Chapter 13
Awarding Damages for Distress and Loss of Reputation in England and Canada
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INTRODUCTION
As a general principle, the English and Canadian courts have traditionally denied recovery of damages for ‘distress’ and lost reputation in contractual claims. This position is considered to stem from the authority of the House of Lords in Addis v. Gramophone Co. Ltd.,¹ although it is far from clear that this authority can be used to support the application of such a sweeping prohibition on recovery,² and from the perception that contract is exclusively concerned with profit and therefore with providing compensation for financial losses.

The term ‘distress’ is used in practice to cover a great multitude of reactions, e.g., loss that is capable of being translated into financial loss,³ inconvenience,

² See e.g., N. Enonchong, ‘Breach of Contract and Damages for Mental Distress’ (1996) 16 OJLS 617.
³ Most frequently reputational loss, although the difficulty here is establishing the necessary causal link between the breach and the loss.

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hurt feelings, upset, anxiety and annoyance. Such losses are generally referred to as ‘non-pecuniary loss’ in England but more usually as ‘intangible loss’ in Canada. Both terms evidence the difficulties faced by the courts in recognising such losses in the contractual context and the deep suspicion of such claims that has traditionally applied in both jurisdictions. There are further complications in making any comparison of treatment since distress may be suffered as a result of the manner of the breach, e.g. callous or malicious conduct, or simply the fact that the breach has occurred. These distress events appear to be subjected to quite different treatment, largely in approach, but sometimes in terms of result, in England and Canada. These differences appear to be the product of a greater willingness on the part of the Canadian courts to ‘achieve the desired objective’, together with the ability to award aggravated damages (as compensatory loss), and even punitive damages, where the manner in which the breach is effected is regarded as sufficiently reprehensible. However, the ability to recover aggravated damages in Canada, or at least the description of the damages as aggravated compensation, extends beyond the loss associated with the manner of the breach to the fact of breach itself. This greater armoury allows the Canadian courts to be far more flexible (or, some might argue, more complicated) in their response to a perceived need to recognise ‘distress’ loss, albeit that an independent actionable wrong is a precursor to the recovery of aggravated and punitive damages. In addition, any analysis of recovery in this area is affected by the fact that on occasions the distress suffered may be a direct consequence of the breach, whereas in other instances it will be indirect or consequential loss following from a direct consequence. Nevertheless, there is no consistent judicial response in either jurisdiction which is based on this distinction.

The decision of the House of Lords in *Farley v. Skinner (No. 2)* evidences some relaxation in the traditional approach to the ‘objects’ exception in English law, but the actual decision on the facts indicates that there is unlikely to be a radical change in the application of the objects exception so that suggestions in

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7 In *Watts v. Morrow* [1991] 1 WLR 1421, 1445, Bingham L. J. explained that the prohibition on recovery is not absolute and that ‘[w]here the [very] object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation’, it is possible to recover distress damages ‘if the fruit of the contract is not provided or if the contrary result is procured instead’.