

WEEK 6: PERFORMANCE AND BREACH:

1. Termination (Continued)

Consequences of Affirmation or Termination

Case	Bowes v Chaleyer (p 644)
Facts	<ul style="list-style-type: none"> <li>• The Seller [plaintiff/respondent, Chaleyer] entered a contract for sale of 1800 yards tie silks with the Buyer [defendant/appellant, Bowes].</li> <li>• Short time after, Defendant wrote to the Plaintiff that the Defendant would be compelled to cancel the order due to concerns about prices.</li> <li>• The Plaintiff nonetheless continued to import the silks:             <ul style="list-style-type: none"> <li>○ 340 yards 21st October</li> <li>○ 800 yards 17th November</li> <li>○ 580 yards 13th December</li> </ul> </li> <li>• The Defendant refused to accept them, asserting the contract had been cancelled shortly after it was made.</li> <li>• The Plaintiff sued claiming damages for the difference between contract price and price obtained on sale by auction, alleging buyer's wrongful repudiation</li> </ul>
Issue	<ul style="list-style-type: none"> <li>• Consequences of affirmation</li> </ul>
Judge's Comments	<p>Higgins J:</p> <ul style="list-style-type: none"> <li>• When the Buyer purported to cancel the contract that was repudiation. However, that repudiation was affirmed and therefore all rights and obligations remain in place <b>for both parties</b>.             <ul style="list-style-type: none"> <li>○ "It is clear, therefore, that on and after 19th January, if not before, the defendant gave absolute and unequivocal notice to the plaintiff that he would not accept the goods—would not perform the contract. The plaintiff then had a right of election: he could have concurred with the defendant in rescinding the contract, and bring an action for the breach; or he could have treated the notice as inoperative, and proceed with the contract. The plaintiff chose the latter course; and thereby he remained subject to all his own obligations under the contract, and the defendant remained in a position to take advantage of any failure of the plaintiff to do his part."</li> </ul> </li> </ul> <p>Knox CJ:</p> <ul style="list-style-type: none"> <li>• In determining whether the buyer repudiated by accepting the goods, the question is 'was the buyer entitled to reject the goods on the ground that the conditions of the shipment had not been complied with?'</li> <li>• This question has three parts:             <ol style="list-style-type: none"> <li>1. What is the meaning of the shipping stipulation? – there was no ambiguity – natural and literal meaning means half now, half in two months. Nonetheless, this is not necessary to decide.</li> <li>2. Did the seller comply with the stipulation? - No. Two months did not elapse between shipments. The shipments were uneven.</li> <li>3. If not, did the failure to comply with it entitle the buyer to reject the goods? - There is a general rule: <b>A stipulation in a contract for the sale of goods that goods shall be shipped by a certain time is a condition precedent, the breach of would justify the buyer in rejecting the goods tendered</b> (terminating the contract). No reason in this case to ignore</li> </ol> </li> </ul>

	the rule - the stipulation was a condition precedent.
Principle	The plaintiff then had a right of election: he could have concurred with the defendant in rescinding the contract, and bring an action for the breach; or he could have treated the notice as inoperative, and proceed with the contract. The plaintiff chose the latter course; and thereby he remained subject to all his own obligations under the contract, and the defendant remained in a position to take advantage of any failure of the plaintiff to do his part. A door must be either open or shut; a contract must either subsist or be at an end"
Outcome	<ul style="list-style-type: none"> <li>• on the grounds that the Seller breached a condition, the buyer was justified in rejecting the goods and his conduct <b>did not</b> amount to repudiation.</li> <li>• Appeal allowed, the Plaintiff fails</li> </ul>
Class notes	<ul style="list-style-type: none"> <li>• Saying he didn't want it amounts to repudiation</li> <li>• Continues with it amounting to an affirmation</li> <li>• Is not half-half there is a right to terminate for breach of a condition – apply test of essentiality; business operations will be made around the silk deliveries</li> <li>• Risk</li> </ul>

### Restrictions on the Right to Terminate

Case	<b>Tropical Traders v Goonan (p 663)</b>
Facts	<ul style="list-style-type: none"> <li>• Appellant [Tropical traders, vendor] were selling land to Respondent [Goonan, purchaser]. <ul style="list-style-type: none"> <li>○ Contract provided a time for completion and specified that time is of the essence.</li> </ul> </li> <li>• Contract provided a payment method and that if money wasn't paid properly, the Appellant can rescind the contract and keep all money already received.</li> <li>• Many payments were made late and one wasn't made at all.</li> <li>• The Respondent asked for a 3 month extension to pay his debts, the Appellant gave him a couple of days extension, but specified that it is doing it out as an act of grace and without forfeiting its rights under the contract.</li> <li>• Payment was not made, the contract was terminated.</li> <li>• The Appellant seeks an declaration that the termination was valid, whilst the Respondent claims wrongful termination.</li> </ul> <p>Argument:</p> <ul style="list-style-type: none"> <li>• The Respondent claims that: <ol style="list-style-type: none"> <li>1. By accepting the late payment, the Appellant either waived the 'time is of the essence' clause or induced an assumption that he would not terminate because of lateness</li> <li>2. By accepting the interest due on the deadline date, or by giving the extension, the Appellant has elected not to terminate</li> </ol> </li> </ul>
Issue	<ul style="list-style-type: none"> <li>• Does the acceptance of late payments amount to an affirmation</li> </ul>
Judge's comments	<p><b>Acceptance of late payments</b></p> <ul style="list-style-type: none"> <li>• The acceptance of late payment did not result in the waiver for the 'time is of the essence' clause neither does it give rise to an estoppel.</li> <li>• Each time the Appellant accepted a late payment was a separate election not to terminate for that particular breach of a condition. <ul style="list-style-type: none"> <li>○ "...it does not follow that in respect of the final payment of...the appellant</li> </ul> </li> </ul>

	<p>was giving the respondents to understand that they might safely rely upon its treating of cl 12 of the contract as no longer in force...Each acceptance of a late payment operated, of course, as an election by the appellant not to rescind the contract for non-payment of the relevant amount on its due date"</p> <p><b>Granting of the extension</b></p> <ul style="list-style-type: none"> <li>• Granting an extension does not nullify a 'time is of the essence' clause - it <b>can</b>, but does not do so generally.</li> <li>• More likely, it usually merely substitutes the original time with a new one, which is still 'of the essence'.</li> <li>• The granting of an extension in no way waived the Appellant's right or affirmed the contract.</li> <li>• "On the contrary, the extension was granted with a plain intimation...that the appellant was insisting upon its strict rights under the contract except to the extent of the indulgence it was offering. In the face of the letter the respondents had no reasonable ground for a belief that if they should fail to pay...they could still count on being allowed further time."</li> </ul> <p><b>Election in general</b></p> <ul style="list-style-type: none"> <li>• A party is not required to elect at once. <ul style="list-style-type: none"> <li>◦ "It might keep the option open, so long as it did nothing to affirm the contract and so long as the respondents' position was not prejudiced in consequence of the delay."</li> </ul> </li> <li>• In this case, the Appellant merely decided to defer its election until the new deadline, after which it elected to terminate. This is perfectly fine.</li> </ul>
Principle	<ul style="list-style-type: none"> <li>• Acceptance of late payments is only an affirmation for each particular breach – time is still of the essence</li> <li>• Do not need to make election straight away- but until you do need to be careful not to induce the party into thinking you have affirmed by your actions</li> </ul>
Outcome	<ul style="list-style-type: none"> <li>• In this case, the Appellant merely decided to defer its election until the new deadline, after which it elected to terminate.</li> <li>• The appellant wins</li> </ul>
Class notes	

## 2. Remedies for Breach of Contract

### The Measure of Damages

Case	<b>Commonwealth v Amann Aviation (Mason CJ and Dawson J only) (p 710)</b>
Facts	<ul style="list-style-type: none"> <li>• Plaintiff [Amann] had a contract with the Defendant [Commonwealth] to provide surveillance flights.</li> <li>• When the time for performance came, the Plaintiff was not really ready to fulfill its contractual obligations (the state of the aircraft being deficient).</li> <li>• The Defendant terminated the contract, and the Plaintiff sued for wrongful termination to recover its losses spent in preparing the aircraft.</li> <li>• The Trial judge ruled for the Plaintiff and gave fairly low damages. The Full court ruled for the Plaintiff and gave way more extensive damages.</li> <li>• This appeal deals only with the matter of damages, because the Defendant</li> </ul>

	admitted by now that it wrongfully terminated.
Issue	<ul style="list-style-type: none"> <li>The calculation of damages</li> </ul>
Judge's comments	<p><b>Assessing damages</b></p> <ul style="list-style-type: none"> <li><i>Robinson v Harmon principle</i></li> <li>'the onus of proving damages sustained lies on the plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, <b>objectively determined</b>, rather than subjectively ascertained... a plaintiff must prove on the balance of probabilities, that his or her expectation of a certain outcome, as a <b>result of performance</b> of the contract, had a likelihood attainment rather than being mere expectation.'</li> <li>'A plaintiff is only entitled to damages for an amount equivalent to that which would have been earned had the contract been fully performed'</li> <li>"plaintiff is not entitled, by way of award of damages upon breach, to be placed in a superior position to that which he or she would have been in had the contract been performed"</li> </ul> <p><b>If P cannot prove what damages is reasonable, they are to recover the expenditure:</b></p> <ul style="list-style-type: none"> <li>"Not possible what position a plaintiff would have been in had the contract been fully performed... the law considers the just result in such as case is to allow a plaintiff to recover such expenditure as is reasonably incurred un reliance on the defendants promise." "the law assumes that a plaintiff could at least have recovered his or her expenditure has the contract been fully performed"</li> </ul> <p><b>This is a presumption</b></p> <ul style="list-style-type: none"> <li>"a party would not enter into a contract in which its <b>cost were not recoverable...</b> such a presumption is not irrebuttable but, until that presumption is rebutted, a plaintiff may rely on it to <b>recover his or her reasonable expenses</b> both in the case of a contract which would not have been profitable and in the case of a contract where the outcome of the contract, if it been fully performed, cannot be demonstrated, whether at all or with any certainty "</li> </ul>
Principle	<p>Affirms the principle in <i>Robinson v Harman</i>, "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".</p> <ul style="list-style-type: none"> <li>P has to prove what a reasonable assessment of damages is</li> <li>If cannot prove, P is entitled to recover reliance (cost) damages</li> <li>There is a presumption that P will enter into a contract only where costs are recoverable</li> <li>D has to rebut presumption and if successful is not liable to pay</li> </ul>
Outcome	<ul style="list-style-type: none"> <li>Cth liable to pay</li> </ul>
Class notes	

Case	<b>Bellgrove v Eldridge (p 734)</b>
Facts	<ul style="list-style-type: none"> <li>The Appellant entered a contract with the Respondent by which he was to build her a house under certain specifications in return for a certain sum.</li> <li>The Appellant built the house with substantial departures from the specifications</li> </ul>

	<p>of the Respondent.</p> <ul style="list-style-type: none"> <li>○ The house may even be unstable because of those departures.</li> <li>• The Respondent seeks extensive damages. The issue is how are the damages ascertained</li> </ul> <p>Argument:</p> <ul style="list-style-type: none"> <li>• The Appellant argued that the proper measure of damages was the difference between the value of the house if it was built according to the specification and the value of the house now (without the specifications).</li> </ul>
Issue	<ul style="list-style-type: none"> <li>• How are damages awarded in cases of warranties?</li> </ul>
Judge's comments	<p>Dixon CJ, Webb and &amp; Taylor JJ:</p> <ul style="list-style-type: none"> <li>• Whilst damages are meant to financially restore a plaintiff, the argument of the Appellant does not apply here. <ul style="list-style-type: none"> <li>○ This is partly because a departure from the specifications doesn't always affect the value (eg, if the builder paints it a different colour etc). If the Appellant's argument is accepted, a plaintiff in such a scenario will be left without a remedy.</li> </ul> </li> <li>• The damages awarded will be the cost of demolishing the house and building a new one, according to the specifications. This is the only way to truly compensate the owner. <ul style="list-style-type: none"> <li>○ 'The respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specification which formed part of it, and her damage is the loss which she has sustained by the failure of the builder to perform his obligations to her'.</li> <li>○ 'This loss can prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract'.</li> </ul> </li> <li>• The qualification to this rule is that the rectification 'must be a reasonable course to adopt'. <ul style="list-style-type: none"> <li>○ For example, a house built with superior bricks to the one specified cannot be demolished in order to be built with lesser quality bricks. That is unreasonable.</li> </ul> </li> <li>• It is irrelevant whether the Plaintiff actually goes ahead and does the rectification with the damages he received...he can get the damages and do nothing with them.</li> <li>• Because the house appears to be unstable, it is not unreasonable to rectify the house. Therefore the Respondent's damages will be the cost of demolishing and rebuilding</li> </ul>
Principle	<ul style="list-style-type: none"> <li>• “The qualification, however to which this rule is subject it that, not only must the work undertaken be necessary to produce formality, but that also, it must be a reasonable course to adopt”</li> </ul>
Outcome	<ul style="list-style-type: none"> <li>• Respondent wins</li> </ul>
Class notes	<ul style="list-style-type: none"> <li>• 2 ways to assess the amount of damages <ul style="list-style-type: none"> <li>- Reinstatement; demolish and rebuild</li> <li>- Diminution; Difference between value of what the house should have been and the value the house is with the defects</li> </ul> </li> <li>• Generally apply first measure where it is reasonable and necessary</li> </ul>

	<ul style="list-style-type: none"> <li>In this case it was necessary and reasonable because she needed a stable and safe house to live in</li> </ul>
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Case	<b>Howe v Teefy (p 744)</b>
Facts	<ul style="list-style-type: none"> <li>Plaintiff [Teefy] was leasing a horse off the Defendant [Howe] for the purposes of racing it and generally making money off it (through bets etc).</li> <li>The Defendant randomly took the horse back.</li> <li>The Plaintiff sued for damages, including the loss of chance (to win money through races, bets, selling information on the horse to other gamblers etc)</li> </ul>
Issue	
Judge's comments	<ul style="list-style-type: none"> <li>The agreement was made in place to give the Plaintiff a <b>chance</b> of making money off the horse. <ul style="list-style-type: none"> <li>"the test in every case is, as I say, whether the plaintiff was possessed of something which had a monetary value, and of which he was deprived by the defendant's breach of contract</li> </ul> </li> <li>The presence of contingencies (i.e. whether the horse would win races, whether the Plaintiff would win bets etc) do not render damages incapable of assessment. The value of the chance can still be assessed. <ul style="list-style-type: none"> <li>"The presence of contingencies...does not render the damages incapable of assessment though it may make the calculation of the pecuniary loss sustained incapable of being carried out with certainty or precision."</li> </ul> </li> <li>"if a plaintiff has been deprived of something which has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty."</li> <li>In this case, it is clear that the Plaintiff was deprived of something of value.</li> <li>Notice, the calculation "was not how much he would probably have made...but how much his chance of making that profit...was worth in money"</li> </ul>
Principle	<ul style="list-style-type: none"> <li>Damages are awarded for lost opportunity or chance</li> <li>Contingencies (future events) although difficult to assess their monetary values it is not impossible. The courts will strive to out a values on anything that has monetary value</li> </ul>
Outcome	
Class notes	

Case	<b>Attorney-General v Blake (p 746)</b>
Facts	<ul style="list-style-type: none"> <li>Blake was a former SIS</li> <li>Signed in 1944, an undertaking not to divulge any official information gained</li> <li>Between 1951 and 1960 he disclosed valuable secret information to the SU</li> <li>1961 convicted of spying, sentenced to 42 years imprisonment, but in 1966 escaped and lived in Moscow</li> <li>1989 he wrote an autobiography, substantial parts bases on SIS info he had acquired</li> <li><i>Official Secrets Act (UK) 1989</i>: offence to disclose infor relating to intelligence due to being a member of the service</li> <li>Blake enter publishing contract: \$50000 advance payment and \$50000 on</li> </ul>

	<p>delivery and \$50000 on publication. Crown had no knowledge of book until publication was announced. After vlake already received some money</p> <ul style="list-style-type: none"> <li>• Attorney general bought a private law action against Blake, claiming breach of fiduciary duty and payment of all moneys received and to be received</li> </ul>
Issue	
Judge's comments	<p><b>Discussing specific performance</b></p> <ul style="list-style-type: none"> <li>• ‘these specific remedies go a long way towards providing suitable protection for innocent parties who will suffer loss from breaches of contract which are not adequately remediable by an award of damages. But these remedies are not always available’</li> </ul> <p><b>Reasoning for accounts of profits</b></p> <ul style="list-style-type: none"> <li>• “In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefits he has gained”</li> <li>• In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract”</li> </ul> <p><b>Statements of accounts of profits:</b></p> <ul style="list-style-type: none"> <li>• “only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise’ a useful general guide, although not exhaustive, is whether the plaintiff has a legitimate interest in preventing the defendant's profit- making activity and, hence, depriving him of his profit”</li> </ul> <p><b>Why Blake is under fiduciary claim</b></p> <ul style="list-style-type: none"> <li>• “He was, therefore in regard to all information obtained by hi, in the intelligence service, confidential or not, in a very similar position to a fiduciary. The reason of the rule applying to fiduciaries applies to him”</li> </ul>
Principle	<ul style="list-style-type: none"> <li>• In exceptional cases, when the normal remedy is inadequate to compensate for breach of contract, the court can order the defendant to account for all profits. This was an exceptional case as Blake had harmed the public interest ### not Australian position</li> </ul>
Outcome	
Class notes	<ul style="list-style-type: none"> <li>• In exceptional circumstances England will give damages based on the benefit gained by the defendant</li> <li>• The possibility of gains of the defendant damages being awarded in response to a breach of contract has not been accepted in Australia.</li> </ul>

Case	<b>Hospitality Group v Australian Rugby Union Ltd (mentioned at p 754)</b>
Principle	<p>Cited: <i>Tito v Waddell</i></p> <p>The question is not one of making the defendant disgorge what he has saved by committing the wrong but one of compensating the plaintiff</p> <p>And <i>Amann</i></p> <p>The corollary of the principle in <i>Robinson v Harman</i> is that a plaintiff is not entitled, by the award of damages upon breach, to be place in a <u>superior position</u> to that which he or she would have been in had the contract been performed</p>