House of Lords

Farley *v* Skinner

[2001] UKHL 49

2001 June 18, 19, 21; Oct 11

Lord Steyn, Lord Browne-Wilkinson, Lord Clyde, Lord Hutton and Lord Scott of Foscote

Damages — Contract — Breach — Plaintiff instructing surveyor to report whether property affected by aircraft noise — Surveyor negligently reporting that property unlikely to be affected — Plaintiff purchasing property — Property substantially affected by aircraft noise — Plaintiff deciding not to move — Provision of amenity not sole object of contract and not subject of guarantee by surveyor — Whether plaintiff entitled to damages against surveyor for loss of amenity

The plaintiff, who was considering buying a house in Sussex some 15 miles from an airport, engaged the defendant as his surveyor. He specifically asked the defendant to investigate, in addition to the usual matters, whether the property would be affected by aircraft noise, telling him that he did not want to be on a flight path. The surveyor reported that he thought it unlikely that the property would suffer greatly from aircraft noise. The plaintiff bought the property. Before moving in he spent a considerable sum on modernisation and refurbishment. After moving in, he discovered that the property was substantially affected by aircraft noise. He decided, however, not to sell. On his action against the defendant for damages, the judge found that the defendant had been negligent and that if he had carried out his instructions properly the plaintiff would not have bought the property. He found that the purchase price paid by the plaintiff coincided with the market value of the property taking the aircraft noise into account so that the plaintiff's claim for diminution of value failed. As to non-pecuniary damage, he found that the plaintiff was not a man of excessive susceptibilities but found the noise a "confounded nuisance". He had been entitled not to move and should not be penalised for not having done so. The judge awarded him £10,000 for discomfort. The Court of Appeal by a majority allowed the defendant's appeal.

On appeal by the plaintiff—

Held, allowing the appeal, that although general damages could not in principle be awarded in respect of a plaintiff's state of mind caused by the mere fact of a contract being broken they could be awarded in respect of his disappointment at loss of a pleasurable amenity that was of no economic value but was of importance to him in ensuring his pleasure, relaxation or peace of mind, and the principle was not confined to physical inconvenience or discomfort; that it was sufficient if the provision of the amenity had been a major or important part of the contract rather than its sole object and it was immaterial that the defendant had not guaranteed achievement of a result but merely undertaken to exercise reasonable care in achieving it; that the defendant's obligation to investigate aircraft noise had been a major or important part of his contract with the plaintiff and the judge had been entitled to award the plaintiff damages for the significant interference with his enjoyment of the property caused by the noise and consequent on the defendant's breach of contract; and that the plaintiff had not forfeited his right to damages by not moving house (post, paras 24, 25–27, 32, 37, 39, 41, 42–43, 44–45, 50–51, 53, 55–56, 79, 85–87, 101, 105–108, 111).

Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344, HL(E) and *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 applied.

Watts v Morrow [1991] 1 WLR 1421, CA considered.

Knott v Bolton (1995) 11 Const LJ 375, CA overruled.

Decision of the Court of Appeal [2000] Lloyd's Rep PN 516 reversed.

The following cases are referred to in their Lordships' opinions:

Addis v Gramophone Co Ltd [1909] AC 488, HL(E)
Bailey v Bullock [1950] 2 All ER 1167
Broome v Cassell & Co Ltd [1972] AC 1027; [1972] 2 WLR 645; [1972] 1 All ER 801, HL(E)
Cook v Swinfen [1967] 1 WLR 457; [1967] 1 All ER 299, CA
Czarnikow (C) Ltd v Koufos [1969] 1 AC 350; [1967] 3 WLR 1491; [1967] 3 All ER 686, HL(E)
Diesen v Samson 1971 SLT (ShCt) 49
Hadley v Baxendale (1854) 9 Exch 341
Hamlin v Great Northern Railway Co (1856) 1 H & N 408
Hayes v James & Charles Dodd [1990] 2 All ER 815, CA
Heywood v Wellers [1976] QB 446; [1976] 2 WLR 101; [1976] 1 All ER 300, CA
Hobbs v London and South Western Railway Co (1875) LR 10 QB 111
Jackson v Chrysler Acceptances Ltd [1978] RTR 474, CA
Jackson v Horizon Holidays Ltd [1975] 1 WLR 1468; [1975] 3 All ER 92, CA
Jarvis v Swans Tours Ltd [1973] QB 233; [1972] 3 WLR 954; [1973] 1 All ER 71, CA
Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E)
Knott v Bolton (1995) 11 Const LJ 375, CA
Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL(Sc)
McAlpine (Alfred) Construction Ltd v Panatown Ltd [2001] 1 AC 518; [2000] 3 WLR 946; [2000] 4 All ER 97, HL(E)
Perry v Sidney Phillips & Son [1982] 1 WLR 1297; [1982] 3 All ER 705, CA
R v Investors Compensation Board, Ex p Bowden [1994] 1 WLR 17; [1994] 1 All ER 525, DC
Robinson v Harman (1848) 1 Exch 850
Ruxley Electronics and Construction Ltd v Forsyth [1994] 1 WLR 650, CA; [1996] AC 344; [1995] 3 WLR 118; [1995] 3 All ER 268, HL(E)
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528; [1949] 1 All ER 997, CA
Wapshott v Davis Donovan & Co [1996] PNLR 361, CA
Watts v Morrow [1991] 1 WLR 1421; [1991] 4 All ER 937, CA

The following additional cases were cited in argument:

A B v Tameside & Glossop Health Authority [1997] 8 Med LR 91, CA
Alexander v Rolls Royce Motor Cars Ltd [1996] RTR 95, CA
Baltic Shipping Co v Dillon (1993) 176 CLR 344
Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191; [1996] 3 WLR 87; [1996] 3 All ER 365, HL(E)
Bliss v South East Thames Regional Health Authority [1987] ICR 700, CA
Branchett v Beaney [1992] 3 All ER 910, CA
Brown v Waterloo Regional Board of Comrs of Police (1982) 136 DLR (3d) 49
Groom v Crocker [1939] 1 KB 194; [1938] 2 All ER 394, CA
Hicks v Chief Constable of the South Yorkshire Police [1992] 2 All ER 65, HL(E)
McCall v Abelesz [1976] QB 585; [1976] 2 WLR 151; [1976] 1 All ER 727, CA
Verderame v Commercial Union Assurance Co plc [1992] BCLC 793, CA
Warrington v Great-West Life Assurance Co (1996) 139 DLR (4th) 18
Wood v Law Society The Times, 2 March 1995; Court of Appeal (Civil Division) Transcript No 246 of 1995, CA

APPEAL from the Court of Appeal

This was an appeal by the plaintiff, Graham Farley, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Steyn and Lord Hutton) given on 12 December 2000 from the judgment of the Court of Appeal

(Stuart-Smith, Mummery and Clarke LJJ) on 6 April 2000 by a majority (Clarke LJ dissenting) allowing an appeal by the defendant, Michael Skinner, from the judgment of Judge Peter Baker QC, sitting as a judge of the Queen's Bench Division, on 27 May 1999 ordering that the defendant pay the plaintiff damages of £10,000 with interest and costs.

The facts are stated in the opinion of Lord Steyn.

Martin Spencer for the plaintiff. The plaintiff ought to be entitled to recover damages to compensate him for the fact that his enjoyment of the property is diminished. This right should be independent of whether he is also entitled to recover damages on the usual basis of diminution in the value of the property. The test in *Watts v Morrow* [1991] 1 WLR 1421 covers the situation. The judge found, and was entitled on the evidence to find, that the plaintiff had suffered physical discomfort and inconvenience and so was entitled to damages for it together with the mental distress and anxiety consequent thereon.

The majority of the Court of Appeal considered the question of whether the evidence supported a finding of physical discomfort and inconvenience without first asking themselves the fundamental question of what was meant by that expression. To establish physical inconvenience it is not necessary to show physical injury: see Clarke LJ's analysis [2000] Lloyd's Rep PN 516, 529, paras 60–63; *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 and *Bailey v Bullock* [1950] 2 All ER 1167. The question is whether the plaintiff has suffered real and substantial physical inconvenience as opposed to mere annoyance and injury to feelings: see *Wapshott v Davis Donovan & Co* [1996] PNLR 361. Physical inconvenience and discomfort may well, of course, engender feelings of annoyance; indeed, it is inevitable that this will be the case where, as here, there is no physical injury, but it is not sufficient, and may be positively misleading, to concentrate on the injured party's expression of his feelings in analysing whether he has suffered physical discomfort such as to qualify for damages under this head. The claimant may have been motivated to bring the proceedings by his anger and frustration at the fact that the other party was in breach of contract, but it would be wrong to deprive him of damages in such a case where he has also suffered physical inconvenience and discomfort. There is no logical reason why inconvenience and discomfort arising from noise should be any less physical inconvenience and discomfort than that arising from smell, or from having to walk a long distance, or from having to live in cramped conditions.

Alternatively, this was a contract within the exceptional category in *Watts v Morrow* [1991] 1 WLR 1421 where an objective of the contract is to provide peace of mind and freedom from anxiety. The exceptional category is not confined to contracts to provide pleasure and the like, and it is sufficient that the provision of peace of mind, etc, is the object of a particular part of a contract rather than the whole contract. A rule that it must be "the very object of the contract" would have the effect of allowing recovery in one case and refusing it in another where both were equally meritorious. The key is the communication of a matter of importance and the acceptance of the contract on that basis. *Knott v Bolton* (1995) 11 Const LJ 375 was wrongly decided and should be overruled. [Reference was also made to *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95; *Branchett v Beaney* [1992] 3 All ER 910; *Jackson v Chrysler Acceptances Ltd* [1978]

A RTR 474; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 213; *Heywood v Wellers* [1976] QB 446 and *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297.]

Surveyors' contracts are not excluded by *Watts v Morrow* [1991] 1 WLR 1421. It is too easy and simplistic to define a contract as an ordinary surveyor's contract and exclude damages on that basis: such an argument begs, or excludes, the very question, namely, whether it is or is not an "ordinary" surveyor's contract. By a specific clause or obligation entered into, an ordinary surveyor's contract (in every other respect) may be made into an extraordinary surveyor's contract, not for all purposes, but for the purposes of that particular obligation.

Nor does it matter that the provision in question was part of a wider surveyor's contract, or that the defendant was separately remunerated for the contractual obligation that is said to provide peace of mind. If the defendant's arguments were correct, the plaintiff would succeed if he had asked the defendant to look into the question of aircraft noise but nothing else, employing another surveyor to carry out the duties more commonly associated with the survey of a property, but could not succeed because he had asked him to do both. Such a result is absurd and illogical and shows that this cannot be the law. The absurdity becomes even plainer when it is appreciated that the consequences of such a law can be avoided by the buyer simply entering into separate contracts with the same surveyor.

For present purposes, there is no valid distinction between contracts warranting the production of a certain result and contracts where the obligation is the ordinary one of exercising reasonable skill and care. The distinction is a false basis on which to distinguish *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, which in fact fully supports recovery of general damages in a case such as the present to reflect the "consumer surplus" (see Harris, Ogus and Phillips, "Contract Remedies and the Comsumer Surplus" (1979) 95 LQR 581) and to compensate the plaintiff for the very real loss of having to put up with the noise that he had specifically sought to avoid. The damage sustained by him was within the actual contemplation of the parties, and the test for recoverability should be that laid down in *Hadley v Baxendale* (1854) 9 Exch 341: this was not a commercial contract for profit (so far as the plaintiff was concerned) where the parties must be taken to accept breaches of contract as a fact of commercial life but a consumer contract in which all damages, including damages for mental distress, disappointment, etc, should be recoverable. Nor is the awarding of such damages inconsistent with the general principle in *Addis v Gramophone Co Ltd* [1909] AC 488 that there can be no recovery of general damages for injury to feelings, annoyance and frustration arising from the manner in which a contract (at least, a commercial contract) is broken. As Lord Lloyd of Berwick said in the *Ruxley* case, at p 374C, rather than regarding compensation for the claimant as being a further inroad on the rule in *Addis's* case, it should be regarded as a logical application or adaptation of the existing exception to a new situation. Just as nobody today would seriously argue (compare *Addis's* case) that a contract of employment is no more than a commercial contract entered into by both parties with a view to profit, neither should a surveyor's contract be so regarded, at least where it contains a provision of the kind with which the present case is concerned. The plaintiff was a consumer rather than a

commercial contractor: he was buying the property not as a speculative investment but as his home to live in. [Reference was made to *Johnson v Gore Wood & Co* [2002] 2 AC 1.] Damages for injury to feelings are not in general in the reasonable contemplation of the parties in commercial contracts. [Reference was made to *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518; *McGregor on Damages*, 16th ed (1997), paras 98–99 and *Hayes v James & Charles Dodd* [1990] 2 All ER 815.]

It is difficult to perceive any valid reason of public policy whereby the plaintiff should be deprived of the damages for the very real wrong done to him by the defendant's negligence. If non-professionals can expect to pay damages for negligence or breaches of contract where the damage is reasonably foreseeable and/or in the parties' actual or reasonable contemplation, professionals in general, and surveyors in particular, should not be in any different position. All the policy considerations referred to by Mummery LJ [2000] Lloyd's Rep PN 516, 523, paras 32–35 are matters that judges have to contend with on a daily basis in deciding on damages in cases of personal injury. In any event, policy matters, and any restriction on the recovery of damages where a person is in principle entitled to them, are best left to Parliament. If the approach adopted is that of distributive justice, the plaintiff should be entitled to his damages. The question should simply be whether there was sufficient evidence to justify the judge in making a finding under this head. The Court of Appeal really found that the injury was so trivial as not to sound in damages at all, but there was ample evidence to support the judge's finding.

The threshold as to entitlement to damages may well be objective, but quantum once over the threshold is subjective. The plaintiff, as the judge specifically found, acted reasonably in deciding not to move to get away from the aircraft noise but to stay and "make the best of a bad job". Had he decided to move, the damages would have been substantially greater. The case is in this respect very different from *Watts v Morrow* [1991] 1 WLR 1421. The award of damages was within the band of reasonable awards that the judge could have made for the damage that he found that the plaintiff had sustained. If anything, it was modest and should be increased.

There is no ground that would justify interfering with the judge's exercise of his discretion in relation to costs. He rightly reminded himself that this was an allegation of negligence against a professional man, and he had no indication that there would have been any change of the defendant's attitude to defending the claim had the plaintiff's claim been any smaller. He also rightly took into account the fact that there was no payment into court nor any offer to settle and that the case had been conducted on the basis of a resolute defence to the allegation of professional negligence. The plaintiff was essentially the winning party: he succeeded in proving not only that the defendant had been negligent despite being a professional man but also that he was entitled to damages, albeit not in as great a sum as he had claimed. The order made was well within the judge's discretion, and it would be wrong in principle to interfere with it. The judge was right to refuse leave to appeal on this issue, and the defendant's appeal on this aspect of the case should not be entertained.

Mark Simpson and *Spike Charlwood* for the defendant. The general rule laid down in *Addis v Gramophone Co Ltd* [1909] AC 488 is that damages

A for breach of contract cannot include damages for "mental distress". This umbrella term covers mental suffering, distress, frustration, anxiety, displeasure, vexation, tension and aggravation. It is important to distinguish between two types of distress: distress at the very fact that a promise has been broken and distress at not receiving an expected benefit or at the consequences of the breach. The law in relation to the recoverability of non-pecuniary loss suffered as a result of a breach of contract is, and B should remain, as summarised by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445F–H and endorsed by the House of Lords in *Johnson v Gore Wood* [2002] 2 AC 1. The plaintiff's distress was not consequential on physical inconvenience and discomfort, nor does this case fall within the exception in *Watts v Morrow* [1991] 1 WLR 1421 where the "very object" of the contract is to provide pleasure, peace of mind or freedom from C molestation.

The rationale for the existing law is compelling. At least since *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408, the rule in contract (generally referred to as "the rule in *Addis*") has been that damages for distress are not recoverable. The rule was reiterated in *Hobbs v London and South Western Railway Co* LR 10 QB 111. An exception has developed where the "very object" of the contract is peace of mind or freedom from D distress, that is to say, where there is an express or implied warranty for the provision of a pleasurable amenity. The present case does not fall within the exception, which was established by the "holiday cases", *Jarvis v Swans Tours Ltd* [1973] QB 233 and *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468. Despite what *McGregor on Damages*, 16th ed (1997), para 102 describes as the "downturn" in the law that started with *Bliss v* E *South East Thames Regional Health Authority* [1987] ICR 700, the rule remains, subject only to the narrowly confined "very object" exception. In *Johnson v Gore Wood & Co* [2002] 2 AC 1 Lord Bingham of Cornhill did not regard *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 as undermining the long-established rule: see p 38B–C. That was a correct understanding of the *Ruxley* case. *Johnson v Gore Wood & Co* [2002] 2 AC 1 is indistinguishable in relation to the application of the rule in F *Addis* and the existing exception and inconsistent with the plaintiff's proposed test for liability in this type of case. It is impossible for the plaintiff to say that his was a contract for peace of mind within the "very object" exception, given that Mr Johnson's was not. The more a contract represents a bundle of rights acquired, the less ready the court should be to find that peace of mind was the "very object" of the contract.

G Recovery here would be inconsistent with the general denial of recovery of damages for distress in the tort of negligence. Peace of mind (i e, freedom from distress) has historically not been an interest protected by the law. What is being protected in those cases that derogate from the rule in *Addis* (the "contracts providing pleasurable amenity" cases) is not peace of mind simpliciter, but the consumer surplus, which is an economic interest: see Harris, Ogus and Phillips, "Contract Remedies and the Consumer Surplus" H (1979) 95 LQR 581, 582 et seq. It is right that a developed and principled law of contract should protect such an interest where it is the "very object of the contract". *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 can also be explained in terms of consumer surplus. [Reference was also made to *Mayne, Treatise on the Law of Damages*, 1st ed (1856), p 29;

Warrington v Great-West Life Assurance Co (1996) 139 DLR (4th) 18, 26; *Groom v Crocker* [1939] 1 KB 194; *Cook v Swinfen* [1967] 1 WLR 457; *Heywood v Wellers* [1976] QB 446; *McCall v Abelesz* [1976] QB 585; *Branchett v Beaney* [1992] 3 All ER 910; *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474; *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297; *Verderame v Commercial Union Assurance Co plc* [1992] BCLC 793; *Wood v Law Society* The Times, 2 March 1995; *R v Investors Compensation Board, Ex p Bowden* [1994] 1 WLR 17; *Knott v Bolton* 11 Const LJ 375; *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65 and *A B v Tameside & Glossop Health Authority* [1997] 8 Med LR 91.]

There is a fundamental difference between contracts, professional and otherwise, where the promise is for a result, and contracts where the promise is to use reasonable skill and care. Contracts made by professionals generally fall into the latter category. Damages for loss of peace of mind or the consumer surplus are and should only be available in the former. The distinction between the two categories is particularly clear where, as here, the promise is to use reasonable skill and care to provide information. In a surveyor's contract where the promise is to use reasonable skill and care to provide information, the provision of such amenity is not "the very object" or even "an object" of the contract. To obtain compensation for "mere" lack of consumer surplus the plaintiff should stipulate, and pay for, a warranty, either from the vendor or from the professional. This is fair. The unfairness of treating the professional as warranting the existence of the non-existent amenity in the "information" cases becomes clearer when the assessment of damage is considered more closely. In the present case, the plaintiff paid £425,000 for a property that was affected by aircraft noise. The judge found as a fact that £425,000 was the market value. If, as the plaintiff asserts, the loss of amenity was more than de minimis, that market value will have been adversely affected by the noise. Free of noise, the property would have been worth more. The plaintiff has therefore underpaid for it by the amount that the relevant amenity is worth. If the defendant has to pay damages for lack of that amenity, the plaintiff is obtaining an uncovenanted benefit. The substance of his complaint is that he has suffered the "loss" of a non-existent amenity of which an expectation had negligently been created by the defendant. There is a further problem in relation to information cases where the information provided relates to prospects, rather than certainty, of achieving a certain result.

The above analysis explains the derogation from the rule in *Addis* as summarised in *Watts v Morrow* [1991] 1 WLR 1421. In the cases falling within the derogation, the "very object of the contract" is the provision of a pleasurable amenity, in the sense that the promisor expressly or impliedly warrants that he will provide such amenity and that warranty is the core obligation of the contract. The rule and the exception, recently endorsed in *Johnson v Gore Wood & Co* [2002] 2 AC 1, exist for rational and principled reasons and bring certainty to this area of the law. Neither should be altered. They have been adopted by the High Court of Australia and the Supreme Court of Canada, and similar rules exist in the United States, Scotland and South Africa. The position in New Zealand is less clear.

There are compelling policy reasons why the law should remain as it is: see *Watts v Morrow* [1991] 1 WLR 1421 and *Hayes v James & Charles Dodd* [1990] 2 All ER 815. Reliance on policy does not mean that denial of recovery is unprincipled. The line between principles of law and principles of policy is a fine one. The question that ultimately falls for decision is whether the law should recognise protection from mental distress as falling within the scope of a professional's duty of care. The plaintiff argues that the House of Lords should be cautious of denying a person damages for policy reasons where in principle he is entitled to them. That argument, however, assumes what it seeks to prove, namely, that the plaintiff is in principle entitled to damages. There are compelling reasons for holding that he is not.

In the present climate, expansion of liability for distress to cover cases such as the present would encourage the perception that there is no perceived wrong or loss too trivial to be uncompensatable by professionals. That perception would be detrimental to the relationship generally between professionals and their clients. If the plaintiff recovers distress damages here the implications for claims against professionals are substantial. The plaintiff's case is that such damages should be recoverable, if foreseeable, in all "consumer contracts", i e, contracts that are not "commercial contracts for profit". This would presumably cover all contracts with professionals not made in the course of a business. The price of professional services will inevitably rise. Defensive practices will be encouraged. Professionals' clients will have, in effect, to pay a compulsory insurance premium against the possibility of their own distress or disappointment if the professional is negligent. This is manifestly undesirable and would restrict access to professional services. The warranty route allows individual clients the option of paying more if they particularly require this type of insurance whilst not fettering those who do not require it.

The rule as set out in *Watts v Morrow* [1991] 1 WLR 1421 appears to have led to very little difficulty in interpretation in the past 10 years. Whilst certainty in the law is not an end in itself, replacing the "very object" test with a broad appeal to foreseeability would create unnecessary confusion and might lead the courts to make use of unarticulated policy considerations, concealed beneath the foreseeability test, in an attempt to restrict the number of successful claims.

Further, if, as the plaintiff suggests, breach of a duty of reasonable skill and care in contract is to sound in damages for mental distress, providing only that the distress is foreseeable, it is hard to see why the same rule should not apply in tort in the negligent misstatement cases in which the relationship is "akin to contract", i e, based on a voluntary assumption of responsibility.

The unobservable subjective nature and extent of intangible harm means that it is inherently difficult to prove or to refute: see per Mummery LJ [2000] Lloyd's Rep PN 516, 523, para 34. As Mummery LJ points out, it is a fundamental requirement of a fair and workable litigation system that the outcome of a claim should be reasonably predictable as to both liability and quantum.

If the law remained as set out in *Watts v Morrow* [1991] 1 WLR 1421, and the plaintiff could not bring himself within the exception, the judge misdirected himself in concluding that the plaintiff suffered physical inconvenience and discomfort (which must have been real and substantial),

and the Court of Appeal was right to overrule that finding. In any event, both physical inconvenience and discomfort and mental distress were too remote. The essence of this test is the same in tort. When considering whether a particular type of loss is foreseeable, it is assumed that the claimant is a normal person. The plaintiff's evidence, taken at its highest, indicated that he suffered (and suffers) no more than annoyance from the aircraft noise, such annoyance not being consequential on any physical inconvenience or discomfort. It is clear that a substantial part of his annoyance was due to the very fact of the breach of contract rather than the presence of aircraft noise. He has not attempted to sell the property but still lives there. As a matter of common sense, aircraft some miles away at over 6000 feet do not cause physical inconvenience or discomfort. Any property blight occurs some 20 miles to the north. The plaintiff proposes either as an interpretation of the existing exception to the rule in *Addis* or, alternatively, as an extension of that exception that the appropriate test in consumer contracts is one of reasonable foreseeability of distress. This is the wrong test, but, in any event, it was not satisfied here. Real and substantial annoyance to a person of ordinary phlegm as a result of the failure, beyond the terms of the existing report, to report the presence of the beacon was not foreseeable as a not unlikely result of the defendant's breach of contract. [Reference was made to *Brown v Waterloo Regional Board of Comrs of Police* (1982) 136 DLR (3d) 49.]

The award of £10,000 was manifestly excessive. Damages should be restricted to one year, that being a reasonable time in which to move house in the country house market: see *Watts v Morrow* [1991] 1 WLR 1421, 1445C–D. The plaintiff argues that, having spent £125,000 in renovating the property before moving in, he has acted reasonably in staying and that he has in any event mitigated his loss on the basis that he was awarded £10,000 for indefinite physical inconvenience and discomfort whereas the cost of moving would have been approximately £60,000. This argument is misconceived. It would be wrong to inflate the award of damages for physical inconvenience and discomfort, i e, non-pecuniary loss, by reference to a head of pecuniary loss to which the plaintiff would have been entitled had he incurred it but which was not, in fact, incurred. At the time he made the decision to stay, the plaintiff would have had no idea of what he might be awarded for the indefinite physical discomfort and inconvenience of staying as against the cost of moving. The legitimate calculation that he would have made would have been between the indefinite physical inconvenience and discomfort of staying and the short term physical inconvenience and discomfort of moving. He decided to stay. Having performed that balancing exercise he should not now be able to recover beyond the date on which he would have moved had he decided to do so. On analysis, the "cost of renovation" point adds nothing to the mitigation point. There was no suggestion that the sum spent on renovation would have been lost on sale. The matter being put into the balance here is, in fact, the possible physical inconvenience of having to renovate another house, which would have been compensatable had the plaintiff decided to move. In an average year, he will spend approximately 130 days at the house. Any inconvenience, even if physical, is thus relatively insubstantial and any award should have been very substantially less than that in *Watts v Morrow* [1991] 1 WLR 1421. Alternatively, if damages should be awarded for an indefinite period, they

should be discounted for the possibility that the plaintiff will move in the future. If what was suffered here was not physical inconvenience and discomfort but mere distress, for whatever period, then a fortiori the award of general damages was too high. Although much will turn on the facts of each case, as a matter of principle awards for mere distress in this context should be more modest than those for physical inconvenience.

There are good grounds for interfering with the judge's exercise of his discretion in relation to costs, particularly if the award of damages is reduced. The plaintiff failed on the most substantial issue of valuation. His valuation evidence was manifestly flawed. The "follow the event" principle should therefore be departed from. In particular, the plaintiff should meet the costs of valuation issues. There comes a point, where a claimant only recovers a very low percentage of his claim, when the court is entitled to ask itself "who was essentially the winning party?" The court should not be distracted from making a just order as to costs by the absence of a payment into court that the plaintiff obviously would not have accepted.

Spencer replied.

Their Lordships took time for consideration.

11 October. **LORD STEYN**

1 My Lords, the central question is whether a buyer, who employed a surveyor to investigate whether a property in the countryside was seriously affected by aircraft noise, may in principle recover non-pecuniary damages against the surveyor for the latter's negligent failure to discover that the property was so affected. The trial judge answered this question in the affirmative. A two-member Court of Appeal disagreed on it. The point was then reargued before a three-member Court of Appeal. By a majority the Court of Appeal reversed the decision of the trial judge and ruled that there was no right to recover non-pecuniary damages in such cases. The second Court of Appeal was deluged with authorities. So was the House on the present appeal. The hearings of what was a comparatively simple case took up an exorbitant amount of time. This circumstance underlines the importance, in the quest for coherent and just solutions in such cases, of simple and practical rules.

I. Riverside House, aircraft noise and the surveyor

2 In 1990 the plaintiff, a successful businessman, contemplated retirement. He owned a flat in London, a house in Brighton and a property overseas. He wanted to buy a gracious country residence. He became interested in a beautiful property known as Riverside House in the village of Blackboys in Sussex which was situated some 15 miles from Gatwick International Airport. The property is in the heart of the countryside. There is a stream running through the middle of it. The property has a croquet lawn, tennis court, orchard, paddock and swimming pool. Although the attractive house required modernisation and refurbishment, it appeared to be ideal for the plaintiff. There was, however, one question mark over the transaction. For the plaintiff a property offering peace and tranquillity was the raison d'être of the proposed purchase. He wanted to be reasonably sure that the property was not seriously affected by aircraft noise.

3 The plaintiff engaged as his surveyor the defendant, who had been in practice as a sole practitioner for some years. The surveyor had to investigate the usual matters expected of a surveyor who inspects a property. In addition the plaintiff also specifically asked the surveyor to investigate, amongst other things, whether the property would be affected by aircraft noise. The plaintiff told the surveyor that he did not want a property on a flight path. The surveyor accepted these instructions.

4 On 17 December 1990 the surveyor sent his report to the plaintiff. From the plaintiff's point of view it was a satisfactory report. About aircraft noise the surveyor reported:

> "You have also asked whether we felt the property might be affected by aircraft noise, but we were not conscious of this during the time of our inspection, and think it unlikely that the property will suffer greatly from such noise, although some planes will inevitably cross the area, depending on the direction of the wind and the positioning of the flight paths."

Comforted by this reassuring report the plaintiff decided to buy the property. The purchase price was £420,000 (which included £45,000 for chattels). The purchase was completed on 28 February 1991.

5 In the next few months the plaintiff caused the house to be modernised and refurbished at a total cost of about £125,000. During this period he was unaware that there was a significant problem associated with aircraft noise. On 13 June 1991 the plaintiff and his partner (who had a 32·74% beneficial interest) moved in. Since 1991 they had lived there three to four days a week for seven to nine months of the year.

6 After he moved in the plaintiff quickly discovered that the property was indeed affected by aircraft noise. In fact, the property was not far away from a navigation beacon (the Mayfield Stack) and at certain busy times, especially in the morning, the early evening, and at weekends, aircraft waiting to land at Gatwick would be stacked up maintaining a spiral course around the beacon until there was a landing slot at the airport. Aircraft frequently passed directly over, or nearly over, the position of the house. The impact of aircraft noise on the tranquillity of the property was marked. The property was undoubtedly affected by aircraft noise.

7 It is common ground that the plaintiff's enjoyment of the property was diminished by aircraft noise at those times when he was enjoying the amenities of the property outdoors and aircraft were stacked up, maintaining their spiral course around the beacon, waiting for a landing slot at the airport. Nevertheless, after initial vacillation, the plaintiff decided not to sell the property and he does not presently intend to do so.

II. The proceedings in the High Court

8 In due course the plaintiff claimed damages against the surveyor. The action came for trial before Judge Peter Baker QC sitting as a judge of the Queen's Bench Division in May 1999. The action was resolutely defended by the surveyor on all aspects of the claim. The judge accepted the plaintiff's account of his instructions to the defendant. I have already set out the instructions. The judge had to consider whether the defendant had been negligent. It was clear that the surveyor could have discovered the true position by checking with Gatwick. He did not do so. The judge found that the surveyor had been negligent and that, if the surveyor had carried out his

A instructions properly, the plaintiff would not have bought the property. The judge's conclusions on this aspect are not challenged on the appeal before the House.

9 The principal claim was one for a diminution of value of the property by reason of the negative effect of aircraft noise. The judge found that the purchase price coincided with the open market value of the property after
B taking into account aircraft noise. He accordingly dismissed the principal claim. There is also no challenge to this part of the judgment at first instance.

10 The judge then had to consider the plaintiff's claim for non-pecuniary damage. He accepted the evidence of Mr Attwood, a sound expert. The report of this expert summarised the general effect of the aircraft noise on Riverside House as follows:

C

> "On a subjective basis, the aircraft noise, with its particular character, is out of keeping with the nature of the area around the house. The grounds are in a very beautiful setting with many specimen trees and with a stream running through the middle. The outlook is also very beautiful. Essentially, this house and garden are in the heart of the countryside. The noise from the aircraft, flying overhead, represents a very significant
> D intrusion into the peace of this setting.
>
> "It is the opinion of the author that the aircraft noise represents a very significant nuisance to anyone trying to enjoy the amenity of the grounds at Riverside House."

The judge approached the claim in accordance with the law as stated in
E *Watts v Morrow* [1991] 1 WLR 1421. He upheld the plaintiff's claim.

> "*Here I think one must bear in mind that this was a specific contract dealing, inter alia, with noise so far as the defendant is concerned*, and I was impressed by the account that Mr Farley gave of a number of matters. Firstly, he is particularly vulnerable because he has a habit, practice, of being an early riser and of wishing, when clement weather
> F conditions prevail as even in this country [they] occasionally do, to sit outside on his terrace, or wherever, and enjoy the delightful gardens, the pool and the other amenities which is made pretty intolerable, he says, and I accept from his point of view between, say, the hours of 6 o'clock and 8 o'clock in the morning which is the time when he would be minded to do this.
>
> "Likewise, pre-dinner drinks are not made the better for the evening
> G activity in the sky not far away. That he is not a man, if I may say so, with excessive susceptibilities is shown by the fact that he did his best to grit his teeth and put up with it but, as he ultimately said, 'Why should I when I had endeavoured to cover this particular point in the instructions that I had given to a professional man whom I had paid to do this?' He finds it a confounded nuisance, and this is a matter that, of course, he will be
> H stuck with. It is not a case of something like drains or dry rot or what have you that he can do anything about. Short of buying Gatwick and closing it down, this is a matter that will continue." (Emphasis added.)

For what he described as the discomfort that had been sustained by the plaintiff the judge awarded £10,000.

11 Immediately after this judgment was given counsel for the defendant invited the judge to deal specifically with one of his arguments, viz that the plaintiff's claim must be rejected because he had decided not to move house. The judge dealt with this point as follows:

> "Bingham LJ said in *Watts v Morrow* [1991] 1 WLR 1421, 1445: 'If, on learning of the defects which should have been but were not reported, a purchaser decides, for whatever reason, to retain the house and not move out and sell, I would question whether any loss he thereafter suffers, at least in the ordinary case, can be laid at the door of the contract-breaker.'
>
> "Dealing with that, in my judgment this is not an ordinary case because if you look how matters worked out, Mr Farley, not knowing at the time of the defect of which he should have been informed, on my judgment, thereafter incurred vast expense in altering the house to get it to a much higher standard. I think the sum of £100,000-odd was mentioned. It was a very large sum. It seems to me, he not learning of the matters which I find [in] my judgment in this case until much later than he incurred that expense, it seems to me it would be putting too high a burden to say that he should then have decided to move and to get away from the nuisance, if I may so describe it. That nuisance being, for obvious reasons, not one that one can do anything about. It is not a structural defect that can be remedied, and that therefore he made the best of a bad job and stayed. I think in my judgment with the greatest deference, what Bingham LJ was saying was, in my view, obiter. He should not be penalised for not having done that. Thank you for reminding me of that matter."

The judge's decision on the claim for non-pecuniary damages therefore stood.

III. The proceedings in the Court of Appeal

12 The surveyor appealed to the Court of Appeal. In November 1999 the matter came before Judge and Hale LJJ. The issue was whether as a matter of law the judge was entitled to make the award of non-pecuniary damages. The members of the court disagreed. Judge LJ thought that the judge's decision was correct and he would have dismissed the appeal. Hale LJ took the opposite view and would have allowed the appeal. For her the insuperable obstacle was that the surveyor had not guaranteed a result but had only undertaken a duty to exercise reasonable care. In the result the matter had to be reargued.

13 In March 2000 the matter came before a three-member Court of Appeal [2000] Lloyd's Rep PN 516. In separate judgments the majority (Stuart-Smith and Mummery LJJ) held that the award of non-pecuniary damages was contrary to principle and allowed the appeal. In a detailed and powerful judgment Clarke LJ dissented. Stuart-Smith LJ concluded that the judge made the award on the ground that the breach of contract caused physical inconvenience and discomfort to the plaintiff. He found that the evidence did not justify this conclusion. He further held that the case fell beyond the reach of the exceptional category where the very object of the contract is to provide pleasure, relaxation, or peace of mind. He did so essentially for two separate reasons. First, in his view the particular obligation to investigate aircraft noise was "simply one relatively minor aspect of the overall instructions" (p 521). Secondly, there was not an

A "obligation to achieve a result" (p 523) but a mere obligation to exercise reasonable care. Mummery LJ agreed with Stuart-Smith LJ and reinforced his reasoning by reference to policy considerations of incommensurability, subjectivity and difficulties of proof involved in claims for mental distress flowing from breach of contract.

B *IV. The law*

14 The judgments in the Court of Appeal and the arguments before the House took as their starting point the propositions enunciated by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421. In that case the Court of Appeal had to consider a claim for damages for distress and inconvenience by a buyer of a house against his surveyor who had
C negligently failed to report defects in the house. Bingham LJ observed, at p 1445:

> "(1) A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not
D foreseeable, which they surely are or may be, but on considerations of policy.
>
> "(2) But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.
E A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.
>
> "(3) In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period
F when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained, and that the awards in this case far exceeded a reasonable award for the injury shown to have been suffered." (Numbering introduced.)

As Stuart-Smith LJ pointed out in the present case [2000] Lloyd's Rep
G PN 516, 519–522, the propositions of Bingham LJ have often been cited and applied.

15 But useful as the observations of Bingham LJ undoubtedly are, they were never intended to state more than broad principles. In *Broome v Cassell & Co Ltd* [1972] AC 1027 Lord Reid commented, at p 1085:

> "experience has shown that those who have to apply the decision to
H other cases and still more those who wish to criticise it seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of . . . judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much

that they say is intended to be illustrative or explanatory and not to be definitive." A

Bingham LJ would have had this truth about judicial decision making well in mind. So interpreted the passage cited is a helpful point of departure for the examination of the issues in this case. Specifically, it is important to bear in mind that *Watts v Morrow* [1991] 1 WLR 1421 was a case where a surveyor negligently failed to discover defects in a property. The claim was not for B breach of a specific undertaking to investigate a matter important for the buyer's peace of mind. It was a claim for damages for inconvenience and discomfort resulting from breach. In *Watts v Morrow* therefore there was no reason to consider the case where a surveyor is in breach of a distinct and important contractual obligation which was intended to afford the buyer information confirming the presence or absence of an intrusive element before he committed himself to the purchase. C

V. Recovery of non-pecuniary damages

16 The examination of the issues can now proceed from a secure foothold. In the law of obligations the rules governing the recovery of compensation necessarily distinguish between different kinds of harm. In tort the requirement of reasonable foreseeability is a sufficient touchstone of D liability for causing death or physical injury: it is an inadequate tool for the disposal of claims in respect of psychiatric injury. Tort law approaches compensation for physical damage and pure economic loss differently. In contract law distinctions are made about the kind of harm which resulted from the breach of contract. The general principle is that compensation is only awarded for financial loss resulting from the breach of contract: E *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, per Lord Blackburn. In the words of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1443 as a matter of legal policy "a contract-breaker is not *in general* liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party" (my emphasis). There are, however, limited exceptions to this rule. One such exception is damages for pain, suffering and loss of amenities caused to F an individual by a breach of contract: see *McGregor on Damages,* 16th ed (1997), pp 56–57, para 96. It is not material in the present case. But the two exceptions mentioned by Bingham LJ, namely where the very object of the contract is to provide pleasure (proposition (2)) and recovery for physical inconvenience caused by the breach (proposition (3)), are pertinent. The scope of these exceptions is in issue in the present case. It is, however, G correct, as counsel for the surveyor submitted, that the entitlement to damages for mental distress caused by a breach of contract is not established by mere foreseeability: the right to recovery is dependent on the case falling fairly within the principles governing the special exceptions. So far there is no real disagreement between the parties.

VI. The very object of the contract: the framework H

17 I reverse the order in which the Court of Appeal considered the two issues. I do so because the issue whether the present case falls within the exceptional category governing cases where the very object of the contact is to give pleasure, and so forth, focuses directly on the terms actually agreed

between the parties. It is concerned with the reasonable expectations of the parties under the specific terms of the contract. Logically, it must be considered first.

18 It is necessary to examine the case on a correct characterisation of the plaintiff's claim. Stuart-Smith LJ [2000] Lloyd's Rep PN 516, 521 thought that the obligation undertaken by the surveyor was "one relatively minor aspect of the overall instructions". What Stuart-Smith and Mummery LJJ would have decided if they had approached it on the basis that the obligation was a major or important part of the contract between the plaintiff and the surveyor is not clear. But the Court of Appeal's characterisation of the case was not correct. The plaintiff made it crystal-clear to the surveyor that the impact of aircraft noise was a matter of importance to him. Unless he obtained reassuring information from the surveyor he would not have bought the property. That is the tenor of the evidence. It is also what the judge found. The case must be approached on the basis that the surveyor's obligation to investigate aircraft noise was a major or important part of the contract between him and the plaintiff. It is also important to note that, unlike in *Addis v Gramophone Co Ltd* [1909] AC 488, the plaintiff's claim is not for injured feelings caused by the breach of contract. Rather it is a claim for damages flowing from the surveyor's failure to investigate and report, thereby depriving the buyer of the chance of making an informed choice whether or not to buy resulting in mental distress and disappointment.

19 The broader legal context of *Watts v Morrow* [1991] 1 WLR 1421 must be borne in mind. The exceptional category of cases where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation is not the product of Victorian contract theory but the result of evolutionary developments in case law from the 1970s. Several decided cases informed the description given by Bingham LJ of this category. The first was the decision of the sheriff court in *Diesen v Samson* 1971 SLT (Sh Ct) 49. A photographer failed to turn up at a wedding, thereby leaving the couple without a photographic record of an important and happy day. The bride was awarded damages for her distress and disappointment. In the celebrated case of *Jarvis v Swans Tours Ltd* [1973] QB 233, the plaintiff recovered damages for mental distress flowing from a disastrous holiday resulting from a travel agent's negligent representations: compare also *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468. In *Heywood v Wellers* [1976] QB 446, the plaintiff instructed solicitors to bring proceedings to restrain a man from molesting her. The solicitors negligently failed to take appropriate action with the result that the molestation continued. The Court of Appeal allowed the plaintiff damages for mental distress and upset. While apparently not cited in *Watts v Morrow* [1991] 1 WLR 1421, *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474 was decided before *Watts v Morrow*. In *Jackson's* case the claim was for damages in respect of a motor car which did not meet the implied condition of merchantability in section 14 of the Sale of Goods Act 1893 (56 & 57 Vict c 71). The buyer communicated to the seller that one of his reasons for buying the car was a forthcoming touring holiday in France. Problems with the car spoilt the holiday. The disappointment of a spoilt holiday was a substantial element in the award sanctioned by the Court of Appeal.

20 At their Lordships' request counsel for the plaintiff produced a memorandum based on various publications which showed the impact of the developments already described on litigation in the county courts. Taking into account the submissions of counsel for the surveyor and making due allowance for a tendency of the court sometimes not to distinguish between the cases presently under consideration and cases of physical inconvenience and discomfort, I am satisfied that in the real life of our lower courts non-pecuniary damages are regularly awarded on the basis that the defendant's breach of contract deprived the plaintiff of the very object of the contract, viz pleasure, relaxation, and peace of mind. The cases arise in diverse contractual contexts, e g the supply of a wedding dress or double glazing, hire purchase transactions, landlord and tenant, building contracts, and engagements of estate agents and solicitors. The awards in such cases seem modest. For my part what happens on the ground casts no doubt on the utility of the developments since the 1970s in regard to the award of non-pecuniary damages in the exceptional categories. But the problem persists of the precise scope of the exceptional category of case involving awards of non-pecuniary damages for breach of contract where the very object of the contract was to ensure a party's pleasure, relaxation or peace of mind.

21 An important development for this branch of the law was *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. The plaintiff had specified that a swimming pool should at the deep end have a depth of 7 feet 6 inches. The contractor failed to comply with his contractual obligation: the actual depth at the deep end was the standard 6 feet. The House found the usual "cost of cure" measure of damages to be wholly disproportionate to the loss suffered and economically wasteful. On the other hand, the House awarded the moderate sum of £2,500 for the plaintiff's disappointment in not receiving the swimming pool he desired. It is true that for strategic reasons neither side contended for such an award. The House was, however, not inhibited by the stance of the parties. Lord Mustill and Lord Lloyd of Berwick justified the award in carefully reasoned judgments which carried the approval of four of the Law Lords. It is sufficient for present purposes to mention that for Lord Mustill, at p 360, the principle of pacta sunt servanda would be eroded if the law did not take account of the fact that the consumer often demands specifications which, although not of economic value, have value to him. This is sometimes called the "consumer surplus": see Harris, Ogus and Phillips, "Contract Remedies and the Consumer Surplus" (1979) 95 LQR 581. Lord Mustill rejected the idea that "the promisor can please himself whether or not to comply with the wishes of the promise which, as embodied in the contract, formed part of the consideration for the price". Lords Keith of Kinkel and Bridge of Harwich agreed with Lord Mustill's judgment and with Lord Lloyd of Berwick's similar reasoning. Labels sometimes obscure rather than illuminate. I do not therefore set much store by the description "consumer surplus". But the controlling principles stated by Lord Mustill and Lord Lloyd are important. It is difficult to reconcile this decision of the House with the decision of the Court of Appeal [2000] Lloyd's Rep PN 516 in the present case. I will in due course return to the way in which the majority attempted to distinguish *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. At this stage, however, I draw attention to the fact that the majority in the Court of Appeal, at p 521, regarded the relevant observations

A of Lord Mustill and Lord Lloyd as obiter dicta. I am satisfied that the principles enunciated in *Ruxley's* case in support of the award of £2,500 for a breach of respect of the provision of a pleasurable amenity have been authoritatively established.

VII. The very object of the contract: the arguments against the plaintiff's claim

B

22 Counsel for the surveyor advanced three separate arguments each of which he said was sufficient to defeat the plaintiff's claim. First, he submitted that even if a major or important part of the contract was to give pleasure, relaxation and peace of mind, that was not enough. It is an indispensable requirement that the object of the entire contract must be of this type. Secondly, he submitted that the exceptional category does not C extend to a breach of a contractual duty of care, even if imposed to secure pleasure, relaxation and peace of mind. It only covers cases where the promiser guarantees achievement of such an object. Thirdly, he submitted that by not moving out of Riverside House the plaintiff forfeited any right to recover non-pecuniary damages.

23 The first argument fastened onto a narrow reading of the words "the D very object of [the] contract" as employed by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445. Cases where a major or important part of the contract was to secure pleasure, relaxation and peace of mind were not under consideration in *Watts v Morrow*. It is difficult to see what the principled justification for such a limitation might be. After all, in 1978, the Court of Appeal allowed such a claim in *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474 in circumstances where a spoiled holiday was only one E object of the contract. Counsel was, however, assisted by the decision of the Court of Appeal in *Knott v Bolton* (1995) 11 Const LJ 375 which in the present case the Court of Appeal treated as binding on it. In *Knott v Bolton* an architect was asked to design a wide staircase for a gallery and impressive entrance hall. He failed to do so. The plaintiff spent money in improving the staircase to some extent and he recovered the cost of the changes. The F plaintiff also claimed damages for disappointment and distress at the lack of an impressive staircase. In agreement with the trial judge the Court of Appeal disallowed this part of his claim. Reliance was placed on the dicta of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445.

24 Interpreting the dicta of Bingham LJ in *Watts v Morrow* narrowly the Court of Appeal in *Knott v Bolton* ruled that the central object of the contract was to design a house, not to provide pleasure to the occupiers of G the house. It is important, however, to note that *Knott v Bolton* was decided a few months before the decision of the House in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. In any event, the technicality of the reasoning in *Knott v Bolton*, and therefore in the Court of Appeal judgments in the present case, is apparent. It is obvious, and conceded, that if an architect is employed only to design a staircase, or a surveyor is H employed only to investigate aircraft noise, the breach of such a distinct obligation may result in an award of non-pecuniary damages. Logically the same must be the case if the architect or surveyor, apart from entering into a general retainer, concludes a separate contract, separately remunerated, in respect of the design of a staircase or the investigation of aircraft noise. If this is so the distinction drawn in *Knott v Bolton* and in the present case is a

matter of form and not substance. David Capper, "Damages for Distress and Disappointment—The Limits of *Watts v Morrow*" (2000) 116 LQR 553, 556 has persuasively argued:

> "A ruling that intangible interests only qualify for legal protection where they are the 'very object of the contract' is tantamount to a ruling that contracts where these interests are merely important, but not the central object of the contract, are in part unenforceable. It is very difficult to see what policy objection there can be to parties to a contract agreeing that these interests are to be protected via contracts where the central object is something else. If the defendant is unwilling to accept this responsibility he or she can say so and either no contract will be made or one will be made but including a disclaimer."

There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind. In my view *Knott v Bolton* 11 Const LJ 375 was wrongly decided and should be overruled. To the extent that the majority in the Court of Appeal relied on *Knott v Bolton* their decision was wrong.

25 That brings me to the second issue, namely whether the plaintiff's claim is barred by reason of the fact that the surveyor undertook an obligation to exercise reasonable care and did not guarantee the achievement of a result. This was the basis upon which Hale LJ after the first hearing in the Court of Appeal thought that the claim should be disallowed. This reasoning was adopted by the second Court of Appeal and formed an essential part of the reasoning of the majority. This was the basis on which they distinguished *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. Against the broad sweep of differently framed contractual undertakings, and the central purpose of contract law in promoting the observance of contractual promises, I am satisfied that this distinction ought not to prevail. It is certainly not rooted in precedent. I would not accept the suggestion that it has the pedigree of an observation of Ralph Gibson LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1442B–D: his emphasis appears to have been on the fact that the contract did not serve to provide peace of mind, and so forth. As far as I am aware the distinction was first articulated in the present case. In any event, I would reject it. I fully accept, of course, that contractual guarantees of performance and promises to exercise reasonable care are fundamentally different. The former may sometimes give greater protection than the latter. Proving breach of an obligation of reasonable care may be more difficult than proving breach of a guarantee. On the other hand, a party may in practice be willing to settle for the relative reassurance offered by the obligation of reasonable care undertaken by a professional man. But why should this difference between an absolute and relative contractual promise require a distinction in respect of the recovery of non-pecuniary damages? Take the example of a travel agent who is consulted by a couple who are looking for a golfing holiday in France. Why should it make a difference in respect of the recoverability of non-pecuniary damages for a spoiled holiday whether the travel agent gives a guarantee that there is a golf course very near the hotel, represents that to be the case, or negligently advises that all hotels of the particular chain of hotels are

A situated next to golf courses? If the nearest golf course is in fact 50 miles away a breach may be established. It may spoil the holiday of the couple. It is difficult to see why in principle only those plaintiffs who negotiate guarantees may recover non-pecuniary damages for a breach of contract. It is a singlarly unattractive result that a professional man, who undertakes a specific obligation to exercise reasonable care to investigate a matter judged B and communicated to be important by his customer, can in Lord Mustill's words in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360 "please himself whether or not to comply with the wishes of the promise which, as embodied in the contract, formed part of the consideration for the price". If that were the law it would be seriously deficient. I am satisfied that it is not the law. In my view the distinction drawn by Hale LJ and by the majority in the Court of Appeal between contractual guarantees and C obligations of reasonable care is unsound.

26 The final argument was that by failing to move out the plaintiff forfeited a right to claim non-pecuniary damages. This argument was not advanced in the Court of Appeal. It will be recalled that the judge found as a fact that the plaintiff had acted reasonably in making "the best of a bad job". The plaintiff's decision also avoided a larger claim against the surveyor. It D was never explained on what legal principle the plaintiff's decision not to move out divested him of a claim for non-pecuniary damages. Reference was made to a passage in the judgment of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445C. Examination showed, however, that the observation, speculative as it was, did not relate to the claim for non-pecuniary damages: see the criticism of Professor M P Furmston, E "Damages—Diminution in Value or Cost of Repair?—Damages for Distress" (1993) 6 JCL 64, 65. The third argument must also be rejected.

27 While the dicta of Bingham LJ are of continuing usefulness as a starting point, it will be necessary to read them subject to the three points on which I have rejected the submissions made on behalf of the surveyor.

VIII. Quantum

F

28 In the surveyor's written case it was submitted that the award of £10,000 was excessive. It was certainly high. Given that the plaintiff is stuck indefinitely with a position which he sought to avoid by the terms of his contract with the surveyor I am not prepared to interfere with the judge's evaluation on the special facts of the case. On the other hand, I have to say that the size of the award appears to be at the very top end of what could G possibly be regarded as appropriate damages. Like Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445H I consider that awards in this area should be restrained and modest. It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation.

H *IX. Conclusion*

29 In agreement with the reasoning of Clarke LJ I would therefore hold that the decision of the majority in the Court of Appeal was wrong. I would also reject the subsidiary written argument of counsel for the surveyor that the plaintiff was not entitled to his costs at trial.

X. Inconvenience and discomfort

30 It is strictly unnecessary to discuss the question whether the judge's decision can be justified on the ground that the breach of contract resulted in inconvenience and discomfort. It is, however, appropriate that I indicate my view. The judge had a great deal of evidence on aircraft noise at Riverside House. It is conceded that noise can produce a physical reaction and can, depending on its intensity and the circumstances, constitute a nuisance. Noise from aircraft is exempted from the statutory nuisance system and in general no action lies in common law nuisance by reason only of the flight of aircraft over a property: see section 6(1) of the Civil Aviation Act 1982 and *McCracken, Jones, Pereira & Payne, Statutory Nuisance* (2001), para 10.33. The existence of the legislation shows that aircraft noise could arguably constitute a nuisance. In any event, aircraft noise is capable of causing inconvenience and discomfort within the meaning of Bingham LJ's relevant proposition. It is a matter of degree whether the case passes the threshold. It is sufficient to say that I have not been persuaded that the judge's decision on this point was not open to him on the evidence which he accepted. For this further reason, in general agreement with Clarke LJ, I would rule that the decision of the Court of Appeal was wrong.

XI. Disposal

31 I would allow the appeal and restore the judge's decision.

LORD BROWNE-WILKINSON

32 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Steyn and Lord Scott of Foscote. For the reasons they have given I too would allow the appeal.

LORD CLYDE

33 My Lords, in December 1990 the appellant plaintiff, Graham Farley, was interested in buying a house at Blackboys, East Sussex. The trial judge described it as a beautiful house in a beautiful setting. It had a terrace, a croquet lawn, a tennis court, an orchard, a paddock and a swimming pool. The property is not very far from Gatwick Airport. He engaged the respondent defendant, a surveyor, to inspect and report on the property. He also asked him to report on certain specific matters, including whether the property would be affected by aircraft noise. The defendant did so, but it is now accepted that his report was negligent in relation to the aircraft noise. The plaintiff relied on the report and bought the property. Considerable work required to be done to the house and some time passed before the plaintiff was able to move in. He then discovered the extent of the aircraft noise. Had the defendant made an adequate investigation of the aircraft noise he would have ascertained the true position and the plaintiff would not have bought the property. His enjoyment of the amenity of the property outside the house has been diminished by aircraft noise. He has not sought to sell the property and does not intend to do so. He claims damages for the impairment to his use and enjoyment of the property caused by aircraft noise.

34 Much weight in the argument was placed upon the observations of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445. Having expressed the general rule that a contract-breaker is not in general liable for

the distress and suchlike which may follow upon the breach, his Lordship continued:

> "But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall into this exceptional category. In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort."

In the ordinary case accordingly damages may be awarded for inconvenience, but not for mere distress; but where the contract is aimed at procuring peace or pleasure, then, if as a result of the breach of contract that expected pleasure is not realised, the party suffering that loss may be entitled to an award of damages for the distress.

35 It would detract from the importance of this summary in *Watts v Morrow* if the words used were to be treated as written in stone and subjected to the kind of analysis which might be more appropriate to a conveyancing document. The expression "physical inconvenience" may be traced back at least to the judgments in *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111, where damages were awarded for the inconvenience suffered by the plaintiffs for having to walk between four and five miles home as a result of the train on which they had taken tickets to Hampton Court travelling instead to Esher. They had tried to obtain a conveyance but found that there was none to be had. A further claim was made for the consequences of an illness which the wife contracted as a result of the walk but that was refused by the Court of Appeal as too remote. The railway company paid into court £2 as being ample to cover the cost of a conveyance. They resisted a larger award for inconvenience, relying on the observations of Pollock CJ in *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408, 411 to the effect that a plaintiff could recover whatever damages naturally resulted from the breach of contract, "but not damages for the disappointment of mind occasioned by the breach of contract". Cockburn CJ referred, at p 115, to the claim which was allowed as being one for "personal inconvenience". Blackburn J referred to it, at p 120, as an "inconvenience". Mellor J, at p 122, contrasted matters of "real physical inconvenience" with matters "purely sentimental". Archibald J observed, at p 124: "The case is not one of mere vexation, but it is one of physical inconvenience, which can in a sense be measured by money value . . ." It does not seem to me that there is any particular magic in the word "physical". It served in *Hobbs's* case to emphasise the exclusion of matters purely sentimental, but it should not require detailed analysis or definition. As matter of terminology I should have thought that "inconvenience" by itself sufficiently covered the kinds of difficulty and discomfort which are more than mere matters of sentimentality, and that "disappointment" would serve as a sufficient label for those mental reactions which in general the policy of the law will exclude.

36 In *Hobbs's* case the defendants were prepared to compensate the plaintiffs for the cost of a conveyance, even although they had not been able to find any. In the present case the defendant would be prepared to pay for the costs of sale and removal if the plaintiff had decided to sell because of the noise. It is said by the respondent that since he has decided to keep the house he is not entitled to any damages at all. But in *Hobbs* the plaintiffs were entitled to damages in respect of the inconvenience. It is hard to understand why a corresponding result should not follow here. That an award may be made in such circumstances is to my mind in line with the thinking of this House in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. In that case there was a breach in the performance of a contract to provide a pleasurable amenity, a swimming pool. The cost of rebuilding it to conform to the required specification was an unreasonable and inappropriate measure of the damages. The House restored the judge's original award of general damages for loss of amenity. So also here, where the plaintiff has decided to remain in the property despite its disadvantage, he should not be altogether deprived by the law of any compensation for the breach of contract. It may be noticed in passing that in *Hobbs's* case the damages awarded for the inconvenience were substantially more than the cost of the conveyance. In the present case it seems that the cost of removal, for which at an earlier stage the plaintiff was claiming, far exceeded the sum awarded for inconvenience. But those differences do not affect the principle.

37 The judge found that the plaintiff was not a man of excessive susceptibility and he refers to the inconvenience he was suffering as "real discomfort". I do not consider it appropriate to explore the detail of the inconvenience as being "physical", either because it impacts upon his eardrums, or because it has some geographical element, such as the relative locations of the aircraft and the property, or the obviously greater audibility of their movements when the plaintiff is seeking to enjoy the amenity of the terrace and the gardens than when he is inside the house. In my view the real discomfort which the judge found to exist constituted an inconvenience to the plaintiff which is not a mere matter of disappointment or sentiment. It is unnecessary that the noise should be so great as to make it impossible for the plaintiff to sit at all on his terrace. Plainly it significantly interferes with his enjoyment of the property and in my view that inconvenience is something for which damages can and should be awarded.

38 As I have already noted the plaintiff's claim has been not for disappointment at the absence of the expected pleasure but for inconvenience. The claim related to the use and enjoyment of the property, but I do not understand this as intended to include injury to his personal feelings. The judge quoted from the headnote to *Watts v Morrow* [1991] 1 WLR 1421, 1422, where the summary is given in these terms: "(2) That in the case of the ordinary surveyor's contract general damages were recoverable only for distress and inconvenience caused by physical consequences of the breach of contract . . ." That formulation is no doubt prompted by passages in the judgment of Ralph Gibson LJ, such as at pp 1442C ("distress caused by physical consequences") and 1443E ("the physical consequence of such a breach"). But elsewhere he uses the expression "physical discomfort or inconvenience resulting from the breach . . ." (e g at p 1440B–C) and the language of Bingham LJ, at p 1445, which I have already quoted is in like terms. But it seems plain that the judge

A was proceeding upon the basis that this was an ordinary surveyor's contract and the award which he sought to make was intended to be within the guidance which *Watts v Morrow* gave him on that approach. That is to say that it was not an award falling within the exceptional category noted in *Watts v Morrow*. He recorded that the plaintiff found the noise to be a "confounded nuisance", but the award which he made was intended to meet the "real discomfort" which he found the plaintiff to be suffering. It seems to B me that he decided the case as an ordinary example of inconvenience following on a breach of contract. In my view he was entitled to make an award on that basis. While the judge thought that the award would be regarded by the plaintiff as almost derisory I would regard it as almost erring on the side of generosity. But I would not interfere with it. In my view the appeal can be allowed on the foregoing basis.

C 39 But it is possible to approach the case as one of the exceptional kind in which the claim would be for damages for disappointment. If that approach was adopted so as to seek damages for disappointment, I consider that it should also succeed.

40 It should be observed at the outset that damages should not be awarded, unless perhaps nominally, for the fact of a breach of contract as distinct from the consequences of the breach. That was a point which D I sought to stress in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518. For an award to be made a loss or injury has to be identified which is a consequence of the breach but not too remote from it, and which somehow or other can be expressed and quantified in terms of a sum of money. So disappointment merely at the fact that the contract has been breached is not a proper ground for an award. The mere fact of the loss E of a bargain should not be the subject of compensation. But that is not the kind of claim which the plaintiff is making here. What he is seeking is damages for the inconvenience of the noise, the invasion of the peace and quiet which he expected the property to possess and the diminution in his use and enjoyment of the property on account of the aircraft noise.

41 The critical factor on this approach, as it seems to me, is that the plaintiff made the specific request of the defendant to discover whether the F property might be affected by aircraft noise. It is suggested that because this point was wrapped up together with a number of other matters in the instructions given by the plaintiff it cannot be regarded as constituting the "very object" of the contract. But that approach seems to me simply to be playing with words. What is referred to as a breach of contract is often a breach of a particular provision in a contract. The effect of that breach may G affect the continued existence of the other terms of the contract, so as to bring the whole to an end. But the point which is the focus of concern is a particular provision in the whole agreement. I can see no reason for distinguishing the present case from a situation where the plaintiff had instructed the defendant simply to advise on the matter of aircraft noise, having already obtained a survey report covering all the other matters. The defendant's argument gained some support from *Knott v Bolton* 11 Const H LJ 375 which concerned the failure to provide the wide staircase and gallery which the clients had particularly requested. The Court of Appeal held that the main object of the contract with the architects was the designing of the house, not the giving of pleasure in respect of the staircase and the gallery. In proceeding on the basis that the contract could only be regarded as a whole

I consider that the court was mistaken. The approach involves a very literal reading of the passage in *Watts v Morrow* [1991] 1 WLR 1421, to which I have already referred.

42 What was said in *Watts v Morrow* must be seen in the context of the case. It is instructive to refer to a passage in the judgment of Ralph Gibson LJ with which Bingham LJ was expressly in complete agreement. He said, at p 1442, of the proposition that the contract in that case was a contract whose subject matter was to provide peace of mind or freedom from distress:

> "That, with respect, seems to me to be an impossible view of the ordinary surveyor's contract. No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract."

The present case is not an "ordinary surveyor's contract". The request for the report on aircraft noise was additional to the usual matters expected of a surveyor in the survey of a property and could properly have attracted a extra fee if he had spent extra time researching that issue. It is the specific provision relating to the peacefulness of the property in respect of aircraft noise which makes the present case out of the ordinary. The criterion is not some general characteristic of the contract, as, for example, that it is or is not a "commercial" contract. The critical factor is the object of the particular agreement.

43 The defendant, following something of the thinking in the second hearing before the Court of Appeal in the present case, sought to take from the passage in the judgment of Ralph Gibson LJ in *Watts v Morrow,* at p 1442, support for an argument that while damages for distress might be granted in the case of a breach of a warranty for the provision of peace and quiet, an award should not be permitted where the case is one of a failure to exercise reasonable skill and care in the performance of a contractual obligation to provide information. I am not persuaded that that can fairly be taken from the passage in question nor that the alleged consequence follows from the distinction. There would be no sufficient logic in allowing damages for inconvenience where the travel agent warrants that the client will have peace and quiet on the beach at Brighton and refusing damages where he negligently advises his client that that beach would be a place to find peace and quiet. Nor does it seem to me that the distinction is one supported by precedent. On the contrary *Heywood v Wellers* [1976] QB 446 was a case of negligent advice by a solicitor where an award for the consequent distress was made.

44 The object of the request to consider the risk of aircraft noise was very plainly to enable the plaintiff to determine the extent of the peace and quiet which he could enjoy at the property. It would be within the contemplation of the defendant that if the noise was such as to interfere with the occupier's peaceful enjoyment of the property the plaintiff would either not buy it at all or live there deprived of his expectation of peace and quiet.

A Each of these consequences seems to me to flow directly from the breach of contract so as to enable an award of damages to be made on one or other basis. The present case can in my view qualify as one of the exceptional cases where a contract for peace or pleasure has been made and breached, thereby entitling the injured party to claim damages for the disappointment occasioned by the breach.

B 45 For the foregoing reasons I would allow the appeal and restore the judge's award.

LORD HUTTON

46 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn and I gratefully adopt his account of the facts of the case and of the issues to which they give rise and I can C therefore proceed to state my opinion on those issues. I consider first the question whether the plaintiff is entitled to recover damages to compensate him for the annoyance and nuisance from aircraft noise to which the defendant's breach of contract exposed him, the judge having found that the plaintiff would not have bought the house if the defendant, as he should have done under the contract, had advised him of the true position in relation to aircraft noise. I propose to consider this issue on the assumption (contrary D to the opinion which I express later) that the annoyance and nuisance from aircraft noise did not constitute physical inconvenience and discomfort.

The principle, and the exception to it, stated in Watts v Morrow

47 It is clearly established as a general rule that where there has been a breach of contract damages cannot be awarded for the vexation or anxiety E or aggravation or similar states of mind resulting from the breach. The principle was stated by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, F founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy."

This general principle has recently been approved by this House in *Johnson v Gore Wood & Co* [2002] 2 AC 1. The principle has particular application to commercial cases and in *Johnson v Gore Wood & Co* Lord Cooke of Thorndon observed, at p 49, that: "Contract-breaking is treated as an G incident of commercial life which players in the game are expected to meet with mental fortitude." But the principle is not applicable in every case and in *Watts v Morrow* [1991] 1 WLR 1421 Bingham LJ went on to state that there was an exceptional category of cases which he described as follows:

> "Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if H the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category."

Bingham LJ then stated:

> "In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort."

Cases such as *Jarvis v Swans Tours Ltd* [1973] QB 233 where a travel company in breach of contract fails to provide the holiday for which the plaintiff has paid and damages are awarded for mental distress, inconvenience, upset, disappointment and frustration are examples of this exception to the general principle.

48 In addition, the speeches of Lord Mustill and Lord Lloyd of Berwick (with which Lord Keith of Kinkel and Lord Bridge of Harwich agreed) in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 established that in some cases the plaintiff, notwithstanding that he suffers no financial loss, should be compensated where the defendant is in breach of a contractual obligation. In that case a contractor contracted to build a swimming pool for a householder in his garden. The contract specified that the pool should have a maximum depth of 7 feet 6 inches but, as built, the maximum depth was only 6 feet. The trial judge found that the pool as constructed was perfectly safe to dive into and that the shortfall in depth had not decreased the value of the pool. The judge held that the householder was entitled to damages of £2,500 for loss of amenity and rejected his claim for the cost of reinstatement which would have involved demolition of the existing pool and the reconstruction of a new one, on the ground that the cost of reinstatement was an unreasonable claim in the circumstances. The Court of Appeal held that the householder was entitled to recover the cost of reinstatement amounting to £21,560. This House held that reinstatement would be unreasonable and the expense of the work involved would be out of all proportion to the benefit to be obtained. But the speeches of Lord Mustill and Lord Lloyd of Berwick are important in relation to the present case because they considered the entitlement of a party to a building contract to recover damages for breach of contract where he was not entitled to the cost of reinstatement and where the breach had not caused diminution in the market value of the property. Their conclusion was that in such a case justice required that reasonable damages should be awarded. Lord Mustill stated, at p 360:

> "It is a common feature of small building works performed on residential property that the cost of the work is not fully reflected by an increase in the market value of the house, and that comparatively minor deviations from specification or sound workmanship may have no direct financial effect at all. Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes; not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash. To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has

produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain. In the valuable analysis contained in *Radford v De Froberville* [1977] 1 WLR 1262, Oliver J emphasised, at p 1270, that it was for the plaintiff to judge what performance he required in exchange for the price. The court should honour that choice. Pacta sunt servanda. If the plaintiff's argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law."

And he stated, at pp 360–361, that in some cases

> "and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see for example the valuable discussion by Harris, Ogus and Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away."

49 In his speech Lord Lloyd referred, at p 374, to the general rule that in claims for breach of contract the plaintiff cannot recover damages for his injured feelings and referred to the exception to this rule, as exemplified in the holiday cases, that a plaintiff may recover damages for his disappointment where the object of a contract is to afford pleasure. He stated that this was the principle which the trial judge had applied and he held that the judge had been entitled to award £2,500 to the householder on the ground that the contract was one "for the provision of a pleasurable amenity", and in the event the householder's pleasure was not as great as it would have been if the pool had been 7 feet 6 inches deep. He then stated:

> "That leaves one last question for consideration. I have expressed agreement with the judge's approach to damages based on loss of amenity on the facts of the present case. But in most cases such an approach would not be available. What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measurable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be that it would have afforded an alternative ground for justifying the judge's award of damages. And if the judge had wanted a precedent, he could

have found it in Sir David Cairns's judgment in *G W Atkins Ltd v Scott* (1991) 7 Const LJ 215, where, it will be remembered, the Court of Appeal upheld the judge's award of £250 for defective tiling. Sir David Cairns said, at p 221: 'There are many circumstances where a judge has nothing but his common sense to guide him in fixing the quantum of damages, for instance, for pain and suffering, for loss of pleasurable activities or for inconvenience of one kind or another.' "

50 Whilst *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 was concerned with the proper measure of damages for breach of a construction contract, I consider that the principle stated in it can be of more general application and that, as Lord Mustill stated, at p 360, there are some occasions "where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure" and for which the law must provide a remedy. In my opinion the present case falls within the ambit of this principle as the defendant in breach of contract failed to alert the plaintiff to the presence of aircraft noise with the result that the plaintiff bought a house which he would not have bought if he had been made aware of the true position.

51 Counsel for the defendant submitted that even if it were right to extend the exception as exemplified by the holiday cases to other cases, nevertheless the exception must be confined to cases where, in the words of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445, "the very object of a contract" is to provide the benefit which the promisee regards as being of particular importance to him. This argument was accepted by Hale LJ in the first hearing before the Court of Appeal and by Stuart-Smith and Mummery LJJ in the second hearing. I am unable to accept this submission because I can see no reason in principle why, if a plaintiff who has suffered no financial loss can recover damages in some cases if there has been a breach of the principal obligation of the contract, he should be denied damages for breach of an obligation which, whilst not the principal obligation of the contract, is nevertheless one which he has made clear to the other party is of importance to him. It is clear from the speech of Lord Mustill in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360 that he considered that a householder may obtain damages for comparatively minor deviations from specification or sound workmanship which do not cause any diminution in the value of the house. And it is clear that in that case the obligation to build a pool 7 feet 6 inches deep as opposed to 6 feet deep could not be regarded as the principal obligation or the very object of the contract.

52 In *Knott v Bolton* 11 Const LJ 375 the defendant architect was given instructions to include in his design of a house a wide staircase with a gallery area and an imposing and impressive entrance hall and he failed to carry out these instructions. The plaintiff sought to recover general damages for the disappointment and distress they suffered by reason of this failure, but their claim was rejected by the trial judge and the Court of Appeal. In a judgment delivered some months before the decision of the House in *Ruxley Electronics and Construction Ltd v Forsyth*, Russell LJ laid emphasis, at p 376, on the words "the very object of [the] contract" in Bingham LJ's judgment in *Watts v Morrow* [1991] 1 WLR 1421, 1445 and stated:

A "One or two comments upon that passage are apposite. In my judgment the words 'the very object of a contract' are crucial within the context of the instant case. The very object of the contract entered into by Mr Terence Bolton was to design for the Knotts their house. As an ancillary of that of course it was in the contemplation of Mr Bolton and of the Knotts that pleasure would be provided, but the provision of pleasure to the occupiers of the house was not the very object of the contract and B there was nothing in the contractual relationship between Mr Bolton and the Knotts to indicate that he in any sense warranted or expressed himself to be contractually bound to provide for the Knotts the pleasure of occupation. Of course the pleasure of their occupation was an ancillary of the object of the contract, but it was not the very object of the contract."

C I consider, with respect, that in that case the Court of Appeal was led into error by concentrating too much on the concept of the provision of pleasure—the correct approach would have been to have taken the view later expressed by Lord Mustill in his speech in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360B and to have held that the plaintiffs were entitled to recover some reasonable damages because they D were entitled to say that they chose to obtain from the architect a promise to produce a particular design in order to make the house conform to their own particular tastes and wishes. Accordingly I consider that the decision of the Court of Appeal in *Knott v Bolton* 11 Const LJ 375 should not be followed.

53 I further consider that there is no valid distinction between a case where a party promises to achieve a result and a case where a party is under a E contractual obligation to take reasonable care to achieve a result. Suppose a case where a householder's enjoyment of his garden is spoilt by an unpleasant smell from a septic tank at the bottom of the garden and he employs a company to clean out the tank. If the contract constituted a promise by the company to clean out the tank and it failed to do so, with the result that the smell continued, I think that in accordance with the principle stated by Lord Mustill in *Ruxley Electronics and Construction Ltd v Forsyth* F [1996] AC 344, 360–361 the householder would be entitled to recover a modest sum of damages for the annoyance caused by the continuation of the smell. But if the contract provided that the company would exercise reasonable care and skill to clean out the tank and due to its negligence the tank was not cleaned out, I consider that the householder would also be entitled to damages.

G 54 Whilst I do not accept the submission advanced on behalf of the defendant that, where there is no pecuniary loss, damages can only be recovered where the claim is for breach of an obligation which is the very object of the contract, I think that (other than in building contract cases where the principle stated by Lord Mustill in *Ruxley Electronics and Construction Ltd v Forsyth*, at p 360, gives direct guidance) there is a need for a test which the courts can apply in practice in order to preserve the H fundamental principle that general damages are not recoverable for anxiety and aggravation and similar states of mind caused by a breach of contract and to prevent the exception expanding to swallow up, or to diminish unjustifiably, the principle itself. It will be for the courts, in the differing circumstances of individual cases, to apply the principles stated in your

Lordships' speeches in this case, and the matter is not one where any precise test or verbal formula can be applied, but, adopting the helpful submissions of counsel for the plaintiff, I consider that as a general approach it would be appropriate to treat as cases falling within the exception and calling for an award of damages those where: (1) the matter in respect of which the individual claimant seeks damages is of importance to him, and (2) the individual claimant has made clear to the other party that the matter is of importance to him, and (3) the action to be taken in relation to the matter is made a specific term of the contract. If these three conditions are satisfied, as they are in the present case, then I consider that the claim for damages should not be rejected on the ground that the fulfilment of that obligation is not the principal object of the contract or on the ground that the other party does not receive special and specific remuneration in respect of the performance of that obligation.

55 Counsel for the defendant submitted that the award of damages of £10,000 was manifestly excessive as it constituted compensation for the inconvenience and annoyance from the aircraft noise which the plaintiff would continue to suffer for an indefinite period in the future. In support of this submission counsel relied on the observation of Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445:

> "If, on learning of the defects which should have been but were not reported, a purchaser decides, for whatever reason, to retain the house and not move out and sell, I would question whether any loss he thereafter suffers, at least in the ordinary case, can be laid at the door of the contract-breaker."

Therefore counsel submitted that the damages should have been restricted to compensation for inconvenience and annoyance suffered for one year, that being a reasonable time during which the plaintiff could have moved house; after the period of a year, the inconvenience and annoyance suffered by the plaintiff could not be regarded as caused by default of the defendant.

56 I am unable to accept that submission. I consider that in the circumstances of this case where the plaintiff had expended a considerable sum of money in improving the house before he was aware of the defendant's failure to inform him of aircraft noise, and where he would have had to incur very considerable expense in selling and buying a new house and moving to it, it was reasonable for him to decide to stay in the house, even though that involved putting up with the noise, and I think that the trial judge was right to reject the defendant's argument on this point.

Physical inconvenience and discomfort

57 The second principal issue which arises on this appeal is whether, as a separate ground, the plaintiff is entitled to recover damages because the aircraft noise constituted physical inconvenience and discomfort which he suffered as a consequence of the defendant's breach of contract. The authorities cited and analysed by Clarke LJ in his judgment make it clear, as he observes [2000] Lloyd's Rep PN 516, 527, that damages are recoverable for physical inconvenience and that it is not necessary to establish any kind of physical injury or loss. Thus in *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111, Cockburn CJ stated, at p 117: "I think there is no authority that personal inconvenience, where it is sufficiently

A serious, should not be the subject of damages to be recovered in an action of this kind". Mellor J stated, at pp 122–123:

> "I quite agree with my brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover
B damages . . . where the inconvenience is real and substantial arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience."

And Archibald J stated, at p 124:

> "The case is not one of mere vexation, but it is one of physical inconvenience, which can in a sense be measured by money value, and the
C parties here had the firm measure of that inconvenience in the damages given by the jury."

58 I also consider that Barry J in *Bailey v Bullock* [1950] 2 All ER 1167, 1170–1171 and Beldam LJ in *Wapshott v Davis Donovan & Co* [1996] PNLR 361, 378 were right to emphasise that there is a distinction between mere annoyance or disappointment at the failure of the other party to carry
D out his contractual obligation and actual physical inconvenience and discomfort caused by the breach. Therefore the judge was entitled to award damages to the plaintiff for the annoyance caused to him by the aircraft noise if the noise constituted physical inconvenience and discomfort.

59 In his careful judgment the judge expressly referred to one head of damages discussed in *Watts v Morrow* [1991] 1 WLR 1421 and cited part of
E the headnote which states:

> "in the case of the ordinary surveyor's contract general damages were recoverable only for distress and inconvenience caused by physical consequences of the breach of contract . . . such damages should be a modest sum for the amount of physical discomfort endured . . ."

F Therefore the judge clearly had in mind that damages could only be awarded for physical inconvenience and discomfort. He subsequently stated at page 17 of his judgment that the plaintiff had sustained "real discomfort". The fact that the judge also stated that the plaintiff found the noise "a confounded nuisance" does not, in my opinion, mean that the noise could not be regarded as a physical inconvenience and discomfort. No doubt as Mr Hobbs walked home after midnight with his wife and children the four
G or five miles from Esher station through the drizzling rain he thought that the walk was a confounded nuisance, but that did not disentitle him from recovering damages for physical inconvenience and discomfort.

60 The aircraft noise was something which affected the plaintiff through his hearing and can be regarded as having a physical effect upon him, and on the evidence which was before him I consider that it was open to
H the judge to find that the plaintiff suffered physical inconvenience and discomfort.

61 I agree with Judge and Clarke LJJ that on first impression the award of £10,000 damages appears to be a very high one, but I also agree with them that this is a very unusual case where the inconvenience and discomfort caused to the plaintiff will continue, and on further consideration I do not

consider that it would be right for an appellate court to set aside the award as being excessive. Therefore I would allow the appeal and restore the order of the judge.

LORD SCOTT OF FOSCOTE

62 My Lords, this is a case with simple facts, a short question and, in my respectful opinion, a simple answer.

63 The plaintiff, Mr Farley, wanted to purchase a house in the country. Riverside House at Blackboys, Sussex was on the market. It seemed to fit the bill. It was, however, 15 miles or so from Gatwick Airport. Mr Farley was anxious that his rural retreat should not be affected by aircraft noise. He instructed Mr Skinner, the defendant, who is a chartered surveyor, to inspect the property and report on its general and structural condition. He asked Mr Skinner, also, to report on whether, in view of the proximity of the property to Gatwick Airport, the property would be affected by aircraft noise. Mr Skinner accepted these instructions. On 17 December 1990 Mr Skinner provided Mr Farley with a detailed 38-page report. The report contained, on p 35, a paragraph about aircraft noise. The paragraph indicted Mr Skinner's opinion that it was "unlikely that the property will suffer greatly from such noise".

64 Unfortunately, Mr Skinner had made inadequate inquiries about aircraft noise and, in particular, had not discovered that within a few miles from the property was the Mayfield Stack, an area where aircraft waiting to land at Gatwick were directed to circle until the airport was ready to receive them and from where their route to the airport frequently passed over or near to Blackboys.

65 It was found by the trial judge, and is accepted before your Lordships, that Mr Skinner's failure to find out about the Mayfield Stack and to draw its implications to Mr Farley's attention was an inadequate contractual response to his instructions about aircraft noise.

66 In short, Mr Skinner was in breach of contract. His client, Mr Farley, is entitled in principle to be compensated in damages for the breach.

67 Mr Farley gave evidence that if he had received from Mr Skinner the information about aircraft noise to which he, Mr Farley, was contractually entitled, he would not have purchased Riverside House. This evidence was accepted by the judge. But, in the event, in reliance on the contractually inadequate information about aircraft noise that he had received from Mr Skinner, Mr Farley purchased the property.

68 Having purchased the property, Mr Farley put in hand fairly extensive works of modernisation and renovation. It was only after these had been carried out that he moved in and took up residence. It was then that he discovered that the property was affected by aircraft noise. The degree of discomfort caused by noise is always to some extent subjective. There was evidence that many, perhaps most, of the residents in the area were not troubled by the noise. But Mr Farley was.

69 He gave evidence that it interfered with his enjoyment of a quiet, reflective breakfast, a morning stroll in his garden or pre-dinner drinks. The trial judge, having heard the evidence, concluded that "real discomfort . . . has been sustained by Mr Farley in this case".

70 It is accepted by Mr Simpson, counsel for Mr Skinner, that if Mr Farley, on becoming aware of the extent of the aircraft noise, had

A decided to resell, Mr Skinner would have been liable to compensate him at least for the costs of reselling. But, having had the house modernised and renovated to his taste, and no doubt having become attached to the house, Mr Farley decided not to sell. But none the less, feeling that he ought to be compensated for Mr Skinner's breach of contract, he commenced an action for damages.

B 71 He claimed damages on the footing that the true value of the property, affected by the aircraft noise, was substantially less than the price he had paid. On this issue, however, the judge concluded that the aircraft noise that upset Mr Farley did not result in any diminution in the value of the property.

72 Mr Farley claimed damages on the footing, also, that: "The plaintiff's use and enjoyment of the property has been impaired by aircraft C noise." The judge held that Mr Farley was entitled to damages for impairment of use and enjoyment and awarded him £10,000.

73 Mr Skinner appealed. The issue on appeal was whether, in law, Mr Farley was entitled to contractual damages for impairment of his enjoyment of Riverside House. My noble and learned friend, Lord Steyn, has described the course of proceedings in the Court of Appeal and it suffices for me to say that two Lords Justices held that he was, three held that he was D not, and it is now for your Lordships to resolve the issue.

74 The reason why such an apparently straightforward issue has caused such division of opinion is because it has been represented as raising the question whether and when contractual damages for mental distress are available. It is highly desirable that your Lordships should resolve the present angst on this subject and avoid the need in the future for relatively E simple claims, such as Mr Farley's, to have to travel to the appellate courts for a ruling.

75 In my opinion, the issue can and should be resolved by applying the well known principles laid down in *Hadley v Baxendale* (1854) 9 Exch 341 (as restated in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528) in the light of the recent guidance provided by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421 and by this House in F *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344.

76 The basic principle of damages for breach of contract is that the injured party is entitled, so far as money can do it, to be put in the position he would have been in if the contractual obligation had been properly performed. He is entitled, that is to say, to the benefit of his bargain: see *Robinson v Harman* (1848) 1 Exch 850, 855.

G 77 In *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 builders had agreed to construct a swimming pool with a diving area 7 feet 6 inches deep. The pool when constructed had a depth of only 6 feet. The cost of rebuilding the pool to the contractual depth would have been £21,560. But the trial judge, having heard the evidence, concluded that the pool owner did not have the intention of using the damages to reconstruct the pool. He found also that the residential property of which the pool H formed part had suffered no diminution in value by reason of the lack of one foot or so of depth in the pool's diving area. None the less the pool owner claimed the £21,560 as damages. The builders, on the other hand, contended that, on the facts as found, the pool owner had suffered no loss and the damages should be nil. The trial judge accepted neither contention

but instead awarded the £2,500 expressed as compensation for "a loss of amenity brought about by the shortfall in depth" (see p 363). The Court of Appeal [1994] 1 WLR 650 set aside the £2,500 award and substituted an award of the cost of rebuilding, i e the £21,560. This House restored the trial judge's order.

78 Lord Mustill [1996] AC 344, 360 referred to situations where, in the carrying out of building works on residential property, there had been minor deviations from the contractual specifications but where the deviations had not reduced the value of the property below the value it would have had if the work had been properly carried out. He went on:

> "Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result because he wanted to make his house more comfortable, more convenient and more conformable to his own particular tastes; not because he had in mind that the work might increase the amount which he would receive if, contrary to expectation, he thought it expedient in the future to exchange his home for cash. To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain. In the valuable analysis contained in *Radford v De Froberville* [1977] 1 WLR 1262, Oliver J emphasised, at p 1270, that it was for the plaintiff to judge what performance he required in exchange for the price. The court should honour that choice. Pacta sunt servanda. If the plaintiff's argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law."

Lord Lloyd of Berwick, to the same effect, said, at p 374:

> "What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measurable difference in value of the complete house, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible . . . that it cannot find some middle ground in such a case? I do not give a final answer to that question in the present case. But it may be it would have afforded an alternative ground for justifying the judge's award of damages."

79 *Ruxley's* case establishes, in my opinion, that if a party's contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value. Quantification of that value will in many cases be difficult and may often seem arbitrary. In *Ruxley's* case the value placed on the amenity value of which the pool owner had been

A deprived was £2,500. By that award, the pool owner was placed, so far as money could do it, in the position he would have been in if the diving area of the pool had been constructed to the specified depth.

80 In *Ruxley's* case the breach of contract by the builders had not caused any consequential loss to the pool owner. He had simply been deprived of the benefit of a pool built to the depth specified in the contract. It was not a case where the recovery of damages for consequential loss
B consisting of vexation, anxiety or other species of mental distress had to be considered.

81 In *Watts v Morrow* [1991] 1 WLR 1421, however, that matter did have to be considered. As in the present case, the litigation in *Watts v Morrow* resulted from a surveyor's report. The report had negligently failed to disclose a number of defects in the property. The clients, who had
C purchased the property in reliance on the report, remedied the defects and sued for damages. The judge awarded them the costs of the repairs and also general damages of £4,000 each for "distress and inconvenience" (p 1424). As to the cost of repairs, the Court of Appeal substituted an award of damages based on the difference between the value of the property as the surveyor's report had represented it to be and the value as it actually was. Nothing, for present purposes, turns on that. As to the damages for "distress
D and inconvenience" the Court of Appeal upheld the award in principle but held that the damages should be limited to a modest sum for the physical discomfort endured and reduced the award to £750 for each plaintiff. Bingham LJ, at p 1445, in an important passage, set out the principles to be applied where contractual damages for distress and inconvenience are claimed:

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> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.
>
> "But the rule is not absolute. Where the very object of a contract is to
F provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.
>
> "In cases not falling within this exceptional category, damages are in
G my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort."

82 In the passage I have cited, Bingham LJ was dealing with claims for consequential damage consisting of the intangible mental states and sensory experiences to which he refers. Save for the matters referred to in the first
H paragraph, all of which reflect or are brought about by the injured party's disappointment at the contract breaker's failure to carry out his contractual obligations, and recovery for which, if there is nothing more, is ruled out on policy grounds, Bingham LJ's approach is, in my view, wholly consistent with established principles for the recovery of contractual damages.

83 There are, however, two qualifications that I would respectfully make to the proposition in the final paragraph of the cited passage that damages "for physical inconvenience and discomfort caused by the breach" are recoverable.

84 First, there will, in many cases, be an additional remoteness hurdle for the injured party to clear. Consequential damage, including damage consisting of inconvenience or discomfort, must, in order to be recoverable, be such as, at the time of the contract, was reasonably foreseeable as liable to result from the breach: see *McGregor on Damages,* 16th ed, pp 159–160, para 250.

85 Second, the adjective "physical", in the phrase "physical inconvenience and discomfort", requires, I think, some explanation or definition. The distinction between the "physical" and the "non-physical" is not always clear and may depend on the context. Is being awoken at night by aircraft noise "physical"? If it is, is being unable to sleep because of worry and anxiety "physical"? What about a reduction in light caused by the erection of a building under a planning permission that an errant surveyor ought to have warned his purchaser-client about but had failed to do so? In my opinion, the critical distinction to be drawn is not a distinction between the different types of inconvenience or discomfort of which complaint may be made but a distinction based on the cause of the inconvenience or discomfort. If the cause is no more than disappointment that the contractual obligation has been broken, damages are not recoverable even if the disappointment has led to a complete mental breakdown. But, if the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc) experience, damages can, subject to the remoteness rules, be recovered.

86 In summary, the principle expressed in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 should be used to provide damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable. The principle expressed in *Watts v Morrow* [1991] 1 WLR 1421 should be used to determine whether and when contractual damages for inconvenience or discomfort can be recovered.

87 These principles, in my opinion, provide the answer, not only to the issue raised in the present case, but also to the issues raised in the authorities which were cited to your Lordships.

88 In *Hobbs v London and South Western Railway Co* LR 10 QB 111 the claim was for consequential damage caused by the railway company's breach of contract. Instead of taking the plaintiff, his wife and two children to Hampton Court, their train dumped them at Esher and they had to walk five miles or so home in the rain. The plaintiff's wife caught a cold as a result of the experience. The plaintiff was awarded damages for the inconvenience and discomfort of his and his family's walk home but his wife's cold was held to be too remote a consequence. The plaintiff's recovery of damages attributable, in part, to the discomfort suffered by his wife and children was in accordance with principle. The contractual benefit to which he was entitled was the carriage of himself and his family to Hampton Court. It was reasonable in my opinion, to value that benefit, of which he had been deprived by the breach of contract, by reference to the discomfort to the family of the walk home. This was, in my view, a *Ruxley Electronics* case.

89 *Jarvis v Swans Tours Ltd* [1973] QB 233 was a case in which the plaintiff had contracted for a holiday with certain enjoyable qualities. He had been given a holiday which lacked those qualities. His holiday had caused him discomfort and distress. The trial judge awarded him £31·72, one-half of the price of the holiday. This must, I think have been the value attributed by the judge to the contractual benefit of which the plaintiff had been deprived. But on the plaintiff's appeal against so low an award, the Court of Appeal allowed him £125.

90 Somewhat different reasons were given by the three members of the court. Lord Denning MR said, at pp 237–238:

> "In a proper case damages for mental distress can be recovered in contract . . . One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach."

The reference in this passage to the "contract for a holiday, or any other contract to provide entertainment and enjoyment" is consistent with an intention to compensate the plaintiff for the contractual benefit of which he had been deprived. The reference, however, to "the disappointment, the distress" etc reads like a reference to consequential damage.

91 Edmund Davies LJ based his decision on the defendant's failure to provide a holiday of the contractual quality". He held that the amount of damages was not limited by the price for the holiday. He said, at p 239: "The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided". He regarded the plaintiff's vexation and disappointment as relevant matters to take into account in "determining what would be proper compensation for the defendants' marked failure to fulfil their undertaking". This was a *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 approach. Stephenson LJ, at p 240, based his decision on the "reasonable contemplation of the parties . . . as a likely result of [the holiday contract] being so broken". He said, at pp 240–241, that where there are contracts "in which the parties contemplate inconvenience on breach which may be described as mental: frustration, annoyance, disappointment . . ." damages for breach should take that inconvenience into account. This was a *Watts v Morrow* [1991] 1 WLR 1421 approach.

92 *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 was a case brought by another disappointed holiday-maker. He had booked a holiday for himself, his wife and children. Its quality turned out to be substantially below contractually justified expectations. The plaintiff recovered £1,100 damages as compensation not only for his own discomfort but also for the discomfort experienced by his wife and children. In my opinion, the justification for such an award is that the plaintiff was entitled to be compensated for the value of the contracted benefit of which he had been deprived. This case, like *Jarvis v Swans Tours Ltd* [1973] QB 233, 239, per Edmund Davies LJ, and like *Hobbs v London and South Western Railway Co* LR 10 QB 111, is a *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 type of case.

93 *Knott v Bolton* 11 Const LJ 375 is, in my opinion, inconsistent with *Ruxley's* case and should now be regarded as having been wrongly decided.

The plaintiffs had been deprived of the wide staircase and gallery and baronial entrance hall to which they were contractually entitled and had to put up with lesser facilities. A value should, in my opinion, have been placed on the benefit of which they had been deprived.

94 In *Heywood v Wellers* [1976] QB 446 a firm of solicitors was sued for failure to provide adequate legal services to the plaintiff in connection with proceedings to protect her from molestation by an ex-boyfriend. The failure had the result that the plaintiff continued to suffer molestation. She was awarded damages as compensation for the vexation, anxiety and distress that the continuing molestation had caused her. This, in my opinion, is a clear example of compensation for consequential loss within the reasonable contemplation of the parties at the time of the contract as liable to be caused by the solicitors' failure to deal properly with the anti-molestation proceedings.

95 Contrast *Cook v Swinfen* [1967] 1 WLR 457 and *Hayes v James & Charles Dodd* [1990] 2 All ER 815, both solicitors' negligence cases where it was claimed that the solicitors' failure to provide the services to which the plaintiffs had been contractually entitled had caused the plaintiffs anguish, distress and vexation.

96 In *Cook v Swinfen* Lord Denning MR said, at p 461:

> "if anything goes wrong with the litigation owing to the solicitor's negligence . . . It can be foreseen that there will be injured feelings; mental distress; anger; and annoyance; but for none of these can damages be recovered."

As Bingham LJ pointed out in *Watts v Morrow* [1991] 1 WLR 1421, 1445, these damages are ruled out on public policy grounds.

97 In *Hayes v James & Charles Dodd* Staughton LJ said, at p 824, that contractual damages for mental distress were, as a matter of policy, limited to certain classes of case and that the classes "should not . . . include any case where the object of the contract was not comfort or pleasure, or the relief [from] discomfort, but simply carrying on a commercial activity with a view to profit". So he disallowed the claim for damages for anguish and vexation.

98 In my opinion, the distinction between commercial contracts and other contracts is too imprecise to be satisfactory. I think the decision of Staughton LJ was plainly correct for the reason that the commercial character of the contract required a negative answer to the question whether the anguish and vexation caused by the breach and for which recovery was sought was within the reasonable contemplation of the parties at the time of the contract (see also Lord Reid's point in *C Czarnikow Ltd v Koufos* [1969] 1 AC 350, 383 that the loss in question should, to be recoverable, be "not very unusual and easily foreseeable").

99 In *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 contractual damages for distress and discomfort caused to the plaintiff by having to live for a while in a house with a leaking roof and defective drains were awarded as compensation for a surveyor's negligent failure to draw attention to these defects in his report. The Court of Appeal adopted a foreseeability approach.

100 In *R v Investors Compensation Board, Ex p Bowden* [1994] 1 WLR 17, 28, decided after *Watts v Morrow* [1991] 1 WLR 1421 had been

reported, Mann LJ said this: "Unless the very object of the contract is as stated by Bingham LJ [at p 1445], then a contract breaker is not liable to compensate for mental and physical distress consequent upon his breach of contract."

101 This statement is not, in my opinion, accurate. It concentrates only on the first part and ignores the second part of Bingham LJ's proposition. I agree with Mann LJ that a contract relating to the investment of money is not such a contract as Bingham LJ had in mind as a contract "the very object" of which is to provide pleasure etc. But if a breach of any contract has caused physical inconvenience or discomfort that is within the recognised rules of remoteness and mental distress is a part of that inconvenience or discomfort, it would, in my opinion, in principle be recoverable.

102 Mr Simpson referred to *Johnson v Gore Wood & Co* [2002] 2 AC 1, which he said was indistinguishable from the present case. The case raised a number of difficult issues which have nothing whatever to do with the present case but the case did involve also a claim for damages for mental distress caused by solicitors' negligence. The alleged negligence was the solicitors' failure to advise Mr Johnson, the client, about various financial matters. Mr Johnson claimed, among other heads of damage, damages "for the mental distress and anxiety which he has suffered" as a result of the alleged negligence. Lord Bingham of Cornhill cited, at p 37, the first two paragraphs of the passage from his own judgment in *Watts v Morrow* [1991] 1 WLR 1421, 1445 that I have cited at paragraph 81 above. He referred to *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 and said, at p 38: "It is undoubtedly true that many breaches of contract cause intense frustration and anxiety to the innocent party".

103 He did not, however, think that Mr Johnson's claim for damages for mental distress and anxiety came within the established principles for the recovery of such damages.

104 The decision in *Johnson v Gore Wood & Co* [2002] 2 AC 1 is, in my view, plainly distinguishable from the present. It was not, in my view, remotely arguable that Mr Johnson's alleged mental distress was a consequence that, at the time he retained the solicitors, was reasonably in the contemplation of the parties as liable to result from a breach.

105 It is time for me to turn to the present case and apply the principles expressed in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 and *Watts v Morrow* [1991] 1 WLR 1421. In my judgment, Mr Farley is entitled to be compensated for the "real discomfort" that the judge found he suffered. He is so entitled on either of two alternative bases.

106 First, he was deprived of the contractual benefit to which he was entitled. He was entitled to information about the aircraft noise from Gatwick-bound aircraft that Mr Skinner, through negligence, had failed to supply him with. If Mr Farley had, in the event, decided not to purchase Riverside House, the value to him of the contractual benefit of which he had been deprived would have been nil. But he did buy the property. And he took his decision to do so without the advantage of being able to take into account the information to which he was contractually entitled. If he had had that information he would not have bought. So the information clearly would have had a value to him. Prima facie, in my opinion, he is entitled to be compensated accordingly.

107 In these circumstances, it seems to me, it is open to the court to adopt a *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 approach and place a value on the contractual benefit of which Mr Farley has been deprived. In deciding on the amount, the discomfort experienced by Mr Farley can, in my view, properly be taken into account. If he had had the aircraft noise information he would not have bought Riverside House and would not have had that discomfort.

108 Alternatively, Mr Farley can, in my opinion, claim compensation for the discomfort as consequential loss. Had it not been for the breach of contract, he would not have suffered the discomfort. It was caused by the breach of contract in a causa sine qua non sense. Was the discomfort a consequence that should reasonably have been contemplated by the parties at the time of contract as liable to result from the breach? In my opinion, it was. It was obviously within the reasonable contemplation of the parties that, deprived of the information about aircraft noise that he ought to have had, Mr Farley would make a decision to purchase that he would not otherwise have made. Having purchased, he would, having become aware of the noise, either sell—in which case at least the expenses of the resale would have been recoverable as damages—or he would keep the property and put up with the noise. In the latter event, it was within the reasonable contemplation of the parties that he would experience discomfort from the noise of the aircraft. And the discomfort was "physical" in the sense that Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445 had in mind. In my opinion, the application of *Watts v Morrow* principles entitles Mr Farley to damages for discomfort caused by the aircraft noise.

109 I would add that if there had been an appreciable reduction in the market value of the property caused by the aircraft noise, Mr Farley could not have recovered both that difference in value and damages for discomfort. To allow both would allow double recovery for the same item.

110 Whether the approach to damages is on *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 lines, for deprivation of a contractual benefit, or on *Watts v Morrow* [1991] 1 WLR 1421 lines, for consequential damage within the applicable remoteness rules, the appropriate amount should, in my opinion, be modest. The degree of discomfort experienced by Mr Farley, although "real", was not very great. I think £10,000 may have been on the high side. But in principle, in my opinion, the judge was right to award damages and I am not, in the circumstances, disposed to disagree with his figure.

111 For the reasons I have given and for the reasons contained in the opinion of my noble and learned friend, Lord Steyn, I would allow the appeal and restore the judge's order.

Appeal allowed with costs in Court of Appeal and House of Lords.

Solicitors: Irwin Mitchell, Leeds; Williams Davies Meltzer.

M G