

Choosing a remedy

- The party suing → can specify what **particular** relief they want
 - o Can be a combination of remedies
e.g. terminating performance + claiming remedies
- Other alternative remedies
 - o e.g. specific performance, if judge not willing to grant this → can argue in the alternative for damages
- The nature of performance **owed** may affect the remedies available
 - o One-off event
 - Delivering a particular thing that has been bought and sold
 - o Take place on a number of occasion over a period of time (on-going agreements)
 - When services of a particular type are to be performed each month for a year

Damages for breach of contract

- Damages → ordinary remedy for breach of contract
 - o Award of money to be paid by the defendant to the plaintiff
 - o Not punitive but compensatory
 - o Compensate for a **loss** suffered by the plaintiff because of the defendant's breach of contract
- Definition of a loss:
 - o The plaintiff's financial position after breach is **worse** than it would have been had the contract been performed
- Damages aims to put the plaintiff in the **same position** as if the contract had been **properly performed**

■ *Radford v de Froberville* [1978] 1 All ER 33

D failed to build a wall for R. R was entitled to claim the cost of actually constructing the wall. As if D were to perform the contract, then the wall would have been properly built, and this is the cost R was entitled to claim

■ *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8

Damages should be the cost of restoring the foyer to its previous state rather than the difference between the value of the building with or without a foyer. Because if the contract is performed properly, the foyer would be restored to its original position.

Direct loss vs Consequential loss

- Damages can be claimed to compensate for two types of losses

Direct loss:

- Loss that can be **fairly and reasonably considered** to be **foreseeable as arising naturally** (according to the usual course of things) from the breach of contract itself

- *Koufos v Czamikow Ltd* [1969] 1 AC 350; [1967] 3 All ER 686

C shipped sugar to K but the trip took 10 days longer than expected, and the price dropped. K was entitled to claim for the damages. → immediate loss

Consequential loss

- More remote loss that may reasonably supposed to have been in the contemplation of both parties as the probable result of the breach at the time they made the contract

- *Hadley v Baxendale* (1854) 2 CLR 517; 9 Exch 341

B sent H's broken shaft for repair, but delayed, H's factory completely out of operation due to the broken shaft. H was not entitled to claim for the damage because B had not been told that the mill would remain completely out of operation until the shaft was repaired, so it was not something the both parties had in minds.

→ not a consequential loss

Other loss:

- Damages for wasted expenses
 - Reasonable expenses **incurred** in expectation of proper performance of the defaulting party's contractual obligations

- *McRae v Cth Disposals Commission* (1951) 84 CLR 377

Cth sold a non-existing thing (tanker) to M, and M was entitled to claim the expense for searching for the non-existing thing (tanker) → wasted expense

- Distress or disappointment
 - Not usually compensated
 - Exception:
 - Contract was for the provision of enjoyment, entertainment or pleasure
e.g. pleasure cruise or holiday

- *Baltic Shipping Co v Dillon* (1993) 176 CLR 344

D suffered form distress and disappointment when she had her holiday on B's cruise. entitled to claim for the damage.

Mitigation of loss

- A plaintiff **must** do everything that is **reasonably possible to minimise (reduce, mitigate the losses** that flow from the breach
- A plaintiff **CANNOT** claim losses from a defendant if those losses could have been avoided by the plaintiff by taking *reasonable steps to avoid* them.

*sometimes as long as the non-defaulting party acts reasonably to mitigate losses, even if the result is counterproductive, the non-defaulting part is entitled to recover **both** the actual losses and any additional expenses incurred

Termination of performance

- Plaintiff must be able to prove the defendant *either*:
 - o Performed less than substantial performance of a condition
 - o A serious breach of an innominate term
- Remedy of termination allows the plaintiff to:
 - o **Reject** the unsatisfactory performance and/or
 - o **Put an end** to any future specific performance of the contract

■ *Associated Newspapers v Bancks* (1951) 83 CLR 322

Put B's drawing on page 3 rather than the front page. This was interpreted as a condition as B would not have entered the contract if it weren't for the front page.

→ breach of condition → entitled to termination of performance

■ *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] QB 44; [1975] 3 All ER 739

C bought citrus from B and required the citrus to be "in good condition". B shipped that not in good condition but still good enough for C's purpose.

→ not a serious breach of innominate terms → C cannot reject the goods or terminate the performance.

■ *Finch Motors v Quin* [1980] 2 NZLR 519

Q bought a car to tow a boat, when he tested it, there was nothing wrong. But later he discovered that the car got overheated when towing the boat.

→ Serious breach → Q was entitled to terminate the performance

- What is terminated = defendant's right to perform
- The contract itself remains in existence
- Unperformed obligation still exists
- These obligations must be discharged by **the payment of damages**, to the extent that the failure to perform has caused loss

Electing to terminate

- The aggrieved (怨愤的) party must choose **whether or not to terminate**
- The decision **must be**
 - o **communicated to the defaulting party**
 - o **unambiguous, either by word or deed**
- There may be special procedures agreed in the contract for termination

■ *Holland v Wiltshire* (1954) 90 CLR 409

If you know the other side is going to breach, express it in a way I have the right to terminate, I am giving you a few more days until I use this right. (Make it clear to the other party)

Terminating for breach of conditions imposed in contracts by Sale of Goods legislation

- In terms of sales of goods legislation, for breach of condition imposed into the contract by the act (Section 16, *Goods Act* 1948 (Vic))
 - o Plaintiff has right to → reject the goods + treat the contract as repudiated
- The contract itself is not terminated

- Damages can be claimed following a rejection of the goods

HOWEVER

- If the goods have already been **accepted** or have been **transferred into buyer's ownership** → breach of condition must be treated as a breach of warranty

Specific performance

- Equitable remedy
- Not available 'as of right'
- Discretionary **order** granted by the supreme court directing a person to carry out their obligations under the contract

Will not be ordered if:

- o Damages give *adequate* relief; or
- o Performance involves a close personal relationship, goodwill or cooperation; or
- o Where *continuous supervision* is necessary

■ ***Dougan v Ley* (1946) 71 CLR 142**

D sold L for his car and operating license. D refused to perform the contract. Entitled to a specific performance because operating license is unique at that time and could not be obtained elsewhere.

■ ***Lumley v Wagner* (1852) 42 ER 687.**

L wants W to sing for him: cannot be ordered because it is personal service and it's hard to ensure the performance is carried out properly. However, L wished W not to sing anywhere else. The court could not force her but can only restrain her by issuing an injunction

Injunctions

- Court orders requiring a person to do/not to do something
- Can be used to prevent a threatened breach of contract/stop a continuing breach
- Equitable remedy
 - o Wont be ordered if damages is an adequate remedy

■ ***Buckenara v Hawthorn Football Club Ltd* [1988] VR 39**

H sought an injunction to prevent B from playing for any other club.

→injunction

■ ***Codelfa Constrution v State Rail Authority of NSW* (1982) 149 CLR 337**

Noise law being breached; residents went to court for the issue of injunction

→issued an injunction