

# I. CONTRACT

## 1. COMPENSATORY DAMAGES

\*Note: if it is a **debt**, per Lord Millett in *Jervis v Harris*, a claim in debt is not a claim for damages.

- Definition: A definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation or occurrence of some specified event or condition
- Need only to prove the occurrence of the event or condition on the occurrence of which the debt became due
- Don't need to ascertain the amount of debt at the date of contract so long as it is ascertainable when it falls due
- Remoteness and mitigation are irrelevant

Intro	<p>Cause of action: <b>breach of contract</b></p> <p>Damages for breach of contract are <u>available as of right</u></p> <ul style="list-style-type: none"> <li>• <u>Expectation damages</u> are the default measure of loss, subject to certain exceptions (<i>Robinson v Harman</i> per Hayne J) <ul style="list-style-type: none"> <li>◦ The P may <u>not be placed in a better position</u> (<i>Robinson v Harman; Amann</i>) <ul style="list-style-type: none"> <li>■ However, in <i>Tabcorp</i> the plaintiff was placed in a better position than if contract had been performed (got a newly renovated foyer)</li> <li>■ Also in <i>Clark v Macourt</i>, plaintiff ended up with an extra \$1.3m they would not have had if contract was performed</li> </ul> </li> </ul> </li> </ul>
Measurement of Loss	
Characterise loss	<p>a. <u>Direct loss</u>: loss of value of promised performance</p> <p>b. <u>Consequential loss</u>: loss arising as a result of the breach, usually varying from one plaintiff to another</p>
Expectation	<p><u>General</u></p> <ul style="list-style-type: none"> <li>• Expectation damages are the default measure of loss and aims to place the P in a position as if the contract had been performed, as far as money goes (<i>Robinson</i>)</li> </ul> <p>(1) <u>Loss of profits</u> (either direct or consequential)</p> <ul style="list-style-type: none"> <li>• <u>Measure</u>: Net profit <ul style="list-style-type: none"> <li>◦ Expected revenue less expected costs</li> </ul> </li> </ul> <p>(2) <u>Value</u></p> <ul style="list-style-type: none"> <li>• Delivery of goods cases (where non-delivery, or does not meet contractual specifications)</li> <li>• <u>Objective measure</u>: difference in market value (<i>Clark v Macourt</i>) <ul style="list-style-type: none"> <li>◦ Market value of the good contracted for less market value of the good received</li> <li>◦ The Court does not assess the adequacy of the bargain but rather the difference between what was delivered and what was promised (<i>Clark v Macourt per Hayne J</i>)</li> </ul> </li> </ul> <p>**C.f. <u>Subjective measure</u> applied by Gageler J in <i>Clark</i> awarded no damages since the straws had no value to Clark (were not traded for profit)</p> <p>Consider if damages might be inadequate - too uncertain/impossible to value/unique good</p> <ul style="list-style-type: none"> <li>• NB: <u>'mere difficulty'</u> in assessing expectation loss is insufficient (<i>McRae</i> per Dixon and Fullagar JJ)</li> </ul>
Rectification	<p><u>Situations</u>: Where performance has a <u>subjective value</u>, and difference in value will not adequately meet expectation interest</p> <ul style="list-style-type: none"> <li>• *Look for building contracts</li> <li>• No market substitute (e.g. <i>Tabcorp</i>: foyer) <ul style="list-style-type: none"> <li>◦ "loss of profit or difference in value measures are unlikely to be a fair measure of compensation, as the contract was not for the sale of a marketable commodity (<i>Bellgrove</i>)"</li> </ul> </li> </ul> <p><u>Test</u>: <i>Add to the Robinson principle</i>: The position into which the P is put is not limited to the same financial position (Oliver J in <i>Radford</i>, cited in <i>Tabcorp</i>).</p> <ul style="list-style-type: none"> <li>• Rectification damages allow the plaintiff to fix defective performance (usually cost to build or repair something)</li> <li>• Will apply even if costs substantially more than difference in value (<i>Bellgrove</i>).</li> </ul> <p><u>Limitations</u>: Rectification damages will only be given if it is <u>necessary</u> and <u>reasonable</u> (<i>Bellgrove</i>)</p> <ol style="list-style-type: none"> <li>1. <u>Necessary</u>: <ul style="list-style-type: none"> <li>◦ Amount of money must be <u>no more than is strictly necessary</u> to bring about actual compliance with the contractual duty and nothing more (never really an impediment, but goes to the extent)</li> </ul> </li> <li>2. <u>Reasonable</u>: <ul style="list-style-type: none"> <li>◦ Unreasonable if <u>technical breach</u> (would likely give P a windfall) (<i>Tabcorp</i>) <ul style="list-style-type: none"> <li>■ E.g. <i>Ruxley</i>: pool was slightly shallower, but value was the same and still suitable for diving</li> </ul> </li> <li>◦ <u>Cost</u> incurred to apply rectification damages is a <u>relevant</u> factor, but <u>not determinative</u></li> </ul> </li> </ol>

	<ul style="list-style-type: none"> <li>■ <i>Tabcorp</i>: \$1m vs \$30,000</li> <li>○ <u>Relevance of whether P intends to actually rectify is unclear</u> <ul style="list-style-type: none"> <li>■ In <i>Bellgrove</i>, awarded damages despite no intention by P to demolish the house</li> <li>■ But in <i>Ruxley</i> the court it was relevant (though <i>Ruxley</i> was criticised in <i>Tabcorp</i> for being contrary to established principles)</li> <li>■ Could resolve by saying that in principle <u>finality</u> and <u>efficiency</u> require the court not to consider it (otherwise might require the court to take a supervisory role)</li> </ul> </li> </ul> <p><u>Cases</u></p> <ul style="list-style-type: none"> <li>● <i>Bellgrove</i>: <ul style="list-style-type: none"> <li>○ Reasonable to award the cost of demolishing house built with 'defective foundations <u>seriously threaten the stability</u> of a house'.</li> <li>○ Dicta: Contracted to be made of new bricks but were made of second-hand bricks – demolition is unreasonable.</li> </ul> </li> <li>● <i>Tabcorp</i>: <ul style="list-style-type: none"> <li>○ Rectification damages awarded to cover the cost of demolishing the new foyer and restoring it, as well as damages for loss of rent during that period</li> </ul> </li> <li>● <i>Ruxley</i>: <ul style="list-style-type: none"> <li>○ Unreasonable since no safety issues, value of pool was the same, cost was wholly disproportionate to the disadvantage of a shallower pool, plaintiff was unlikely to use the money to redo the pool</li> </ul> </li> </ul> <p><u>Conclude</u>: Will only deny rectification damages in <u>exceptional cases</u> (<i>Tabcorp</i>)</p> <ul style="list-style-type: none"> <li>● NB: If the reasonableness test fails, the court will still award compensation but using a <u>difference in value measure</u></li> </ul> <p><u>Commercial contexts?</u></p> <ul style="list-style-type: none"> <li>● In <i>Tabcorp</i>, applied rectification damages even though commercial context (possibly because deliberate/egregious breach) <ul style="list-style-type: none"> <li>○ Note the commercial investment context – the value of the foyer was not reduced but rectification damages were still given.</li> </ul> </li> </ul>
<p><b>Reliance</b></p>	<p><u>Intro</u>: Reliance loss is a <u>proxy measurement</u> of loss where expectation loss is unavailable</p> <ul style="list-style-type: none"> <li>● Proxy because there is a <u>presumption</u> that P would not have entered into unless expenses reasonably incurred in performing the contract could have been recouped (<i>McRae</i> per Dixon and Fullagar JJ)</li> </ul> <p><u>Are expectation damages are too difficult or impossible to calculate?</u></p> <ul style="list-style-type: none"> <li>● (<u>Impossible</u>) <i>McRae</i>: Subject of the contract <u>non-existent</u>, so cannot be calculated.</li> <li>● (<u>Very difficult</u>) <i>Amann</i>: Value of the subsequent contracts are 'impossible as a matter of theory' to measure since <u>prospect of renewal is uncertain</u></li> <li>● NB: '<u>mere difficulty</u>' in assessing expectation loss is insufficient (<i>McRae</i> per Dixon and Fullagar JJ)</li> </ul> <p><u>Apply reliance damages</u>: Award will be made for <u>reasonable expenditure made in reliance on the promise</u> (<i>McRae</i> per Dixon and Fullagar JJ)</p> <ul style="list-style-type: none"> <li>● Does not include <ul style="list-style-type: none"> <li>○ Expenses that would have been <u>incurred anyway</u> not included (<i>McRae</i>) <ul style="list-style-type: none"> <li>■ <i>McRae</i>: Normal expenses of operating a boat/insurance not included</li> </ul> </li> <li>○ <u>Purchase of capital assets or improvements</u> to capital assets since you are no worse off (<i>McRae</i>)</li> <li>○ Note also: in <i>McRae</i>, the defendants were not responsible for consequences of ship sinking since it was not their fault</li> </ul> </li> </ul> <p><u>Can D rebut the presumption?</u></p> <ul style="list-style-type: none"> <li>● If D can demonstrate that even if the contract had been performed, the plaintiff would not have been able to recoup their expenditures then can reduce/exclude reliance damages (<i>Amann</i>)</li> </ul>
<p><b>Distress</b></p>	<p><u>General exclusionary rule</u> against recovery for distress and disappointment under contract unless an exception applies (<i>Baltic Shipping</i>)</p> <p><u>Exceptions</u></p> <ol style="list-style-type: none"> <li>1. Injured feelings for breach of a promise for marriage</li> <li>2. <u>Mental distress consequent upon physical injury</u> caused by contract (includes nervous shock)</li> <li>3. <u>Physical inconvenience</u> in certain circumstances <ul style="list-style-type: none"> <li>○ Something similar to loss of amenity</li> <li>○ Try analogise it to recognised circumstances <ul style="list-style-type: none"> <li>■ Train does not deliver you to stipulated destination (<i>Hobbs v London &amp; South Western Rly Co</i>)</li> <li>■ Plaintiff purchases property with defects not revealed in surveyor's report upon which the plaintiff relied (<i>Perry v Sidney Phillips &amp; Son</i>)</li> </ul> </li> </ul> </li> <li>4. <u>Mental distress directly related to physical inconvenience</u> suffered from breach</li> <li>5. Contracts for the <u>purpose of pleasure, relaxation, peace of mind</u> or freedom from molestation <ul style="list-style-type: none"> <li>○ <i>Heywood v Wellers</i>: solicitor negligently failed to get an injunction to protect client from molestation - contract had as its object the protection of the client from molestation</li> <li>○ <i>Jarvis v Swans Tours</i>: Breach of contract to provide a stipulated holiday, entertainment or enjoyment, the object of the contract being to provide pleasure or relaxation</li> <li>○ <i>Baltic Shipping v Dillon</i>: object of the contract was a 'pleasure cruise' to provide enjoyment and relaxation</li> </ul> </li> </ol>

# LIMITING PRINCIPLES

Intro	<p>Even though courts have adopted a common sense causation approach (<i>Alexander</i>), in general two causal inquiries arise: factual causation and legal causation. In the interests of clear legal analysis, it is best to address each inquiry separately.</p> <p><u>Support for common sense approach</u></p> <ul style="list-style-type: none"> <li>The ultimate question is whether, as a matter of commonsense, the relevant act or omission was a cause of the damage (<i>Alexander v Cambridge Credit</i> per McHugh JA)</li> <li>'Rules relating to causation and remoteness are to be liberally construed and not applied so rigidly as to cause injustice' (<i>Alexander</i> per McHugh JA)</li> <li>Criticisms: unstructured and combines factual causation and cause in law analysis</li> </ul>
Factual Causation	
Intro	There must be a causal link between the D's wrongdoing and the loss suffered
'But for'	<p>Test: <b>'But for' causation</b> (<i>Alexander</i>)</p> <ul style="list-style-type: none"> <li><i>Reliance</i>: would this expenditure have been incurred but for the giving of the promise under the contract?</li> <li><i>Consequential</i>: but for the breach, would these expenses or losses have been suffered?</li> <li>NB: If <i>expectation</i> loss or <i>rectification</i>, will never be a problem since loss is inherent in breach</li> </ul>
Exceptions	<p>Only a guide, if doesn't work, ultimate question is 'common sense' approach per <i>Alexander</i></p> <ul style="list-style-type: none"> <li>E.g. if <u>multiple sufficient causes</u>, then only needs to be a <u>substantial factor</u></li> </ul>
Remoteness	
Intro	<p><b>The test for remoteness is set out in <i>Hadley v Baxendale</i></b></p> <ul style="list-style-type: none"> <li>Only <u>type of loss</u> must be foreseeable and not its extent <ul style="list-style-type: none"> <li>NB: sometimes stretched (see eg <i>Victoria Laundry</i> where they distinguished between lucrative contracts and normal contracts)</li> </ul> </li> </ul>
Limb 1	<p><b>Loss is not remote if it <u>naturally</u> arises from the breach in the <u>usual course of things</u> (<i>Hadley</i>)</b></p> <ul style="list-style-type: none"> <li><b>Objective</b> question: what would a <u>reasonable person</u> think would be the <u>natural consequence</u> of the breach? <ul style="list-style-type: none"> <li><i>Hadley</i>: was <u>not the invariable result</u> that failure to deliver crank shaft on time would amount to the mill being non operational for several days (i.e. P's could have had another shaft)</li> <li><i>Vic Laundry</i>: a reasonable person in the D's position would know that because of the delay P's would lose profits arise from the <u>normal course of their business</u></li> <li><i>Jason's example</i>: in a <u>commercial setting</u> where two giant corporations contract it would be highly unlikely to reasonably contemplate that distress and upset feelings would be a natural consequence of any breach and be recoverable</li> </ul> </li> </ul>
Limb 2	<p><b>Loss is not remote if it may <u>reasonably</u> be supposed to have been in the contemplation of both parties, <u>at the time they made the contract</u>, as the probable result of the breach of it" (<i>Hadley</i>)</b></p> <ul style="list-style-type: none"> <li><b>Subjective</b> question: subjective knowledge of the parties at the time of the contract is considered <ul style="list-style-type: none"> <li><i>Hadley</i>: was not communicated to the D's that the P's had only one crankshaft and that delay would result in loss, therefore the loss was remote (cf if had told during contract negotiations that they needed it quickly)</li> <li><i>Vic Laundry</i>: loss for the lucrative dyeing contracts were not in the reasonable contemplation of the parties (different outcome if P had mentioned it)</li> <li><i>Amann</i>: prospect of renewal of the contract was a 'distinct commercial benefit' that was 'inevitably contemplated by the parties' and thus not too remote.</li> </ul> </li> </ul> <p>*NB: two tests overlap and second limb arguably swallows first, if short on time just go to limb 2 and say therefore limb 1 is satisfied</p> <p><b>Notes</b>  <b>[Direct Losses]</b> Direct losses are recoverable under the first limb.  <b>[Consequential Losses]</b> Difficulties arise in relation to consequential losses, unless they are consequential losses arising naturally.</p> <ul style="list-style-type: none"> <li>Generally, the plaintiff must rely on 2<sup>nd</sup> limb to show that the defendant knew of the special circumstances giving rise to the consequential losses</li> </ul>
Agreement based approach ( <i>Achilleas</i> per Lord Hoffman)	<p><u>Indications of when to apply</u></p> <ul style="list-style-type: none"> <li>When the loss is very unpredictable/uncertain (e.g. predicting the value of a subsequent charter)</li> <li>When a market has established expectation of risk allocation (e.g. shipping or banking markets)</li> </ul> <p><u>Implicit allocation of risk/assumption of responsibility</u></p> <ul style="list-style-type: none"> <li><b>Objective</b> enquiry of the <u>intention</u> of the parties given an interpretation of the contract as a whole in light of the <u>commercial background context</u> <ul style="list-style-type: none"> <li>Banking and shipping markets have general expectations and assumptions upon which people contract on in these markets</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ If you depart from these expectations, will unwittingly deliver a profit to one party over and above what the plaintiff would expect in line with industry standards</li> <li>● Look for indications (explicit or implicit) from terms of the contract that the defendant <u>assumed responsibility</u> for the types of losses now claimed</li> <li>● <u>Achilleas</u>: General understanding in the shipping industry that the measure of loss in this type of case is the market value for period overrun</li> </ul>
	<p><u>Precedential value</u></p> <ul style="list-style-type: none"> <li>● Ratio from the case is not clear and Lord Hoffman's approach has not been explicitly endorsed by the High Court (see, eg, <u>Russell v Trustees</u>)</li> <li>● May nonetheless be persuasive</li> <li>● In hypo: see if it changes the outcome at all</li> </ul>
<b>Mitigation</b>	
<b>Intro</b>	<p>An award of damages will be reduced to the extent that they were not reasonably mitigated by the P (<u>Burns</u>)</p> <ul style="list-style-type: none"> <li>● <u>Relation to remoteness</u>: If the P fails to mitigate, P's risks the losses being considered too remote and therefore irrecoverable (<u>Burns</u> per Wilson, Deane and Dawson JJ)</li> <li>● Look at conduct <i>after</i> the breach</li> </ul>
	<p><u>If difference in value measure → not available</u></p> <ul style="list-style-type: none"> <li>● Assessed at time of breach and so loss occurs immediately and so no scope to take steps to mitigate</li> </ul> <p><u>If loss of profits or consequential losses → available</u></p> <ul style="list-style-type: none"> <li>● Court will take into account how profits have been affected between the breach and trial, so steps in mitigation are possible</li> </ul>
<b>Principles</b>	<p>(1) Plaintiff cannot recover for loss that would have been <b>reasonable</b> to avoid (<u>Burns</u>)</p> <ul style="list-style-type: none"> <li>● Look at what was 'reasonable' in the <u>circumstances</u></li> <li>● See if no other option was available <ul style="list-style-type: none"> <li>○ <u>Burns</u>: Plaintiff was too poor to avoid the loss, also the plaintiff had to continue despite discovering true state of the engine or else go broke</li> <li>○ <u>Difficulty in obtaining substitute goods</u>: If it is difficult to source the goods from somewhere else then it cannot be reasonable to avoid <i>consequential</i> losses</li> </ul> </li> </ul>
	<p>(2) Plaintiff can recover for <b>loss incurred in reasonable attempts to avoid loss</b></p> <ul style="list-style-type: none"> <li>● Incentive to mitigate</li> <li>● E.g. if it is reasonable to buy alternative DVD players while paying delivery fees, those delivery fees may be recovered</li> </ul>
	<p>(3) The plaintiff cannot recover for <b>avoided loss</b> (<u>Clark v Macourt</u>)</p> <ul style="list-style-type: none"> <li>● E.g. If you get the alternative DVDs and fulfils contract of onsale for the same amount of profit you would have earned, then won't be able to recover loss of profit</li> </ul>
	<p>(4) If mitigation of loss results in gains, damages are reduced to an extent (<u>Clark v Macourt</u>)</p> <ul style="list-style-type: none"> <li>● Court will take into account profiting from mitigation of loss and decrease the amount of damages by that amount to avoid overcompensation</li> </ul>
<b>Substitute performance</b>	<p><u>Avoiding loss through substitute performance?</u></p> <ul style="list-style-type: none"> <li>● If substitute performance is <b>better</b> – damages may be reduced (<u>Westinghouse</u>)</li> <li>● If substitute performance is <b>worse</b> – D liable for increased losses</li> <li>● If substitute performance is <b>same</b> – inquiry stops and damages not reduced <ul style="list-style-type: none"> <li>○ <u>Clark v Macourt</u>: Clark's act of purchasing the substitute straws only served to reveal their market value <ul style="list-style-type: none"> <li>■ Could have reduced consequential losses, BUT there were none on the facts (were not sold for profit)</li> <li>■ If on-sold for gain, would discount the damages by the extent of that gain</li> </ul> </li> </ul> </li> </ul>
<b>Contributory negligence</b>	
<b>Intro</b>	<p>The principle of contributory negligence will limit the damages award to the P to the extent that they are blameworthy for the loss they have suffered. It encourages caution and cooperation between parties (see <u>Astley v Austrust</u> per Callinan J)</p>
<b>Does it apply?</b>	<p><b>Only applies if there is a breach of a <u>contractual duty of care</u> that is <u>concurrent</u> and <u>co-extensive</u> with a <u>duty of care in tort</u> (s 25 <u>Wrongs Act</u>)</b></p> <ul style="list-style-type: none"> <li>● Duties must exist at the <u>same time</u> and have the <u>same content</u></li> <li>● E.g. contract provides for a duty of reasonable care which is concurrent with and coextensive with a duty of care in negligence (e.g. auditor/lawyer might owe duty to take reasonable care)</li> <li>● Look for Duty in tort on solicitor/accounter/adviser to exercise due care and skill and also there might be a contract between them requiring them to invest prudently or with due care then could use that <ul style="list-style-type: none"> <li>○ concurrent - both govern the same conduct</li> <li>○ coextensive - have to be similar in nature</li> </ul> </li> </ul>

Test	<p><b>Apportion responsibility for the loss:</b> If the claimant suffers damages as a result <u>partly of their own negligence</u> (i.e. failure to take reasonable care), the court will reduce damages to the extent the court thinks <u>just and equitable</u> having regard to the claimant's share in the responsibility for the damage (<a href="#">s 26 Wrongs Act</a>)</p> <ul style="list-style-type: none"> <li>• Compare the <u>degree to which the plaintiff/defendant deviated</u> from what would be expected of a reasonable person in their position</li> <li>• Look at who is <u>more blameworthy</u></li> <li>• Focus on the conduct <i>before</i> the wrong occurred</li> </ul>
Novus Actus	
	<p><b>Are there intervening acts or conduct (by third parties or the plaintiff) that sever the causal chain?</b></p> <ul style="list-style-type: none"> <li>• Considerations <ul style="list-style-type: none"> <li>○ Grossly unreasonable conduct by the plaintiff (has to be high to sever, otherwise would likely play a role in CN)</li> <li>○ Unreasonable conduct by third party</li> <li>○ Other intervening events</li> <li>○ However won't be novus actus if it is something inherent to the contract, in the very nature or foreseeable</li> </ul> </li> </ul> <p>***Applies in contract, but much less common compared to tort</p>

## 2. OTHER DAMAGES AWARDS

<b>Exemplary</b>	Unavailable for breach of contract ( <i>SS Fortune Star; Gray</i> ) <ul style="list-style-type: none"><li>Rationale: Manner of breach is irrelevant (<i>Butler v Fairclough per Griffiths J</i>)</li></ul>
<b>Nominal</b>	Where P has suffered no loss but court's want to recognise P's rights infringement by making an award of nominal damages
<b>Contemptuous</b>	Where the P has been technically successful but action should not have been brought in court's opinion

Conclusion: Conclude as to the likelihood of an award of compensatory damages for breach of contract and usefulness for P.

- Remember the corollary principle from *Robinson v Harman* as applied in *Butler* that the P cannot be made better off.

### 3. SPECIFIC PERFORMANCE

<b>Intro</b>	<p>Does P want the actual execution of the contractual obligation?</p> <ul style="list-style-type: none"> <li>• Specific performance requires actual execution of the contract according to its stipulations and terms</li> <li>• Look for terms that are promissory in some sense</li> </ul>
<b>Jurisdiction: Adequacy of damages</b>	
<b>Overview</b>	<p>Traditionally, equity will only have jurisdiction to intervene when CL damages are <u>inadequate</u></p> <ul style="list-style-type: none"> <li>• <u>Overriding question</u>: Would compensation put the parties in the position they would have been in if the contract had been performed <ul style="list-style-type: none"> <li>◦ Probably not relevant whether or not the plaintiff has the money or not</li> </ul> </li> <li>• Note that there is a trend to seeing this as a discretionary factor rather than jurisdictional</li> </ul> <p><u>Considerations</u></p> <ul style="list-style-type: none"> <li>• Unique?</li> <li>• Hard to quantify loss?</li> </ul>
<b>Land</b>	<p><u>General rule</u>: It is arguable that specific performance is presumptively available in land contracts because they are unique</p> <ul style="list-style-type: none"> <li>• <u>Applies regardless of the nature of the interest</u>: leases (<i>Lever v Koffler</i> - unless the lease is of short duration), contractual licences or contract for right to build higher on land</li> <li>• <u>Commercial purpose</u>: the High Court has held that specific performance is appropriate even if the purchaser only has a commercial interest in the land (<i>Barwick CJ in Pianta</i>; dissent in <i>Bonner</i>)</li> <li>• Even the vendor has a claim to specific performance, even though his/her only claim is purchase price (<i>Turner v Bladin</i>)</li> </ul> <p><u>Is there a loan attached to the land contract</u></p> <ul style="list-style-type: none"> <li>• Lord Pearson in <i>Bonner</i>: <ul style="list-style-type: none"> <li>◦ If the loan is ancillary (e.g. land+mortgage) then will still be specifically enforced;</li> <li>◦ BUT in this case it was a composite contract (land + making a loan without security) which included what was in substance a long-term unsecured loan which could not be specifically enforced</li> </ul> </li> <li>• Cf Barwick who held that SP could still be awarded even if part of the contract was a loan <ul style="list-style-type: none"> <li>◦ Generally will not award specific performance of a loan since damages are usually adequate</li> <li>◦ But the question is whether it would do justice, and the presence of a loan does not necessarily preclude SP <ul style="list-style-type: none"> <li>■ If it is inadequate to award damages for part of the contract (the land part) then it will be inadequate for non-performance of the whole contract</li> </ul> </li> <li>◦ Also note that minority has been adopted in Australia</li> </ul> </li> </ul>
<b>Goods</b>	<p><u>General rule</u>: Won't be inadequate for non-unique goods (<i>Dougan</i>)</p> <ul style="list-style-type: none"> <li>• <i>Dougan</i>: Because of the restricted number of taxis licensed and registered coupled with the high value representing the rarity of the taxi and the license, specific performance should be granted</li> <li>• Exceptions <ul style="list-style-type: none"> <li>◦ May be <u>non-substitutable</u> because the defendant is particularly well situated to meet the plaintiff's needs and the plaintiff could not quickly get a substitute performance (<i>North v Great Northern Railway Company</i>)</li> <li>◦ May be generally substitutable, but unavailable because of <u>particular circumstances</u> at that time (<i>Howard Perry &amp; Co v British Railways</i>)</li> <li>◦ Sometimes courts may award specific performance of an instalment contract to supply goods and services over a long period of time because a <u>complex contract</u> cannot be replaced with an identical deal (<i>Eastern Rolling Mill v Michlovitz</i>)</li> </ul> </li> </ul>
<b>Shares</b>	<p>If the shares are freely available in the market (e.g. public companies), then there will generally be no specific performance (<i>Dougan v Ley</i>)</p> <p>If they are not freely available, then will generally get specific performance (<i>ANZ Executors</i>)</p> <ul style="list-style-type: none"> <li>• Irrelevant that the plaintiff's only real interest in them is their financial value (i.e. planned to sell them for profit) (<i>ANZ Executors</i>)</li> </ul>
<b>Services</b>	<p><u>General position</u>: specific performance of a contract for services is not generally available (note discretionary bars)</p> <ul style="list-style-type: none"> <li>• NB: if there is a breach of a <u>negative covenant</u>, consider whether an injunction should be applied for (*see injunctions hpyo)</li> </ul>
<b>Conclusion</b>	<p>However, it is increasingly debatable whether inadequacy of damages goes to jurisdiction or whether it is simply a factor relevant to the discretion of the court.</p> <ul style="list-style-type: none"> <li>• If failed adequacy of damages → If it is only a discretionary factor, it is still necessary to weigh up other factors to determine the overall balance of justice in awarding the remedy.</li> <li>• Also note that the above categories are just guidelines and should not detract from the general inquiry</li> </ul>
<b>Jurisdiction: Ready, Willing and Able to Perform</b>	
	If specific performance in its strict sense (wholly executory) then this acts as a jurisdictional bar to SP



## Discretionary factors and bars to relief

### General equitable bars to relief

#### Hardship/ public interest

Intro: Only in extraordinary and persuasive situations will hardship be a reason not to specifically perform a contract (*Patel v Ali*) and cases should involve unconscionability or compassionate grounds (*Longtom*)

#### Hardship considerations

- Extraordinary hardship
  - *Webb*: Railway company contracting to buy 8 acres but then abandoning development, it would be unjust to force the purchase when damages for loss of the contract could be easily obtained
  - *Patel v Ali*: Immense delay (4 years) not attributable to her, the unique nature of the property given her change of circumstances, that her hardship was completely unforeseeable at the time of contracting, cancer in leg which was amputated meant that specific performance removing her from the property would be great, no guarantee should would able able to keep children
    - Was probably supported by the fact that the community had raised money for her so that she would be able to pay damages instead
    - Though might be able to distinguish that such a high level of hardship was required since this was a sale of land case
- Financial hardship alone is insufficient
  - *Longtom*: No hardship in merely carrying out what was promised, there must be something more amounting to injustice
    - *Longtom*: third party taxpayer interests were irrelevant in that case
  - Example of injustice → large cost but very little benefit (i.e. waste)
    - E.g. contract of renovation of a building due for demolition
    - *Longtom*: Gravel pit could not be seen from P's land, could not be seen from the road, fee simple was with the council so the P could not use the land, would only see the land if ventured off road specifically to look at it
      - P argued that this was the very reason why specific performance should be granted since nominal damages were only available
      - Seems to be defeated by public interest considerations of holding public authorities to account
- Timing: Hardship is generally assessed at the time the contract is entered into, but in exceptional cases courts can have regard to circumstances occurring after the date of the contract (*Patel v Ali*)
  - Would require Mrs Ali moving out of the home which was close to her relatives which would cause hardship as she had had her leg amputated.

Public interest considerations are relevant (*Patrick Stevedores Operations*; *Miller v Jackson*)

- Weigh up with any hardship or disadvantage that may be caused to third persons or to the public generally
  - *Longtom*: public interest in holding a public authority to do things they commit to
  - *Longtom*: third party taxpayer interests were irrelevant in that case (or maybe overridden by above factor)

#### Where to put this stuff?

Note: practical consequences of the order here for future negotiations

- Upon publication of this judgement the parties can agree on what would be a suitable amount to release the council's obligation to have to perform the contract
- Other ways to fill the gravel pit (e.g. garbage dump, ornamental lake etc.) warns the plaintiff not to be too greedy in settlement negotiations

#### Lack of clean hands

Lack of clean hands may operate as a bar to a SP award:

- Not governed by morals/simple unfairness/bad behaviour, requires some legal wrongdoing (i.e. in the nature of a counterclaim)
  - Plaintiff was responsible for some procedural unfairness in the way the contract came about
    - E.g. mistake, misrepresentation, material non-disclosure, exploitation of defendant's incapacity, other unconscionable conduct
    - Cf: unilateral mistake by defendant usually won't be sufficient (*Slee v Warke*)
    - *Summers v Cocks*: P was aware that liquor licence of the hotel was in jeopardy but did not inform the D (misleading and deceptive conduct/misrepresentation/lack of consideration)
    - *Blomley v Ryan*: special disadvantage (old drunk) exploited by plaintiff
  - Or misled the court or abused its processes
- Note overlap with ready, willing and able to perform: lack of RWA may mean lack of clean hands

#### Laches: delay with acquiescence and delay with prejudice

Mere delay on the part of the P will not be enough to preclude a SP award

- E.g. Cases of 12 and 26 year delays have been specifically performed by courts

#### Two requirements

- Length of delay: Has there been delay with acquiescence on the part of the P?
- Unjust prejudice: Has the P's delay caused prejudice to the D?
  - Consider what has happened by way of acts and intervening events since the breach

### Factors only applying to specific performance and injunction



<p><b>Ready, willing and able to perform</b></p>	<p><u>Plaintiff must show that he or she is ready and willing to perform their side of the bargain</u></p> <ul style="list-style-type: none"> <li>• E.g. have they breached the contract?</li> <li>• Or can look at their current or future inability to perform (can they as a factual matter perform their obligations substantially)</li> </ul> <p><u>Factor vs bar</u></p> <ul style="list-style-type: none"> <li>• If specific performance in the <u>strict sense</u> (where the whole contract remains executory and unperformed) then RWA acts as a jurisdictional bar to SP (go through this first if strict) <b>*NOTE THIS IS IMPORTANT TO WHETHER YOU CAN GET LCA DAMAGES - but if you could get an injunction then won't be a problem</b> <ul style="list-style-type: none"> <li>◦ If you fail - then can say in any case can get injunction (where RWA is not a jurisdiction)</li> </ul> </li> <li>• If specific performance in the <u>weak sense</u> (where contract has been partly performed) then RWA is a discretionary factor</li> </ul>
<p><b>Mutuality</b></p>	<p><b><u>Fry: For a contract to be specifically enforceable, it must be able to be enforced by either party at the time of contracting</u></b></p> <ul style="list-style-type: none"> <li>• E.g. Minor is unable to bring an action for SP since such an action could not lie against him or her</li> <li>• Heavily criticised but not definitively ruled out in Australia</li> <li>• UK approach: <u>Price v Strange</u> instead held that it should be <u>assessed at the time of the court hearing</u> <ul style="list-style-type: none"> <li>◦ Avoided a strict application of mutuality to prevent unfairness</li> <li>◦ At time of contract defendant could not force the plaintiff to effect the repairs, since they were already completed by landlord - but would be unfair to plaintiff since he did a substantial part of repairs, but then was prevented from finishing it</li> <li>◦ But, at the time of the court hearing, the repairs were completed and the court could ensure fairness to the defendant by ordering a monetary adjustment (pay landlord for cost of finishing repairs).</li> </ul> </li> </ul>
<p><b>Continuous supervision/ Personal services</b></p>	<p><b>1. Courts will refuse to award specific performance if the award will result in P continually complaining to the court that the D is breaching the order (<u>Argyll</u>)</b></p> <ul style="list-style-type: none"> <li>• Repeated applications over a period of time would lead to great expense to the parties and the judicial system (<u>Argyll</u>) <ul style="list-style-type: none"> <li>◦ Cf. one and for all inquiry as to damages</li> <li>◦ Not in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative for compensation (i.e. damages)</li> </ul> </li> </ul> <p><b>2. Courts will generally refuse to award specific performance if it is a contract for personal services</b></p> <ul style="list-style-type: none"> <li>• For <u>services</u>: consider also <u>breakdown of trust, potential oppression, supervision problem</u>, issue of having to frame order with <u>sufficient precision</u> so it is clear what is required</li> </ul> <p><u>Carrying on a business cases</u></p> <ul style="list-style-type: none"> <li>• <u>Imprecise orders</u> which leaves open the possibility of wasteful litigation and <u>oppression</u> to the defendant who is at the risk of being held in contempt of court (<u>Argyll</u>) <ul style="list-style-type: none"> <li>◦ The fact that the contractual terms are precise so as to avoid uncertainty does not necessarily mean that they are sufficiently precise for specific performance (<u>Argyll</u>)</li> </ul> </li> <li>• <u>Injustice by allowing the P to be enriched</u> at the D's expense (<u>Argyll</u>) <ul style="list-style-type: none"> <li>◦ P is placed in a <u>strong bargaining position</u> and allowing him to secure more money for the release of the court order than she would have done from full performance of the contract. (<u>Argyll</u>)</li> <li>◦ Yokes the parties together in a hostile relationship and prolongs the battle (<u>Argyll</u>)</li> </ul> </li> </ul> <p><u>Achieve of a result cases</u></p> <ul style="list-style-type: none"> <li>• <u>Imprecision is tolerated</u> to a certain degree in achieve of a result cases where the P's merits are strong (<u>Argyll</u>) <ul style="list-style-type: none"> <li>◦ Building contract cases, where each stage is carefully mapped in the contract specifications, so it is easy for a court informed by expert evidence to determine whether or not the contract is being properly performed</li> </ul> </li> </ul> <p><u>Exception:</u></p> <ul style="list-style-type: none"> <li>• Gross breaches of personal faith and using threats of non performance as blackmail will mean that justice will override settled practice (<u>Argyll</u>) <ul style="list-style-type: none"> <li>◦ <u>Argyll</u>: broken promise was not particularly egregious <ul style="list-style-type: none"> <li>■ They were large commercial players whose interest were purely financial therefore no element of personal breach of faith</li> <li>■ Both were likely aware that remedy for breach of covenant was likely limited to damages</li> <li>■ Argyll did not promise nor was it warranted to other tenants that they would continue to run the supermarket</li> </ul> </li> </ul> </li> <li>• Mandatory injunction awarded compelling D to continue to run the petrol station ordered by Beach J bc <u>no constant supervision would be needed</u> by the court (despite previously refusing to SP a similar contract on the basis of <u>Argyll Stores</u>) (<u>Diagnostic X-ray</u>)</li> <li>• <u>Diagnostic X-ray: Petrol station case</u>: Distinguished from <u>Argyll</u> as an exceptional case <ul style="list-style-type: none"> <li>◦ The D's business had not become unviable</li> <li>◦ D's actions reversible without much cost (petrol station still in tact cf. <u>Argyll</u> where the D's had stripped the supermarket of its fittings)</li> <li>◦ Petrol stations more simple to operate than supermarkets, and the defendant had operated it successfully for 7 years (ie. less supervision)</li> <li>◦ D able to find someone to take over the petrol station lease (cf. <u>Argyll</u>)</li> <li>◦ 'Significant detriment' to other tenants if not awarded.</li> </ul> </li> </ul>

*Gillespie:*

- Interlocutory injunction given for D to maintain the computing system due to
  - Special expertise of D (computer analyst)
  - DD's help was essential for the continued successful operation of the business
  - D had the option of training an agent to maintain the system (it was key that someone else could personally provide the services)
- Was a contract for services and not for personal service (i.e. employment contract which requires trust and cooperation between parties)

**Conclusion**

Combine the effect of the discretionary factors

- Would the contract be specifically enforced?

\*Note: if SP is available but should not be awarded for some reason, consider whether LCA damages would be awarded (\*see specific hypo)

**\*CAN AN INJUNCTION HELP?**

## 4. AOP/DISGORGEMENT

### Position in Australia

#### Nah

AoP is not available as a remedy for breach of contract in Australia (*Hospitality Group*; see also *Deane J in Hospital Products*).

- *Hospitality Group*: Allowing AoP for breach of contract would contravene the ruling principle laid down in *Robinson* → placing P in position as if contract had been performed and not entitled to be placed in a superior position than if the contract had been performed
  - Full federal court rejecting applicability of *Blake* in Australian law

#### Exceptions

##### 1. Concurrent breach

- Concurrent breach of contract and breach of fiduciary duty (*Warman* - employee setting up rival business)
- Consider also concurrent breach of confidence as a possible example

##### 2. Double sale cases: WHENEVER PROMISED TO ONE PERSON THEN SOLD TO ANOTHER

- Uses constructive trust reasoning, but could be seen as gains-based
- D sells land to P, but breaks contract and sells land to third party
- D must account to P for the profits made from the sale through CT (*Lake v Bayliss*)
  - Uses constructive trust reasoning: Some have justified this on the basis that D is a constructive trustee of the land for P (*Lysaught v Edwards*), recent dicta by the High Court in *Tanwar* suggests that D is not a trustee upon entry into the contract but only becomes one when purchase price is paid
  - However may be masking what would otherwise be gains-based: A better analysis may be that these are all account of profit cases.
  - Barnett argues that is actually disgorgement

NB: Barnett also argues for exceptions for agency problem cases (does something you explicitly promised not to do) - though not law

### Position in the UK

#### Intro

In *A-G v Blake* a majority of the House of Lords (Lord Hobhouse dissenting) went beyond the standard exceptions in awarding an account of profits for breach of contract.

- \* *Blake* doesn't allow for profits made by skimmed performance to be recovered, but arguably it does allow for profits made by second sales to be recovered (Barnett)

#### Requirements

1. AoP is an exceptional remedy for breach of contract available damages were inadequate (per Lord Nicholls)
2. It would only be awarded if P had a legitimate interest in the plaintiff's profit-making activities (per Lord Nicholls)
  - Assess legitimate interest by the similar considerations when deciding specific relief (e.g. public interest, delay, hardship etc) → is it just?
  - *Blake*: Possibly look for fiduciary-type relationship
  - *Experience Hendrix*: Jimi would likely never have agreed to the records in question being released – there was a 'legitimate interest' in performance.

#### Cases

##### AG v Blake:

- Blake was a convicted spy who had escaped from gaol and 30 years later he wrote his memoirs, receiving an advance from British publishers, contrary to the contract with the British secret services imposing a lifelong obligation to keep secret all information about his work.
- The trial judge found that Blake had disclosed no confidential information (and therefore could not be held liable for breach of confidence) and was not at the time of publication in a fiduciary relationship with the British government.
- Nicholls and Steyn award AoP for Blake's breach of contract also finding that Blake was a quasi-fiduciary
  - Courts are more comfortable awarding account of profits in a fiduciary like relationship

##### Experience Hendrix:

- Breach of a settlement agreement.
- Jimi would likely never have agreed to the records in question being released – there was a 'legitimate interest' in performance.
- HOWEVER, the court distinguishes from Blake and awards reasonable fee at the end of the day
  - Information is not sensitive relating to national security, no analogy between PPX and that of a fiduciary and Blake's royalty earning capacity derived from his prior breaches of secrecy and this has not parallel in this case
- Give reasonable fee damages instead.

#### Conclusion

It is unlikely that an Australian court would award disgorgement damages for breach of contract in this case.

- *Blake* was rejected by the Full Federal Court in *Hospitality Group* and has been criticised for causing uncertainty and going against principle of *Robinson*