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DISCUSSION PAPER ON REMEDIES FOR BREACH OF CONTRACT

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List of questions and proposals

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)

Comments on Question 1

We do not have any such information or data.

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 outstanding obligations under the contract?

(Paragraph 2.6)

Comments on Question 2

We do not consider that replacing the term 'retention' with 'suspension' or 'withholding' would be helpful. We are not persuaded that simply relabelling an existing concept with a new name would be likely to render that concept inherently more comprehensible to the lay person, or indeed to others.

However, if there is support for changing the term, we consider that 'suspension' rather than 'withholding' is clearer. The word 'withholding' implies that the creditor may be refusing to do something that it should be doing, whereas 'suspension' carries the more accurate implication that performance is not properly called for while a particular state of affairs pertains.

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?

4. Alternatively, are other approaches canvassed in recent judicial decisions to be preferred?

(Paragraph 2.15)

Comments on Questions 3 and 4

Our view is that DCFR's formulation does not appear to present any materially greater degree of clarity as to the meaning and scope of mutuality than the way in which that concept is currently described in Scots law. In particular, we think that the phrase 'it is so clearly connected' in the DCFR formulation would give rise to ample room for doubt, and thus to the development of further case law on the meaning of the phrase, resulting in a jurisprudence no more, and quite possibly less, advantageous than that which we presently have.

We do not consider that the law at present is particularly unclear, or indeed that it is capable of restatement without losing something of its current essence. We consider that *McNeill v Aberdeen City Council (No 2)* was decided in the particular context of employment contracts, and does not introduce any material doubt on the nature of the general concept of mutuality.

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)

Comments on Question 5

For the reasons set out in *Inveresk plc v Tullis Russell Papermakers Ltd*, we consider that mutuality should remain capable of stretching across more than one contract.

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)

Comments on Question 6

Yes. We consider that simply because Party A is in breach of contract does not mean that it is not entitled to treat any part of the contract as remaining in full force and effect. If the contrary was the case, a great deal of unnecessary practical complication would be introduced into the law.

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)

Comments on Question 7

Although we are not persuaded of the need or of the likely utility of a general statutory restatement, and are therefore not in favour of it, we do consider that if it is to be undertaken, then it should provide for a creditor to be entitled to withhold performance as a response to non-performance by the debtor. We would note, however, that considerable detail would require to be overlaid on that basic concept.

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)

Comments on Question 8

(a) Although we entirely recognise the need for some threshold level of significance to be reached before non-performance could justify the deployment of retention or another withholding remedy, we do not consider that use of the inherently uncertain concept of 'materiality' in a restatement in this connection would represent an improvement on the current state of the law.

We would further note that we do not readily recognise the suggestion that the current law leaves open to serious question whether or not, in order to justify retention, a breach of contract must be material to the same degree that it must be to justify rescission. We agree, rather, with McBryde's views in this regard, as outlined in paragraph 2.30 of the Discussion Paper.

(b) If there is any general restatement, we naturally consider that it should provide that the courts should have power to deal with abusive or oppressive use of the concept of retention, while at the same time making it clear that it is not merely a remedy to be made available in the exercise of a judicial discretion.

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)

Comments on Question 9

We agree that the subject of 'special retention' falls outwith the scope of remedies for breach of contract. We do not therefore consider that it should form part of any legislation on remedies for breach of contract.

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)

Comments on Question 10

Although we do not consider that the currently common phrase "anticipatory breach" is particularly unclear, 'anticipated breach' seems to us to be an equally apt description of the concept if the re-naming of things is thought in itself to be a worthwhile exercise.

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?

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)

Comments on Questions 11 and 12

We agree it is desirable to distinguish between the concepts of anticipatory (or anticipated) breach and material breach. However, we do not agree that describing the consequence of both types of breach as a repudiation of the contract is either confusing or misleading. 'Repudiation' accurately describes the potential legal consequence of both of these types of breach.

What we do think is that the description of a breach of contract as "repudiatory" may imply that the subjective intention of the party in such breach as to the future of the contract as a whole has more significance in the characterisation of the breach than is in fact the case. We therefore think that there is merit in describing a breach of sufficient significance to entitle the innocent party to end the contract by some more neutral word, such as "fundamental" or "essential" breach.

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)

Comments on Question 13

If a statutory restatement is to be pursued, then we agree that a principle as formulated above ought to form part of it.

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?

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)

Comments on Questions 14 and 15

If reform is to pursued on this point, then we do not consider it likely that suitable cases for reform by the judicial route will come before the courts sufficiently regularly to justify postponing such reform being taken forward by legislation.

However, we do not believe that the Commission's 1999 recommendation is a better solution to the problem than the present state of the law. It is our view that the phrases '*reasonable substitute transaction*' and "*performance would be unreasonable*" are difficult to reconcile with the fundamental principles of the law of contract, and would enable a creditor to be deprived of the right to perform and be paid by reference to far too low a bar. A criterion partaking far more closely of the concept of nimiety, rather than mere unreasonableness, should be used.

In summary we consider the following:

- We have no particular issue with the law as it currently stands;
- However, if it is thought that this matter should be reformed, then we think that there would be little point in waiting for *AMA* to be developed by the Courts.

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)

Comments on Question 16

We are not convinced that there is a problem to be solved here; on the contrary, we think a formulation of this kind in a statutory restatement would create problems which do not currently exist.

The introduction of such concepts as "concerns" as to the likelihood of performance, "indications of the debtor's unwillingness … to perform" or "adequate assurance of performance" into any statutory restatement would unnecessarily complicate this area of law. We think that a party who regretted a bargain it had made might be tempted, and in many cases would be able, to find sufficiently specious material to manufacture "concerns" about the other party's likely performance and present ultimatums designed unjustifiably to bring a contract to an end. We do not consider that the mischief at which this suggestion appears to be aimed, namely that one party may be locked for a time into a contract which it is convinced will not ultimately be performed by the other party, is sufficiently great in practical terms to justify the pendulum being swung as far in the opposite direction as the suggestion would in our view effect.

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)

Comments on Question 17

(a) We consider that the word 'terminate' is too vague to adequately replace the current import of the word 'rescission'. We do not consider that there is anything to gain by replacing the word 'rescission'. Although we acknowledge that there may be an extremely technical use of the word 'rescission' in the context of contracts voidable *ab initio* – as per paragraph 4.3 of the Discussion Paper – we do not recognise it as a term which is at all commonly used in those specific circumstances in practical terms, and we think that those who do use it in that context already know exactly what concept they are talking about. We therefore do not think that the possibility of widespread confusion arising out of that technical use is at all realistic.

(b) We likewise do not have a real issue with the word 'resile'. We do not consider that that part of the legal profession likely to use the word is under any misapprehension as to its true meanings. However, we can see a moderate case for the argument that the use of the single word 'resile' to denote both the notion that a party is able to declare that he is not bound by an improperly constituted obligation, and also to denote the separate notion that he is ceasing to treat as continuing to bind him an obligation which, according to its own terms, he may so treat, may be potentially confusing to someone unfamiliar with the law of contract. We would, therefore, have no particular objection to the word 'resile' being confined to the first situation, and the word 'withdraw' being used in the second.

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)

Comments on Question 18

We agree that 'fundamental breach' would be a helpful way to describe a breach justifying termination of the relative contract. There is good sense in having adjectives to apply to breaches which distinguish those which merely justify retention and those justifying rescission. 'Material breach' and 'fundamental breach' would appear to us to do those respective jobs sensibly.

19. Should persistent non-material breaches be treated as a breach justifying termination?

(Paragraph 4.16)

Comments on Question 19

Not as such. We accept that there may well be situations where one party to a contract consistently commits breaches, in themselves non-material, which nonetheless, objectively viewed, do manifest an intention not to perform the contract according to its terms. In that situation, we consider that the present law already allows for the recognition of an overarching repudiatory breach. We do not consider that any widening of the current law in this respect has been shown to be justified.

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)

Comments on Question 20

We do not consider that such a right should form part of any statutory restatement, because we consider that, except in those (comparatively rare) cases where the parties have themselves recognised the severability of obligations, it would involve the court recasting the contract which the parties have agreed to, and having to do so by reference to considerations which the parties themselves may or may not have regarded as significant.

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)

Comments on Question 21

If there is to be a general restatement, then we agree there should be provision for a creditor to terminate the contract within a reasonable time after fundamental non-performance by the debtor.

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)

Comments on Question 22

(a) We consider there should be no question of termination *in pectore*, and that a requirement on the creditor to provide notification of termination to the debtor is therefore appropriate and necessary; and

(b) in principle we have nothing against the law specifying the prospective effects of termination, but in practice would require to know what those effects would be specified as being, before being able to comment meaningfully on the substance of the question.

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?

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

(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)

Comments on Questions 23 and 24

23. We do not consider that the law should provide for a general mechanism whereby a non-material breach could be transformed into a fundamental breach by way of an ultimatum procedure. That procedure may be appropriate in certain (relatively limited) kinds of contract, but not as a matter of generality. We refer to our answer to question 19 in relation to the repetition of non-material breaches as potentially constituting a fundamental breach.

24. If, however, a general statutory restatement is pursued, then we agree it should have the features identified.

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?

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

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)

Comments on Questions 25 to 27

25. Yes. We consider that the current lack of clarity on this issue in Scots law represents a defect in that law.

26. It does not appear that an answer to this issue is developing with any speed in Scots law, so some statutory formulation would be helpful. We agree that there should clearly be a concept of reciprocal restitution in Scots law. If the choice is reformulation along the DCFR lines (III. 3.510) on the one hand, or waiting for jurisdictional development on the other, we would be in favour of statutory formulation in similar terms to the DCFR. We consider that the expressions used in the DCFR formulation could be improved somewhat, but that in substance they represent the best solution reasonably available.

27. No, we consider such development to be unlikely to occur, or at least to produce definitive results, in the short to medium term.

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?

29. Do consultees have any information or data about the use of this remedy in a consumer context?

(Paragraph 5.7)

Comments on Questions 28 and 29

28. We do not consider that a price reduction remedy along the lines of that provided in those sections of the 2015 Act should be provided for non-consumer contracts in general. In our view, such a remedy would amount to an undue interference with the freedom of contract. Price reduction is something that the parties can provide for themselves, if they wish.

29. We have no information or data about the use of price reduction in the consumer context.

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?

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

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?

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?

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?

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)

Comments on Questions 30 to 35

30. (a) We consider that a debtor is normally already entitled to cure a failure in performance where performance is still possible within any relevant time limit imposed by the contract, provided that the creditor has not validly exercised a right to rescind the contract by the time performance is re-tendered. In that regard, we observe that, prior to expiry of any relevant time limit, it is difficult to see how there could be "non-performance" unless there had been an unequivocal indication of an intention not to perform, which would amount to a repudiatory breach.

30. (b) It is not entirely clear whether this question is intended to relate to a breach before or after the expiry of a contractual time limit. As a matter of generality, we do not consider that a debtor should have a right to carry out a cure of prior non-performance either where that non-performance is prior to the expiry of a time limit and accompanied by an unequivocal indication that there is no intention to perform further, or where a relevant time limit imposed by the contract has expired.

31. We consider that the answer to this question is closely related to the answer to question 30. In broad terms, we consider that a breach of contract by the debtor should trigger rights on the part of the creditor to exercise appropriate remedies. We consider that the possibility of cure is relevant to the question of materiality of the breach and therefore to the extent of the creditor's rights, but we do not consider that a breach of contract by the debtor should trigger rights on the part of the debtor. It follows that we consider that if the failure by the debtor is such as would under the existing law entitle the creditor to terminate the contract, then the debtor should not be entitled unilaterally to cure the failure.

32. As a matter of generality, we consider that a breach of contract by a debtor should give rise to rights on the part of the creditor, not the debtor. If, however, the debtor does have a right to cure (either because of a new right arising from a statutory restatement of the law or arising from agreement between the parties), then the creditor should not be entitled to terminate the contract during such time as the debtor has been permitted to effect a cure. However, the creditor ought to be entitled to withhold its own performance until such time as the debtor has provided performance conforming to the contract. Until then, the creditor's obligation to make payment does not arise.

33. We consider that in most circumstances a debtor should have an obligation to take back a replaced item and that the creditor should not have to pay for use made of that item. However, the generality of the question may mask difficulties. Consideration would have to be given to whether the operation of a rule in such general terms might give rise to

disproportionate prejudice or advantage to one party or the other to the contract. For example, the original item might have been incorporated into some greater installation in such a way that it could not be removed without great expense.

34. We consider that there would be no other course open to the creditor in the circumstances envisaged, which appear to be that there has been a breach by the debtor and a failure to cure it within a reasonable time. In our view, this question highlights the scope for disputes in the proposed rule under consideration and the shift of rights in favour of the party in breach if it were enacted, all of which we consider to be questionable in policy terms.

35. (a) The phrases "reason to believe" and "in accordance with good faith and fair dealing" are vague and could not in our view sensibly form the basis of any new rule. To some extent this question acknowledges that the rule under consideration would result in a material shift in rights from creditor to debtor unless it was subject to meaningful controls on the part of the creditor.

35. (b) Again, the suggested formulation uses vague phraseology, and acknowledges the material shift in rights from creditor to debtor that might be involved in creating a right to cure.

35. (c) We would be surprised if any respondent to the consultation would be prepared to say that a creditor should be obliged to accept a cure if it would in some meaningful sense be "inappropriate" to do so.

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)

Comments on Question 36

36. We consider that a right to cure in line with the specific remedy of repair and replacement afforded to consumers by the Consumer Rights Act 2015 should not be made available more generally. In the first place, as a matter of generality, non-consumer contracts are likely to be more complex than consumer contracts. As such, we do not think remedies specifically designed for the consumer setting should necessarily be transposed into the non-consumer setting. Secondly, we do not see that the right would add anything to the substantive remedies already available to the creditor at common law.

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?

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)

Comments on Questions 37 and 38

37. Again, we do not consider that the terminology currently in use, (in this case, "specific implement" and "specific performance") causes any problems of comprehension in practice amongst those likely to be discussing the subject matter in the first place. We do not, therefore, consider that any case for changing these well-known and well-used phrases has been persuasively made out.

38. If, contrary to our views, there is to be a change in current terminology, we think that "performance order" is likely to prove as convenient a neologism as any other that might be invented.

39. Are consultees aware of any issues arising in relation to actions for payment that we should consider at this time?

(Paragraph 6.14)

Comments on Question 39

39. We are not aware of any such issues.

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

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?

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?

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

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*?

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)

Comments on Questions 40 to 45

40. Yes. Although very rarely resorted to in practice, civil imprisonment for wilful refusal to comply with a decree *ad factum praestandum* is a necessary and appropriate option for what is, to all intents and purposes, a contempt of court.

41. Yes, wilful refusal to comply with an order *ad factum praestandum* and breach of interdict seem to us to be instances of contempt of court which are mirror images of each other, and which ought therefore to occupy the same field in terms of the available period of imprisonment.

42. Civil imprisonment does not address the right of the creditor in the obligation which is not being performed to have that obligation performed, and if he can be put in that position by some other order which the court can effectively make, then the power to make that order should be (and we believe is) available to the court. However, since civil imprisonment is, in our view, primarily something directed at the debtor's contempt of court as manifested by his wilful refusal to obey an order of the court, we doubt that the court's power to make equitable orders to assist the disappointed creditor should be regarded as an alternative to the power civilly to imprison the debtor, or otherwise to punish him. The fact that the creditor has otherwise obtained satisfaction might be taken into account in reducing the period of imprisonment, but the power to imprison in addition to making an order to satisfy the creditor should remain, for the public interest in the maintenance of law and order rather than the private interest of the creditor.

43. We think that it would be preferable in most circumstances to order the debtor in the first instance to do that which he has promised the creditor he will do, and only upon a failure of such performance to consider possible alternative orders designed to achieve something similar; to present the debtor at once with such alternatives does not seem to us to sit comfortably with the role of the courts in upholding and enforcing, rather than in rewriting, contracts. However, there may be particular cases, as where the debtor makes it clear from the outset that he will not be performing even if ordered by the court to do so, where the alternative could sensibly be made clear in the first instance.

44. We find it difficult to see that it would be appropriate to specify in advance a penalty to be imposed for wilful failure to comply with a decree *ad factum praestandum*, firstly because that may be perceived by the debtor as presenting him with a valid choice, or as in effect pricing non-compliance, which is not how an order *ad factum praestandum* ought to be perceived, and secondly because the appropriate penalty for wilful failure to obey an order of court depends on the precise circumstances of the failure, which are unlikely to be known at the time the order to perform is made.

45. Any penalty for failure to comply with an order of court should be payable to the state.

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?

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?

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?

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)

Comments on Questions 46 to 49

46. We do not consider that the current law suffers from any significant *lacunae* in means of enforcement of non-monetary contractual obligations, and therefore think that any reform would essentially be one of form rather than substance. As with other views we have expressed elsewhere in this document, we see no real merit in formal change for its own sake.

47. We agree that securing, so near as may be, performance of the relevant obligation should be the guiding principle of any reform.

48. Neither. A truly general judicial discretion would be inconsistent with the guiding principle just mentioned; a statutory "pecking order" of remedies would be unlikely to be capable of being applied to greatest effect in every case. What is called for is a restricted judicial discretion within the constraints of the guiding principle.

49. We agree that an expressly illustrative and non-exhaustive list of potential remedies which might secure the implementation of the guiding principle could prove useful in the event of reform along the lines indicated.

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?

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?

52. If so, what exceptions should be allowed?

(Paragraph 7.13)

Comments on Question 50 to 52

50. (a) We consider that a statutory restatement is not required, but if, contrary to our view, there is to be a statutory restatement, then it should make plain that damages are essentially compensatory in nature. We consider that even gain-based damages (discussed elsewhere in this Response) have at their heart compensation; the difficulty in such cases is being unable to measure the loss satisfactorily on any traditional basis.

(b) We consider that the description of the purpose of an award of damages being to put the creditor in the position that it would have been in had the contract been fully performed ought indeed to be the guiding principle.

(c) We consider that providing that losses which are not reasonably foreseeable at the time of contracting are irrecoverable is a satisfactory way of phrasing the test for remoteness. As is recognised in the Discussion Paper, it may not entirely replicate the existing law, but it reflects common albeit slightly inaccurate usage among practitioners and, in any event, the existing law is probably over-complicated.

(d) In broad terms we consider that it would be appropriate to provide that damages may be reduced to the extent that the creditor unreasonably fails to minimise its loss. However, we wonder whether it is quite right to talk of damages being "reduced". We think it may be more accurate to say that any loss that could have been avoided by taking reasonable steps to mitigate cannot be recovered. That may simply be semantics but given what we have to say about contributory negligence it may be appropriate to consider the wording of this provision quite closely.

(e) We consider that it would be appropriate to provide that damages are to be measured in the currency most appropriately reflecting the creditor's loss.

51. We consider that it is open to doubt whether there really is a "breach date rule" and we consider that, even if there is, it is now subject to so many exceptions as to be effectively meaningless as a "rule".

There are certainly many cases where it is appropriate to assess loss as at the date of the breach. However, it seems to us that an inflexible or even a presumptive "breach date rule" does little to implement the guiding principle identified earlier, and may in fact obstruct it.

52. For the reasons set out in answer to question 51, we consider that any statutory

restatement ought not to include a "breach date rule" with exceptions. We consider that it would be almost impossible to identify a comprehensive list of exceptions. It might be possible to make provision for a "breach date rule" to apply except where that did not in fact put the creditor in the position it would have been in if the contract had been performed. However, it seems to us that that simply serves to highlight the fact that, if it exists at all, the "breach date rule" is merely one way of giving effect to the guiding principle.

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?

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)

Comments on Questions 53 and 54

53. We consider that, subject to rules on remoteness and other rules, damages should be (and are) recoverable for non-patrimonial losses. We are, however, of the view that careful consideration needs to be given to what constitutes "loss" or "harm" in these cases.

In our experience, claims for non-patrimonial loss are generally advanced either as very small parts of larger overall claims or as low value alternatives to much larger claims quantified on other bases. The cases where such losses are claimed independently tend to be in circumstances where the loss is already a well-recognised head of claim, such as where damages are claimed for a ruined holiday. Perhaps in contrast to what is said in the Discussion Paper, we consider that there has actually been reasonable development in this area since the last Report in 1999. For example, in *Mack v. Glasgow City Council* 2006 SC 543, which built on the decision in *Wilkie v. Brown* 2003 SC 573, there was discussion about "inconvenience" as a head of claim. In our experience that is now routinely discussed in the Sheriff Court as a head of claim in actions for damages for breach of contract.

We consider that the present law enables courts to make appropriate awards in appropriate cases, and that such awards are made in the Sheriff Court on a relatively frequent basis. We remain of the view that the law is evolving and developing, and that there is no compelling reason for statutory intervention at this stage.

54. We consider that care should be taken here.

We would be concerned about introducing a general entitlement to damages for "loss of satisfaction of obtaining a contractual benefit" without proof of any more tangible patrimonial or non-patrimonial loss. In our view, the courts can and do award damages for non-patrimonial loss in appropriate cases, such as the case of the bride and groom left without photographs of their wedding, or the holiday-makers provided with inferior facilities. Similarly, we think that the courts already award damages for pain, suffering, and mental distress in appropriate cases.

If, contrary to our view, there is to be a statutory restatement, then these heads of loss

should be included, but care should be taken to ensure that they are only available in cases where they do amount to genuine loss or harm.

Chapter 8 Gain-based damages

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

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)

Comments on Questions 55 and 56

55. We consider that there are cases in which adequate compensation for breaches of contract cannot be given other than by way of resort to reasonable fee awards, and that such awards should therefore be available in principle in the law of Scotland. We observe that it is by no means obvious to us that Scots law would not already allow such an award of damages in a suitable case. We are aware of a recent breach of restrictive covenant case on the commercial roll of the Court of Session in which an award of damages on that basis was sought, but which did not proceed to judicial determination.

56. (a) We consider that the circumstances in which such an award of damages ought to be available are those in which *Wrotham Park* damages are available in England, namely where a creditor would find it difficult or impossible to establish a right to substantial damages by the application of more familiar principles of the assessment of damages, and that situation is productive of plain injustice, in the sense that it would undercompensate the creditor and have the practical effect of rewarding the debtor for his breach. We do not consider that such a test is too nebulous to be useful.

56. (b) Again, we consider that the sort of hypothetical exercise carried out in English law, proceeding on the basis of a notionally-willing buyer and seller, and supported by whatever evidence may be available from the market in question (if any) should inform the answer to the question of what is just compensation for the creditor in all the circumstances. We consider that the interests of the debtor as the contract-breaker should carry much less weight in the assessment exercise than those of the creditor.

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?

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?

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.

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)

Comments on Questions 57 to 60

57. Yes, but only in the exceptional circumstances set out below.

58. (a) No, this approach to the assessment of damages should be the exception rather than the rule.

(b) Yes – we deal with the particular conditions which we think appropriate in response to the next question.

59. (a) No – given the general availability of the remedy of specific implement (or interdict) in Scots law in the context of contractual obligations, we do not think that such a condition would be meaningful in this jurisdiction.

(b) Yes – we consider this to be the key consideration in allowing for the possibility of an award of damages requiring a debtor to disclose his profit.

(c) We agree that some mode of distinguishing cases where *Wrotham Park* damages are suitable from cases where *Blake* damages are suitable is required. We also agree that the first stop after "traditional" damages have been considered and rejected as insufficient compensation for the creditor ought to be *Wrotham Park* damages and that *Blake* damages should only be considered after *Wrotham Park* damages have been rejected in turn as representing insufficient compensation. We do not agree, however, that the criterion that no reasonable creditor would have consented to the breach in exchange for a reasonable fee is an apt one to impose as a precondition to the availability of *Blake* damages. We see all of these approaches to an award of damages as being essentially compensatory in nature, and the guiding principle ought therefore in our view to be a consideration of whether the creditor

has in all the circumstances received adequate compensation for the breach by the deployment of a particular mode of assessing damages, coupled with a consideration of whether the debtor is being rewarded for his breach.

60. We would be reluctant to see stipulated any further condition beyond that identified in answer to question 59(b) as amplified in answer to question 59(c).

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)

Comments on Question 61

61. No. We agree with the approach adopted by the DCFR, that issues of transferred loss should be dealt with by the original contracting parties if they see fit, not by any general legal rule in favour of such claims.

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?

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)

Comments on Questions 62 and 63

62. We have already indicated that we do not consider that the law should make any positive provision to deal with transferred loss. That said, if there is to be such provision, then it makes sense for the third party which has suffered the loss to be able to recover it directly from the debtor, rather than having to rely on (or compel) the creditor to assist it.

63. Again, in the context that we do not consider that transferred loss claims should be the

subject of a general positive legal rule:

(a) Consistently with our inclination against transferred loss claims, we consider that reasonable foreseeability is too low a threshold to enable the recovery of damages by a third party, and that actual knowledge at the time of contracting of the prospect of loss being suffered by a third party is a more appropriate criterion.

(b) We agree that each party suffering loss should be able to recover its own loss, and only its own loss.

(c) We would prefer that any statutory provision dealing with transferred loss should clearly state as a rule of law that double recovery is not permissible.

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?

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)

Comments on Questions 64 and 65

64. In the context that we do not consider that transferred loss claims should be the subject of a positive general legal rule:

(a) If the concept of transferred loss is to be statutorily recognised, we do not see any reason in principle why it should or could properly be restricted to property transfer cases.

(b) We refer to the response just stated.

(c) We have already indicated that we consider reasonable foreseeability to be too low a threshold for the allowance of transferred loss claims – see response 63(a).

65. Since we do not consider that any statutory recognition of transferred loss could properly be restricted to property transfer claims, this question does not in our view arise; any statutory recognition should be applicable from the outset to a wider category of claims than those involving property transfers.

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

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)

Comments on Questions 66 and 67

66. In the context that we do not consider that transferred loss claims should be the subject of a positive general legal rule:

(a) We agree that any contractual provision clearly intended to be a substitute for any statutory right to recover transferred loss should be allowed to govern the situation it contemplates.

(b) We agree that any statutory rule should be a default one only, so that parties to a contract could agree expressly (or, in our view, by clear implication) that it is not to apply to that contract.

(c) As in response 66 (a), we think that any contractual provision clearly intended to be a substitute for any statutory right to recover transferred loss should be allowed to govern the situation it contemplates, and that that would include contractual provisions as between the debtor and the third party.

67. (a) If there is to be statutory recognition of transferred loss as a general incident of the law of remedies for breach of contract, then we consider that the availability of such a remedy should be regarded as taking precedence over (and indeed excluding) other potential non-contractual varieties of remedy. It follows that the potential existence of other such remedies should not come in the way of a statutory transferred loss remedy.

(b) We do not consider that the possibility of an assignation of the creditor's claim should prevent the availability of a transferred loss claim which would otherwise exist in terms of any statutory provision. Assignation does not deal with the same legal problem as the transferred loss concept.

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

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

(Paragraph 9.68)

Comments on Questions 68 and 69

68. Yes, we consider generally that the ability of a third party to sue on a contract to which he is not a party should be a matter for agreement by the original contracting parties. That is essentially why we are against the introduction of a positive general legal rule dealing with transferred loss cases. It follows that we consider that any more extensive right for a third party to sue for all sorts of remedies on a contract to which he is not a party would be contrary to principle and would represent a considerable innovation, not simply on the law of contractual remedies, but on the very question of what a contract actually is in our legal system.

69. It follows from the preceding response that we do not consider that this question arises.

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)

Comments on Question 70

70. We consider that the circumstances envisaged by the question would not, in any event, amount to a breach of contract entitling the other party to exercise any remedy for non-performance. Subject to that observation, however, we cannot foresee any particular difficulty in making that provision.

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)

Comments on Question 71

71. We consider that a defence of contributory negligence should not generally be available in claims for damages for breach of contract.

We agree that there is no binding Scottish authority on the application of contributory negligence to breach of contract. However, in our experience the approach in *Forsikringsaktieselskapet Vesta v. Butcher* is followed, and we have little doubt that the approach in that case would be adopted were the matter to come before the Inner House.

We consider that the approach in that case was a principled one, which recognised that in general breach of contract is not dependent upon a characterisation as innocent, negligent, reckless or deliberate. We consider that, where the debtor's liability arises from a contractual obligation that is not expressed in terms of taking care (so-called category 1 cases), the concept of contributory negligence ought not to be used to reduce damages. In our view, to do so would in effect amount to the court re-writing the parties' contract by allocating risk according to what a particular judge thought was "just and equitable". We think that the parties are best placed to allocate risk among themselves.

The distinction between so-called category 3 cases (where there is concurrent liability in contract and delict) and so-called category 2 cases (where the contractual obligation was expressed in terms of taking care but did not correspond to a common law delictual duty to

take care) was driven by the wording of the Law Reform (Contributory Negligence) Act 1945. We can see that, free of the constraints of the wording of the 1945 Act, there might be room for extending the concept of contributory negligence to category 2 cases. However, we consider that that should probably be done as a matter of construction of the individual contract rather than by application of a general rule of law. In other words, in those cases contributory negligence ought to be available if either the parties expressly agreed that it was or if it can be presumed to have been their intention that it be available.

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)

Comments on Question 72

(a) Yes. If general default rules for contract are to be progressed, we consider that specific legislation dealing with certain types of contract and remedies should take precedence and should not be affected by the general contractual statutory regime.

(b) Yes, a general principle of freedom to contract other than in specific types of contract such as the law already closely regulates should be protected.

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)

Comments on Question 73

(a) Yes.

(b) Yes.

(c) (i) Yes – it is inherent in the concept of election that a party has made its final choice;

(ii) No. Provided there has been no election in terms of substantive rights, vacillation of remedy should be allowed. We do not consider that this would unduly prejudice the party in

breach.

74. If a general statutory restatement is pursued, should it extend to unilateral voluntary obligations?

(Paragraph 11.12)

Comments on Question 74

We do not consider that unilateral voluntary obligations should be included if a general statutory restatement of the law on remedies for breach of contract is pursued. We consider that those obligations differ in nature from contractual obligations to such an extent as to render their inclusion in a general codification of the law of contractual remedies undesirable. A separate code would be required.

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;

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

(Paragraph 11.22)

Comments on Question 75

(a) We agree it would be unnecessary, and indeed undesirable, to refer to a general requirement of good faith.

(b) We would require further clarification as to which remedies are thought to be 'particular remedies where the concept of good faith is relevant' before being able to answer this question meaningfully.

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

77. If so, should it be possible to give notice orally?

(Paragraph 11.25)

Comments on Questions 76 and 77

76. We do not consider that a general statutory restatement should include default provisions about notices. This is a separate and ancillary matter which is best left to the common law, or at least to separate legislation about notices generally, not limited to the

contractual notice situation.

77. If a general statutory restatement is to be pursued, we agree that it should be possible to give notice orally. Some contracts, particularly but not exclusively in the financial services sector, require to be and are performed so quickly that nothing other than oral notice would be workable.

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?

(paragraph 11.29)

Comments on Question 78

We do not consider that there should be a general statutory restatement. However, if there is, all contractual remedy issues (with the exception of matters identified above as positively unsuitable for inclusion) should be included in the "Contract Remedies Code".

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)

Comments on Question 79

We refer to our comments at Question 78. We do not consider that a general statutory restatement is required, or that, if enacted, it would be likely to represent in practice an appreciable improvement on the current state of the law.

General Comments

We do not have any further comments

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.