporated where there has been a previous consistent course of dealing between the parties on the same terms. Contrast:*McCutcheon v MacBrayne* [1964] 1 WLR 125.

Even if there is no course of dealing, an exclusion clause may still become part of the contract through trade usage or custom. See:*British Crane Hire v Ipswich Plant Hire* [1974] QB 303.

B. Interpretation

Once it is established that an exclusion clause is incorporated, the whole contract will be construed (ie, interpreted) to see whether the clause covers the breach that has occurred. The basic approach is that liability can only be excluded by clear words. The main rules of construction are as follows:

1. ***contra proferentem***

If there is any ambiguity or uncertainty as to the meaning of an exclusion clause the court will construe it contra proferentem, ie against the party who inserted it in the contract. See: *Baldry v Marshall* [1925] 1 KB 260, *Houghton v Trafalgar Insurance Co* (1954).

Very clear words are needed in a contract to exclude liability for negligence. See: *White v John Warwick* [1953] 1 WLR 1285.

2. **The main purpose rule**

Under this rule, a court can strike out an exemption clause which is inconsistent with or repugnant to the main purpose of the contract. See: *Glynn v Margetson* [1893] AC 351, *Evans Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078.

Effect of Misrepresentation in contract

It often happens that the actual conclusion of a contract is preceded by negotiations between the interested parties. A statement of fact which one party makes in the course of negotiations with a view to inducing the other to enter into the contract and to conclude is, is known as a representation: if such a statement is false, it is a misrepresentation.

A misrepresentation is relevant in the law of contracts only is the following conditions are present;

1) It msut be a representation of material fact
2) It must have been made before the conclusion of the contract with a view to inducing a party to enter into the contract.
3) It must have been made with the intention that it should be acted upon by the party to whom it is addressed.
4) It must actually have been acted upon and must have induced the contract, and
5) It must have been false to the knowledge of the person making it.

There are three main types of misrepresentation;

I. Innocent misrepresentation
II. Negligent misrepresentation
III. Fraudulent misrepresentation

Innocent misrepresentation

Innocent misrepresentation occurs where the false statement has been made honestly, whether made negligently or not. Thus an innocent misrepresentation can also amount to a negligent misrepresentation. However, this will depend on the facts of each case.

Normally innocent misrepresentations are made negligently or carelessly but not fraudulently. The absence of fraud distinguishes an innocent misrepresentation from a fraudulent misrepresentation.

> In *Redgrave v Hurd* (1881) 20 Ch D 1, a solicitor wanted to buy the practice of another solicitor. The solicitor who was selling said that he earned about 300 pounds every year from his practice. He said "you examine my books of account to verify this fact". The solicitor who was buying the practice did not examine any books of accounts but later found that the sum of 300 pounds per year was untrue. The court held that the contract was bad because of the misrepresentation- although no fraud was involved. The fact that the purchaser has not examined the account books also did not matter. The solicitor who was selling had made a false statement although he had done so innocently. However, he was liable for the misrepresentation.

A representation which is true when made at the time of negotiations, but becomes untrue before the contract is entered must be corrected. If it is not corrected, the contract can be rescinded.

Example : In negotiating a sale of a medical practice in January, X represented the takings to be at the rate of 2,000 pounds a year. In May, when the contract was signed, the income had, owing to X's illness, fallen to 5 pounds a week. The Court held that the contract could be repudiated owing to X's failure to disclose the fall in the takings. *With v O'Flanagan* (1936) 1 Ch 575

Fraudulent Misrepresentation

"Fraud is proved", said Lord Herscell in *Derry v Peek* (1889) 14 App Cas 337, "when it is shown that a false representation has been made:

1) Knowingly, or
2) Without belief in its truth: or
3) Recklessly and carelessly whether it be true of false".

A misrepresentation is not fraudulent if the person who made is honestly believed it to be true. Whether a misrepresentation is only innocent or fraudulent will depend on the facts of each case. It is not easy to prove fraud. To allege a fraud is a serious matter because fraudulent conduct can also result in a criminal charge.

Another factor to note is that even a statement of opinion can amount to a misrepresentation.

Example: If a bookseller tells a customer “this is a very good book. I can recommend it highly” this is only an expression of opinion, and no legal action can be taken if the book is a useless book. On the other hand, if the bookseller had said, “This is a very good book, it has sold 50,000 copies”, and if that statement was untrue, such a statement could amount to fraudulent or innocent misrepresentation. If the bookseller had lied deliberately, it would be a fraudulent misrepresentation.

Negligent Misrepresentation

Negligent misrepresentation may be defined as a false statement made by a person who had no reasonable grounds for believing the statement to be true. In other words, the statement was made without reason to justify it. Today, negligent misrepresentation belongs more to the law of delicts/torts (civil wrongs) and not so much to the law of contracts.

This area of law came into prominence after the famous decision of the English house of Lords in the case of Hedley Bryne & Co. Ltd v Heller & Partners Ltd (1964) AC 465. In this case, a banking firm had given a wrong credit report about an advertising firm with which a commercial company wanted to do business. The advertising firm was about to go bankrupt but the bank by mistake did not disclose this fact in its credit report and the commercial company acted on the bank’s report and gave work to the advertising company and lost money. They then sued the bank claiming the money they had lost. They argued that although the bank had not been fraudulent in giving an erroneous and incorrect report, it had acted negligently. The court held the bank liable for negligent misrepresentation under the law of torts.

Duress

Both Roman Dutch law and English law recognize that a contract entered into under duress can be examined by the courts to see whether it is valid and enforceable. Traditionally, duress meant actual violence or threat of violence directed to the personal safety or liberty of the other party to the contract of his family. For example, a threat of kidnapping or wrongful confinement. As an eminent judge had stated, “Duress, whatever form it takes is a coercion of a person’s will so as to vitiate genuine consent.”

Undue Influence

The Roman Dutch law did not develop the concept of ‘undue influence’ as done under the English law. Accordingly, it is well established that in any litigation where the issue of ‘undue influence’ is raised, it will be decided by the application of English law principles: See *Perera v Tissera* (1933) 35 NLR 257; *Anthony v Weerasekara* (1953) 54 NLR 553.

It is common in transactions or in the negotiations of a contract, for one party to seek to persuade or influence the other party to enter into it. Often such influence is exercised wisely. However, there can be instances where such influence was ‘unfair’ or ‘undue’.

Additionally, in situations where the parties to the contract stand in a special relationship of trust and confidence (for example, father and child, doctor and patient) undue influence is presumed

although the presumption may be disapproved by evidence. However, in the case of *Fernando v Mendis* (1967) 72 NLR 433 it was held that the presumption of undue influence does not apply in the case of a strictly contractual relationship of employer and employee, which is not a fiduciary character. Accordingly, where an employee, having freely admitted his liability to pay a sum of money to his employer, enters into a contract voluntarily to pay that amount, no presumption of undue influence attaches to such contract, even though the motive for the contract on the part of the employee may be to avoid a criminal prosecution.

1.4. Termination of Contracts

In Contract law, the term 'discharge' means the process whereby a valid and enforceable contract is brought to an end, thereby releasing the parties to it from all further rights and obligations. The following are the main ways in which a contract is discharged.

i. By Performance
ii. By Agreement between the Parties
iii. Through what is called "Frustration"
iv. By a breach of the contract
v. By Operation of law

Unless one of the above events occurs, the contract continues and the rights and obligations under it can be enforced by either party.

Discharge by performance

This is the most common way of discharging a contract. Each party performs what he undertook to do. Problems have arisen by one party claiming that the performance was not exact as agreed while the other party says that there was substantial performance to satisfy what was undertaken.

> In *Hoening v Isaacs* (1952) 2 All ER 176, the plaintiff was engaged to redecorate the defendant's apartment for $750. Of this sum only $400 was paid. When the plaintiff claimed the balance, the defendant argued that the contract had not been performed in the way promised. The Court examined all the facts and held that the plaintiff had substantially performed the contract and was entitled to the balance sum of $350 less about $55 which was deducted for cost of some remedial work.

Discharge of Contract by Agreement

A contract can be discharged or varied by agreement of the parties. This can be done by a clause in the original contract itself or by a subsequent agreement between the same parties.

Example: A contract with B to buy 50,000 coconuts from B for one year at a certain price. After purchasing coconuts for six months both A and B agree by another contract to terminate the earlier contract. The contract is discharged.

Discharge of Contract through Frustration

After a contract has been entered into by two parties, if performance of the contract becomes impossible without the fault of either party, the contract is said to be discharged by frustration.

> In the leading English case of *Taylor v Caldwell* (1983) 122ER 309, Caldwell hired a music hall to Taylor, Before Taylor could arrange the first performance at the music hall, it caught fire and burnt down. Taylor claimed damages from Caldwell for the expenses he had incurred in arranging several performances. The Court held that since the destruction of the music hall had occurred without the fault of either party, the contract was frustrated and therefore both parties to the contract were discharged from their obligations. Accordingly, Caldwell was not liable to pay Taylor as demanded for breach of contract.

However, mere supervening inconvenience or delay in performing the contract will not amount to frustration.

Example : A contracted to lease Bs premises as a warehouse for six years. Two years later one of the access roads to the warehouse was blocked because of construction of a roadway by the government in the vicinity. This access was not possible only for six months. A cannot argue that the entire contract of lease has been frustrated because of this temporary blockage. See *National Carreirs Ltd. V Panalpina Ltd* (1981) AC 675.

Discharge by breach of Contract

A breach of contract occurs whenever one party to the contract fails to perform his obligations imposed by the contract or intimates to the other party that he will not be performing his obligations. There can be two distinct categories of breach. Firstly, an actual breach. Here there is a failure to perform when the day for performance comes. Second and anticipatory breach. Here there is a clear statement before the date of performance that the contract will not be performed.

Example : A grees to deliver 50,000 coconuts to B for an agreed price by a fixed date. A does not deliver the coconuts on or before the date fixed. This is an actual breach.

In the same example A informs B about two weeks before the date fixed for delivery of the coconuts that he will not be delivering them. Here there is an anticipatory breach of the contract.

Discharge by operation of law

Discharge by operation of law is exceptional because parties are expected to be aware of legal rules before they enter into contracts. The following are some of the main ways where a contract can be so discharged.

I. By Merger. Here an inferior right under the contract becomes merged with a superior right.

Example : A tenant buys the property he has rented or leased from the landlord or lessor – the owner of the property. In such a case the original contract or lease is discharged by merger because the tenant or lessee has become the owner of the property.

II. An unauthorized alteration or cancellation in a contract of one of its vital parts will have the effect of discharging the contract by operation of law and the innocent party will be relieved of all obligations under the contract.

III. Insolvency, liquidation or bankruptcy of one or both parties.

IV. Limitation or prescription periods.

1.5. Remedies for breach of contract

When a contract is breached, the injured (innocent) party may have several courses of action open to him. These are:

i. To refuse further performance of the contract
ii. To bring an action for damages
iii. To sue on a *quantum meruit*
iv. To sue for specific performance
v. To sue for an injunction

Refusal of further performance

If one party has broken his contract, the other party may treat the contract as repudiated and refuse further performance. By treating the contract as repudiated, he makes himself liable to restore any benefits he has received.

Example : If A has agreed to sell goods and has received all or part of the price, he must return them unless it is a term of the contract that he need not do so.

A deposit paid by the purchaser need not be repaid if the sale is not successful because of the purchaser's default, but a sum given in part payment of the price is returnable. See *Howe v Smith* (1884) 27 Ch.D. 89.

Action for damages for breach of contract

Normally, the remedy that the innocent party has for a breach of contract is to sue for damages. The object for seeking damages is to obtain compensation for the actual loss he has suffered. In addition, if the innocent party has paid a deposit or spent money on trying to perform the contract, this incurred expenditure can also be claimed in an action for damages against the guilty party.

In discussing legal actions for damages, one should remember Section 193 of the Civil Procedure Code which states;

"When the action is for damages for breach of contract, if it appears that the defendant is able to perform the contract, the court with the consent of the plaintiff, may decree the specific

performance of the contract within a time to be fixed by the court, and in such case shall award an amount of damages to be paid as an alternative if the contract is not performed."

The object of Damages

The object of an award of damages is to compensate actual loss, at least in so far as money can do. In contract, damages are awarded to place the aggrieved party in the position that he or she would have occupied had the contract been performed as agreed. Contractual damages are calculated by looking at what the position should have been after proper performance of the contract.

> In *Seabridge Shipping Ltd v Ceylon Petroleum Corporation* (2002) 1 SLR 126, the plaintiff company sued the Ceylon Petroleum Corporation for breach of contract for not awarding a tender for the supply of crude oil. They claimed Rs. 200 million as damages. The district Judge awarded only Rs. 2.5 million. On appeal, the only issue was the adequacy of damages awarded. The Appeal Court held as follows;
>
> i. Nature of damages being compensatory, the affected party is only entitled to such sum as will indemnify him for the loss which he actually suffered. When he has not in fact suffered any loss by reason of the breach, he is nevertheless entitled to a verdict, but damages recoverable will be purely nominal.
> ii. Damages could, in principle, be recovered in a contractual action for injury to reputation.
> iii. On the material before the Court it is difficult to come to a finding that, the plaintiff has actually suffered any loss by reason of the breach. Therefore, the damages recoverable would be purely nominal.
> iv. Accordingly, the award of Rs. 2.5 million in this case was reasonable and should be upheld.

Principles governing the award of Damages

The courts have developed a number of rules relating to the award of damages. The following are the main rules;

i. Damages must not be too remote
ii. Damages are only compensatory
iii. Damages must be mitigated
iv. Damages may be pre-agreed by the parties

Remoteness of damages

The principle of remoteness means that it is neither just nor practicable to hold a defendant (wrongdoer) liable in damages for every consequence of breach of contract no matter how

unusual or unexpected those consequences might be. Damages recoverable are limited to those which are not too remote. The defendant will be liable to those which are not too remote. The defendant will be liable for damages that could have been foreseen as a likely result of his or her breach but not for damages which could not have been so foreseen. See *Hadley v Baxendale* (1854) 156 ER 145.

Damages are only compensatory

In assessing appropriate compensation, the court must attempt to place the injured party "in the same situation, with respect to damages, as if the contract had been performed". *Robinson v Harman* (1848) 154 ER 363.

A judge should not refuse to grant damages merely because it is difficult to calculate or quantify the amount that should be awarded.

Duty to mitigate Damages

The law imposes a duty upon those claiming damages to take all reasonable steps to mitigate their loss. All that is required is that the parties act reasonably.

Damages can be pre-agreed

Damages are normally inliquidated. That is, they are not specified in detail in the contract but are calculated by a court in response to the actual loss or damages that the plaintiff suffers. Despite this the parties can always agree, at the time of contracting, on the amount of damages that will be recoverable in the event of breach. If they do so, the damages stipulated are called 'liquidate damages'.

Liquidated damages

It is now common practice to indicate liquidated damages in a contract. Such a step will assist the court in deciding what damages to award for breach of contract.

However, sometimes under the guise of liquidated damages or under such term, one party may have included what is actually a penalty. The distinction is important, because if it is a penalty only the actual damage suffered can be claimed, while if it is liquidated damages the sum fixed can be recovered. The term 'penalty' or 'liquidated damages' in the contract is not conclusive. The court will ascertain whether a sum is in truth a penalty or liquidated damages.

'Quantum Meruit'

The term 'quantum meruit' literally means as 'much as he has earned or deserves'. A court will award a quantum meruit where the party has done work or conferred a benefit on another. Unlike an award for damages where the plaintiff must prove that he suffered a loss, in a quantum meruit claim all he need show is that the defendant received a benefit and unless the plaintiff is compensated for what he did the defendant will be unjustly enriched.

Specific Performance

Instead or in addition to seeking damages for breach of contract, the injured party may ask a court for a decree of specific performance. A decree of specific performance is an order of the court requiring a party to perform the obligations imposed by the contract. The following principles govern the issue of an order for specific performance.

a) It is an equitable remedy and as such is entirely in the discretion of the court.
b) As a result it is not a remedy which can be asked as of right and will be given only when the court feels that damages will not suffice or are not an adequate remedy.
c) Specific Performance will not be issued where the court cannot supervise the execution of its order, for example a building contract.
d) It will not be order where the contract is for personal services. For example, a contract to do a painting or write a book.

Specific performance is usually granted in contracts connected with land or to take shares or debentures in a company.

In *Thamel v Fernando* (2001) 2 SLR 44, Fernando had contracted with Thamel to buy a property for Rs. 40,000/- He had paid an advance of Rs. 20,000/- and had agreed to pay the balance when the deed of sale was executed. It had also been agreed that in the event of default by Fernando (the buyer), the advance paid would be forfeited. On the other hand if the seller (Thamel) defaulted he would return the deposit of Rs. 20,000/- and also pay Rs. 20,000/- as damages for not selling the land.

Subsequently, the seller (Thamel) defaulted. The buyer filed action and asked for specific performance and the District Judge granted the relief asked and ordered that the land in question be transferred to the seller on payment of the balance Rs. 20,000/-

The Appeal Court however disagreed with the order of the District Judge and set it aside. The Appeal Court held that the buyer was only entitles to a refund of his deposit and an additional sum of Rs. 20,000/- as damages for non-performance as provided in the contract. The Court said;

i. A Court must always look for the intention of the parties to ascertain the object of the obligations of their agreement.
ii. On the perusal of this Agreement, it is seen that in the event of default on the part of the vendor there is no provision in the Agreement to compel the sale.
iii. Specific performance is a discretionary remedy and a Court is not at liberty to grant or withhold the remedy capriciously.
iv. Specific performance will not however be granted where the damages are adequate remedy.

Injunction

An injunction is specific performance in reverse. Injunctions, in their most common form, are prohibitory. That is, they are orders prohibiting parties from breaching their contractual undertakings ad, usually, they are granted to stop one party doing something he or she has promised not to do. Classic examples can be found in contract of personal service containing a restraint of trade clause.

> In *Warner Brothers Pictures v Ingolia* (1965) NSWR 988 the defendant who has agreed to sing for the motion picutes company in America disputed her contract of service and flew to Australia and started performing at a theatre there. The plaintiff company asked the court for an injunction to stop her from doing so. The court accepted that the defendant had breached her contract and granted the injunction.

Like specific performance, injunction is an equitable remedy and therefore is entirely at the discretion of the court. It cannot be sought as of right and it will not be granted where common law damages would be adequate remedy, where it would cause hardship or injustice.