

# LAWS1075 Exam Notes

## DAMAGES FOR BREACH OF CONTRACT

Types of Damages

- Compensatory Damages (*Robinson v Harman*)

- Expectation Damages
  - a) Cost of Cure
  - b) Diminution in value
  - c) Reliance (wasted expenditure) (*Cth v Amann Aviation*)
- Loss of Chance (*Howe v Teefy*)

- Gain-based Damages (not recognised in Aus)

- Punitive or Exemplary Damages (not recognised in Aus)

Date of assessment of Damages

Limits on Damages (Claiming non-pecuniary damages)

Remoteness and Causation

Mitigation

## LIMITS ON AGREED REMEDIES AND PENALTIES

Agreed remedies

Penalties doctrine (3-step approach)

## ACTIONS FOR DEBT

Primary and secondary rights

'Entire' or 'Severable'

Substantial Performance

## SPECIFIC PERFORMANCE

The White & Carter Principle

## VITIATING FACTORS

- Limits on the power to rescind (bars to rescission)

- Void/Voidable

1. Mistake (common law and perhaps equity)
2. Misrepresentation (equitable and common law)
3. Misleading or deceptive conduct (statute)
4. Undue influence (equity)
5. Duress (common law)
6. Unconscionable dealing (equity)
7. Unconscionable conduct (statute)

## COMPENSATORY DAMAGES FOR BREACH OF CONTRACT

### The Compensation Principle

- Golden rule - aggrieved is entitled to damages to place them in the same position they would be in if the contract had been performed. Parke B in *Robinson v Harman*

### Expectation Damages

- a) Cost of Cure (cost to rectify)
- b) Diminution in value (measures the value of something before and after the causative act or omission creating the lost value)
  - *Bellgrove v Eldridge* - Damages for breach of an obligation to build or repair should be calculated based on the cost of remedying the work to achieve conformity (limited to reasonableness)
  - *Tabcorp Holdings v Bowen* – betterment, if backed by appropriate evidence may have discount in damages; plaintiff entitled to damages required to restore
  - *Clark v Macourt* - The majority looked at the value of A's right at the time performance was due; Gageler J looked at the consequences after the time performance was due
- c) Reliance (wasted expenditure) (*Cth v Amann Aviation*)
  - Where the plaintiff is not able to prove the value of the benefit, they expected to gain from performance of the contract. Reasons for reliance claim:
    - Difficult/ impossible to quantify loss for non-existent item
    - Forensically easy to quantify reliance damages using the receipts as evidence
    - *McRae v Cth Disposals* – expense for salvaging a non-existent tanker; recoverable (subject to limits)
      - i. reasonably incurred by the plaintiff
      - ii. In reliance of a promise
      - iii. expense was wasted because the promise was breached
      - iv. Onus on the defendant to show that the expense would have been wasted even if the promise wasn't breached
    - *Cth v Amann* - Any net profit had the original contract been performed; value of the chance that the contract would have been renewed

Loss of Chance - expectation damages that compensate a party for the chance of benefit that they expected to gain from performance of the contract

- *Howe v Teefy* - within the reasonable contemplation of the parties since it was the sole object of the agreement to make money by racing the horse; a deprivation of chance resulting from a breach of contract is something compensable

- *Schilling v Kidd Garrett* - Damages for loss of chance may also be awarded for the loss of a commercial opportunity

## DATE OF ASSESSMENT AND LIMITS ON DAMAGES

General Rule: assessed at the date of the breach of contract

Exceptions when: (i) A should seek to mitigate her losses after B's breach; or (ii) giving the court more flexibility in assessing the injustice A has suffered as a result of B's default

- *Johnson v Perez* – inflation/ changing economic values create complications; the date as at which the injury is assessed should reflect the time of the intended conversion

- where, at the time of B's breach, there was no market in which A can buy replacement goods or services
- *The Golden Victory* - If at the date of breach there had been a real possibility that an event would happen terminating contract or otherwise reducing contractual benefits, the quantum of damages might need to be reduced proportionally, to reflect the estimated likelihood of that event materialising
- the breach date rule may be departed from in circumstances where the compensatory principle or the justice of the case requires
  - unlikely to apply where A seeks to claim damages for her consequential loss
  - Where A terminates a contract and claims damages for B's repudiation before B's time for performance arrives and but subsequent events have affected the value of A's right to performance

Claiming non-pecuniary losses

A is a natural person (cf. corporate person), non-pecuniary loss may be awarded if:

[Lord Thurlow - corporate person has no soul to be damned, has no physical body or mind on which you can suffer non-pecuniary loss]

- a. loss of satisfaction (such as enjoyment or peace of mind) or distress and it was an important object of the contract that A would have satisfaction or should not suffer distress (*Baltic Shipping Company v Dillon*)
- b. physical inconvenience or discomfort or distress consequent on A's physical inconvenience or discomfort (*Bailey v Bullock* [1950])
- c. pain, suffering, or loss of amenity consequent on A's personal injury (*Heywood v Wellers* [1976])

## REMOTENESS; MITIGATION

two rules may serve to limit A's ability to claim compensatory damages for breach of contract from B:

- a. damages must not be too remote from B's breach [could not reasonably have been contemplated by B as a serious possibility at the time the contract was made] (*Stuart v Condor Commercial Insulation*)
- *Hadley v Baxendale* - (i) must have been within the reasonable contemplation of the parties at the time of the contract; and (ii) the event that caused the damage must be "not unlikely to occur".

Remoteness principle

- Economic efficiency: encouraging the disclosure of information regarding unusual potential losses (Burrows. 2004)
- Discerning the intentions of the parties concerning particular contractual risks (Hart 2005)
- The rules against remoteness are external to the parties' agreement and are concerned with whether B had a reasonable opportunity to consider the risks associated with a breach of contract (Burrows. 2004)

*Alexander v Cambridge Credit Corp Ltd*

- too remote; the damage which would be contemplated would be damage, speaking generally, in the period until the next audit; not all the three years after breach, but the period until the next audit
- Causation (between breach and loss)
  - In general, 'but for' test will be sufficient to prove the necessary causal connection. The ultimate test is whether, as a matter of commonsense, the relevant act or omission was a cause
  - noting the lack of ongoing reliance on the report (McHugh JA)

*Stuart v Condor Commercial Insulation*

- The contract price (less than \$10,000) was so out of proportion to the risk of being liable for damages for the loss of A's contract with C to be not within the reasonable contemplation of the parties (see at [97]).
- The event that gave rise to the loss in this case was the fire, which was an unusual catastrophic event and was not one which was "not unlikely to occur"

- b. should not be able to claim damages if A should have reasonably avoided the loss (*British Westinghouse Electric and Manufacturing v Underground*)

*Burns v MAN Automotive*

- the aggrieved party has a 'duty to mitigate'; must take all reasonable steps to minimise her loss and must not take unreasonable steps to increase the loss
- it was not reasonable for the buyer to carry on his business with the defective vehicle once he knew that he was operating at a loss; if he was then unable to have the engine fully reconditioned, he could have terminated the hiring

*Simonius v Holt*

- took reasonable steps to mitigate, nonetheless suffering even greater damage as a result of B's breach
- [B] had not proved that the [A's] conduct was unreasonable. ... The consequence, therefore, is that, as a result of reasonable steps to mitigate their damage, the plaintiffs suffered a further loss of money; defendants are bound to make good the loss thereby sustained