Damages General

- Where there is a breach of contract, the innocent party is entitled to sue for damages --- the right to claim damages is implied by law: *Photo Production Ltd v Securicor Transport Ltd [1980]*
- Damages operate as a means of compensation, which places the innocent party in the same position he / she would be in if the contract had been performed.
- Except in cases of anticipatory breach where termination is necessary, a plaintiff does not have to terminate a contract in order to claim damages: *Luna Park v Tramways (1938)*
- Damages are awarded for breach of the contract if the following can be proven:
  - that the plaintiff has suffered loss;
  - that the loss was caused by the breach (causation);
  - that the loss was reasonably foreseeable; and
  - reasonable efforts were taken to mitigate / prevent the loss from occurring.
- Nominal damages & Substantial damages
  - Damages awarded are only nominal in cases where the plaintiff can only prove breach of contract, i.e.the plaintiff proves no more than the defendant's breach: *Luna Park v Tramways (1938)*.
    - Nominal damages are of a token amount, e.g., $5.
  - Where the plaintiff can prove loss or damage, then the damages claimed can be substantial: *Holland v Wiltshire (1954)*
    - Substantial damages is a technical term to mean the damages will be compensatory.
      - ➡It does not necessarily mean the damages will be 'substantial' in terms of the amount.
- The later date is generally chosen as the date for assessment, for example, the date of the performance instead of the date of the acceptance of the repudiation: *Hoffman v Cali [1985]*
- A party can choose to pursue both expectation and reliance damages: they are not mutually exclusive.
- Claims for damages must generally be brought within six years of the date of the breach: ***Limitation Act 1969 (NSW) s 14(1).***
- Damages are assessed as at the date of the breach of the contract.

Causation and Remoteness

Where a plaintiff claims to have suffered loss or damage by reason of the defendant's breach, the onus of proving the extent of loss or damage rests on the plaintiff: *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938)*. It must be established:

- that the loss or damage was caused by the defendant's breach; and
- that the loss or damage was not too remote.

Identifying the Loss

- In identifying the loss, compare the situation of the plaintiff prior to and after the breach of contract: *Alfred McAlpine Constructions Ltd v Panatown Ltd [2000]*
- Concerned with what has been lost by the plaintiff, and not what has been gained by the defendant as a result of breaching the contract.
- In *Luna Park v Tramways*, Luna Park was unable to demonstrate and quantify the loss, an so was unable to obtain damages for loss.

Alfred McAlpine Constructions Ltd v Panatown Ltd [2000] 3 WLR 946

Held, Panatown was not entitled to recover substantial damage on either of the following ground

1. *The building contractor entered into a contract with the employer, Panatown, for the construction of an office block and car park on a site which was owned by another company in the same group of companies as the employer.*
2. *In addition to the contract with the employer, the building contractor also entered into a duty of care deed with the owner of the site.*
3. *By that deed the owner acquired a direct remedy against the contractor in respect of any failure by the contractor to exercise reasonable skill, care and attention to any matter within the scope of the contractor's responsibilities under the contract.*
4. *The deed was expressly assignable by the owner to its successors in title.*
5. *Serious defects were found in the building and the employer served notice of arbitration claiming damages for defective work and delay.*

- *Narrow ground: –> because there was already a duty of care deed between McAlpine and the third party (X), there was no justification for Panatown to recover damages on behalf of X when X had its own cause of action against McAlpine.*
  - ➡ *Otherwise it might introduce new problems such as double liability. (unanimously agreed)*
- *Broad ground: –>Lord Clye: where A contracts with B to pay a sum of money to C and B fails to do so. The loss to A is in the necessity to find other funds to pay to C and provided that he is going to pay C, or indeed has done so, he should be able to recover the sum by way of damages for breach of contract from B.*
  - ➡ *in the present case because there was already a deliberate course adopted by Panatown such that X would have its own right of action against McAlpine in case of breach,*
    - ★ *an exception can not be admitted to the general rule that substantial damages can only be claimed by a party who has suffered substantial loss.*

Causation

- The defendant is only liable or the extent of the loss caused by the breach.
- ***Causation is a question of fact***.
- Sufficient connection will be met where the plaintiff can show that 'but for' the breach, the loss would not have occurred: *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968).*
  - ★ However, the 'but for' test may not apply:
    - where multiple causes contributed to the loss
      - ➡ where there are multiple causes, it is sufficient that the breach be the 'decisive ' or dominant causes: *Monarch SS Co Ltd v A/B Karishamns Oliefabriker [1949]*
    - where the chain of causation is broken
      - ➡ Where some extraneous event or an act of a third party breaks the chain of causation between the breach and the loss suffered, the plaintiff can only claim nominal damages: *Lexmead (Basingstoke) Ltd v Lewis [1982]*

Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1938) 61 CLR 286

Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd (1968) 120 CLR 516

1. *A shopkeeper seeking to protect its premises against burglary engaged a company which carried on the business of providing burglar-proof protection to supply security installations including the supplying, fitting and hanging of a steel-sheeted back door "to suit opening" fitted with a non-break-out locking system.*
2. *Burglars broke into the shop in a comparatively short time by splintering and removing a door jamb and the lintel, chipping brickwork, and levering the door open.*
3. *In an action by the shopkeeper against the supplier of the door, verdict and judgment were given for the shopkeeper.*

Held,

- *that in installing the door as it did there was no breach by the defendant of the express terms of its contract, but a term was implied by the common law in the contract that the defendant, whose business was to provide burglar-proof protection and upon whose skill and ability the plaintiff relied, would supply, fit and hang a door which would provide reasonable protection against a person seeking to break in when the locking devices were in operation, and there was evidence on which the trial judge rightly found that this warranty had been broken.*
- *The measure of damages was the value of the goods stolen.*

In this case, a breach of contract was established by proof that the door, when locked, was not reasonably fit to keep burglars out. Therefore, when burglars broke in through the door and stole stock from their premises the plaintiffs were able to recover damages.

➡ *The position would have been different if it had been proved that the burglars would have gained entry through a door which was reasonably fit.*

Remoteness

- The plaintiff's loss caused by breach of contract must not be too remote.
- The question of whether loss is capable of failing under the concept of ***remoteness is a question of law***, but once established, whether ***loss is remote is a question of fact***.
- The party at fault is only expected to compensate for those losses which were reasonably within his or her contemplation as likely to flow from failure to perform.

a. What kind of loss is to be compensated?

Two limb test for remoteness: *Hadley v Baxendale (1854) 9 Ex 341*

- the damages claimed must flow 'according to the usual course of things' from the defendant's breach: *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 AC 61*; or
- Loss which was reasonably within the contemplation of both parties at the time the contract was formed *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528*

1. *The plaintiff, owners of a flour mill, contracted with the defendants, who were common carriers, to have a broken crankshaft conveyed to Greenwich where a replacement would be made.*
2. *Delivery of the shaft was delayed and the consequence for the plaintiff was that the mill was stopped for five days longer than it should have been and profits which would otherwise have accrued were lost.*
3. *The plaintiff sought damages to compensate for the losses sustained whilst the mill was idle.*

Hadley v Baxendale (1854) 9 Ex 341

Held,

the Loss was too remote and should not be recoverable. It would have been an entirely different position if the defendants had been made aware that the mill would be inoperable without the part but they were not aware that this was the only crankshaft that the claimant possessed.

The judgement gave rise to the Hadley foreseeability test:

- *First Limb: Loss arising naturally from the breach of contract (so implicitly within the foresight of the parties). This requires **no** special or expert knowledge as it is loss that arises in the ordinary course of things.*
- *Second Limb: Loss which was reasonably within the contemplation of both parties at the time the contract was formed. This covers loss that is not 'in the ordinary course of things'. i.e. abnormal loss, hence special knowledge or awareness is required.*

1. *The contract in question was for the sale of a boiler by the defendants to the plaintiffs for use in the plaintiffs' laundry and dyeing business.*
2. *The boiler was delivered to the plaintiffs some 20 weeks after the time fixed by the contract.*
3. *The defendants knew that the plaintiffs needed the boiler for immediate use in their laundry business but did not know the precise use to which the boiler was to be put.*
4. *The plaintiffs claimed damages for the loss of profit they would have made had the boiler been delivered on time. Included in this claim were:*
   - *the loss of a large number of new customers*
   - *the loss of a highly lucrative contract with the Ministry of Supply*

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528

Held,

that the defendants must reasonably be presumed to foresee some loss of business if the boiler was not delivered on time.

★ *However, the plaintiff were not able to recover losses relating to the highly lucrative contracts.*

➡ *For the plaintiffs to recover the profits expected on the special contracts, the defendants would have had to know of the prospect of such contracts.*

The case is an example of the operation of the second limb of Hadley test and sets the standard of remoteness as 'reasonable foreseeability'.

1. *The plaintiffs time-chartered the vessel to the defendants at a daily rate and the vessel was due to be redelivered on 2 May 2004.*
2. *In anticipation of the expiry of the charter, the plaintiffs contracted to charter the vessel at US$39,500 per day (the market rate at that time) under a 'follow-on' charterparty with another charterer.*
3. *The contract included a clause under which it could be cancelled if the vessel was not made available on 8 May (the 'cancellation date').*
4. *The defendants fixed the final voyage for the vessel less than 14 days prior to the end of their charter, which was not objected by the plaintiffs.*
5. *Unfortunately, the vessel was delayed and it became clear that the plaintiffs would not be able to make the vessel available under the follow-on charter prior to the cancellation date.*
6. *In order to obtain an extension of the cancellation date until 11 May, the plaintiffs agreed to reduce the rate of hire under the follow-on charterparty to US $31,500 per day.*
7. *The plaintiffs sustained a loss of US $1.36 million and they claimed from the defendants for this loss.*
8. *The normal (conventional) measure of damages in such a case is the difference between the market rate and the charter rate of hire for the period of delay, a sum of $158,301.*

Transfield Shipping Inc v Mercator Shipping Inc [2009] 1 AC 61

Held,

that the arbitrators had applied too crude a test. defendants only needed to pay extra for the overrun period at the prevailing market rate. Reasonable parties would not enter into a contract like this on the basis that the defaulting party would be liable for any loss, however large, occasioned by a delay in redelivery in circumstances where it had no knowledge of, or control over. The common intention of reasonable parties to a charterparty of this sort would not have been that, in the event of a relatively short delay in redelivery, an extraordinary loss, measured over the whole term of the renewed fixture, was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within the defaulting party's contemplation.

Decision for trial:

The arbitrators applied the first rule set in Hadley v Baxendale 156 E.R. 145 that the loss resulted "naturally, i.e. according to the usual course of things, from such breach of contract itself" - the parties should have realised such probability when they had signed the contract that such loss was "not unlikely" to result from a breach of contract.

However, the decision was reversed by the House of Lords.

1. Respondent proprietor of subject land and respondent's neighbour entered into agreement in September 1999 to relocate right of way over respondent's property which benefited neighbour.
2. Appellant surveyor altered plan prior to registration without agreement or knowledge of either respondent or neighbour.
3. Neighbour lodged caveat against respondent's title and commenced proceedings against respondent seeking various orders against respondent including order respondent comply with specifications and conditions of right of way as agreed between parties.
4. Appellant did not reveal full extent of changes made to plan until receipt of survey done by surveyor retained by neighbour in 2004.
5. Neighbour and respondent continued to dispute construction of right of way until proceedings settled in 2007.
6. Neighbour withdrew caveats in 2009.
7. Respondent commenced proceedings against appellant for damages arising from appellant's breach of contract, duty of care and breach of (CTH) Trade Practice Act 1974 (TPA) s 52 and (NSW) Fair trading Act 1987 (FTA) s 42.
8. NSWDC found appellant liable for breach of contract, breach of duty of care to carry out survey and record results in accordance with respondent's and neighbour's instructions and breach of TPA s 52 and FTA s 42.
    - Ordered appellant to pay respondent sum of $474,360.89 for losses respondent incurred to correct title, remove encroachment on right of carriageway, costs of litigation between respondent and neighbour and loss resulting from inability to sell land as result of caveat lodged by neighbour.
9. The surveyors appealed.

Monaghan Surveyors Pty Ltd v Stratford Glen-Avon Pty Ltd [2012] NSWCA 94

Nature of the Loss:

The losses suffered by the respondent and claimed from the appellant fell into four categories.

- First, there were the surveying and legal expenses required to correct the title.
- Secondly, there were the costs of carrying out works on the land to move the retaining wall and fencing which encroached within the boundaries of the right of way.

➡ The appellants accepted that they were obliged to meet these heads of loss.

- Thirdly, the respondent claimed the costs of litigation between it and the neighbours which commenced in August 2002 and continued for more than five years.
- Fourthly, the respondent claimed costs resulting from its inability to sell the land during the period the land was subject to a caveat lodged by the neighbours, which was not finally withdrawn until 14 May 2009.

➡ The appellants deny responsibility for these expenses, or, in the alternative, for all but a limited part of them.

Grounds for Claim:

Appellant conceded liability and obligation to pay losses incurred to correct title and remove encroachment.

- Claimed respondent not entitled to recover whole of legal costs in respect of litigation between respondent and neighbour.
- Claimed respondent not entitled to recover loss incurred from not being able to sell property as result of caveat lodged by neighbour.

Principle applied:

- The first step in considering the question of causation is to identify the nature of the loss or losses suffered. In circumstances where a claimant seeks to recover legal costs incurred in defending proceedings brought against it, where the litigation is said to have been caused by a third party, the harm suffered may be identified as the loss of an opportunity to avoid the litigation. Where the claimant has successfully defended the litigation, the loss will be the difference between the costs incurred and the costs recovered from the other party.
- The harm suffered by the respondent was economic loss. Putting to one side the claims under the Trade Practices Act and the Fair Trading Act for misleading or deceptive conduct, each of the other claims appears to have been assumed to involve a failure to exercise reasonable care and skill. That form of breach of duty constitutes "negligence" for the purposes of the Civil Liability Act 2002 (NSW), Pt 1A. Accordingly, that Part applied to the claims for damages brought in tort and contract: s 5A(1). To determine whether particular elements of harm were recoverable, the Court needed to apply s 5D, appearing in Div 3 "Causation".
    - The purpose of s 5D(1) has been identified as establishing a two-stage test of causation whereby what is described as "factual causation" is to be addressed separately from "scope of liability":
        - First, there are normative considerations which will influence a finding that particular conduct constitutes a breach of duty, which cannot usefully be ignored in considering the relationship between the conduct and the harm asserted by the plaintiff. –> s 5D(1)(a) Causation
        - Secondly, it appears to have been intended that the normative inquiry under paragraph (b) would extend beyond what have traditionally been seen as elements of causation, to cover questions raised by intervening and successive causes, foreseeability and remoteness.
- In tort, concepts of remoteness are at least partly determined by reference to that which was "reasonably foreseeable" at the time of the conduct. In contract, according to the classic statement of Alderson B in Hadley v Baxendale (1854) 156 ER 145 at 151, liability will extend to that which "may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it". This test, with its two limbs, may operate differentially depending upon whether the claim is for loss of an expected benefit or for a loss which flows from reliance by the injured party on the proper performance of the contract.

Reasoning:

- Established appellant aware relations between neighbour and respondent acrimonious.
- Established appellant attempted to justify conduct and failed to reveal full extent of changes made to plan when doubts were raised as to correctness of registered right of way.
- Established full extent of departure from original plan not known until February 2004.

➡*Accordingly, legal costs incurred by respondent up to February 2004 would fall within scope of appellant's contractual liability and duty of care owed to respondent.*

- *Established continuing dispute as to construction of road did not constitute part of appellant's breach of contract or duty of care owed to respondent because on-going litigation after February 2004 could not reasonably have been in contemplation of parties.*

  ➡*Accordingly, appellant not liable for costs of litigation between respondent and neighbour after February 2004.*

- *Not necessary to consider whether different results would apply to assessment of loss under statutory schemes because conduct of appellant involved no different consequences or considerations than those that arose in tort of breach of contract.*
  - *Consideration in tort would be:*
    - *Innocent misrepresentation --> Negligence*
    - *s 5D of the CLA*
      - *Causation test*
      - *Remoteness test*

Held,

the land surveyor should only be held liable for breach of contract and duty of care up to the date when the surveyor admitted the full extent of the changes he made to the plan.

➡*Appropriate to reduce damages payable by respondent by excluding costs of litigation between respondent and neighbour after February 2004 and amount allowed for engineering and construction works on road.*

- *Allowed amount for engineering and construction works on right of way totalling $20,453.*

Appeal allowed in part.

S 5D of the Civil Liability Act 2002 (NSW)

If you have a breach of contract in NSW in regards of negligence, have to mention s 5D of the CLA.

b. Foreseeability

- The test for remoteness is more generous in contract than in tort, where consequential losses must be very remote to preclude compensation: *Koufos v C Czarnikow Ltd [1969]*
- Where parties contemplate the type of consequence which may follow a breach of contract, they will be liable for specific damage of that type. It is not necessary for the specific damage of that type foreseeable: *Parson (H.) (Livestock) Ltd v Uttley Ingham & Co Ltd [1978]*

1. *Koufos chartered a ship (the Heron II) from Czarnikow to bring 3,000 tons of sugar to Basra.*
2. *Owing to those deviations the voyage was delayed by nine or ten days and the ship arrived at Basrah on December 2 instead of on November 22*
3. *The sugar price had dropped from £32 10s to £31 2s 9d.*
4. *Koufos claimed the difference in the loss of profit. Czarkinow knew there was a sugar market, but not that Koufos intended to sell it straight away.*

Koufos v C Czarnikow Ltd [1969] 1 AC 350

The sole rule as to the measure of damages for any kind of breach of any kind of contract was that the aggrieved party was entitled to recover such part of the damage actually caused by the breach as the defaulting party should reasonably have contemplated would flow from the breach; that since prices in a commodity market were liable to fluctuate, shipowners should reasonably contemplate that (per Lord Reid) it was not unlikely that, if their ships delayed their voyage, the value of marketable goods on board their ships would decline and that, therefore, where there was wrongful delay in the delivery of marketable goods under a contract of carriage of goods by sea the measure of damages was the difference between the price of the goods at their destination when they should have been delivered and the price of the goods when they were in fact delivered, accordingly, the charterers were entitled to recover that difference (£4,183 16s. 8d.) as damages.

Interpretation of 'usual course of things':

In this case, the House of Lords held that the loss occurred in the 'usual course of things' because the defendants knew:

1) that the plaintiffs were sugar merchants; and

2) that there was a market for sugar at Basrah.

It did not matter that they had no actual knowledge of the plaintiffs' intention to sell because they ought to have contemplated that the plaintiffs would, under the criteria applied, suffer the loss in question.

Interpretation of 'reasonable foreseeable'

In this case, the view was taken that 'reasonable foreseeable' is more appropriate to tort than contract cases, and that 'on the cards' is far to imprecise. However, there was no real agreement on the proper criterion to be applied:

- *Lord Reid preferred the criterion of 'not unlikely' to result;*
- *Lord Morris did not dissent from that view but he indicated that 'liable to result' was also acceptable;*
- *Lord Hodson indicated a preference for 'liable to result'; and*
- *Lord Pearce found 'liable to result' somewhat ambiguous and, like Lord Upjohn, preferred to state the critetion in terms of 'serious possibility' or 'real danger'.*

★ *The balance of Australian authority would seem to accept Lord Reid's approach.*

- *He emphasised that the tests in tort and contract were very different, on the basis that where there is a contract the parties will have had the opportunity to apportion their liabilities already.*

➡ *Therefore, the test for remoteness should be more generous than in tort, where consequential losses must be very remote to preclude compensation. In another word, a fairly high degree of probability is indicated in contract, certainly higher than that applied to damages claims in tort.*

1. *In 1971, the plaintiffs ordered a bulk food storage hopper from the defendants for the purpose of storing pignuts for feeding their top grade pig herd.*
2. *When the defendants installed the hopper they failed to ensure that the ventilator was open, with the result that pignuts dispensed by the hopper were mouldy.*
3. *The condition of the nuts caused the outbreak of an intestinal infection in the herd which killed 254 pigs.*
4. *The plaintiffs brought an action for breach of contract claiming substantial damages including loss of profit.*
5. *The trial judge, giving judgment for the plaintiffs, held that the defendants were in breach of their warranty that the hopper should be reasonably fit for the purpose of storing pignuts in a condition suitable for feeding to the plaintiffs' pigs and that the illness of the pigs was a direct and natural consequence of such breach, but he also found that at the time of the contract in 1971 the parties could not have reasonably contemplated that there would be a serious possibility of mouldy pignuts causing serious illness in the pigs.*
6. *On appeal by the defendants.*

Parson (H.) (Livestock) Ltd v Uttley Ingham & Co Ltd [1978] QB 791

Where parties contemplate the type of consequence which may follow a breach of contract, they will be liable for specific damage of that type, even where the specific damage was not foreseeable.

Held, dismissing the appeal,

- *that (per Scarman and Orr L.JJ.) damages for breach of contract were recoverable in respect of injury or loss where the parties, given the situation at the time of the contract, would have contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued on breach of contract; and that it must have been within the contemplation of the parties that injury to the pigs was a serious possibility if, in breach of contract, the hopper was unfit for storing nuts suitable to be fed to the plaintiffs' pigs (post, pp. 805D , 813D-E).*
- *Per Lord Denning M.R. The defendants were liable for the loss of the pigs that died because they ought reasonably to have foreseen that there was a possibility that they might become ill, even though it was not a serious possibility, but were not liable for the loss of profits (post, p. 804E-G).*
- *Per curiam. The law must be such that, in a factual situation where all have the same actual or imputed knowledge and the contract contains no term limiting the damages recoverable for breach, the amount of damages recoverable does not depend on whether, as a matter of legal classification, the plaintiffs' cause of action is breach of contract or tort (post, pp. 804C , 807B).*
- *Decision of Swanwick J. affirmed.*

Measure of Damages

Expectation Damages

- Expectation damages attempt to place the plaintiff in the same situation as if the contract had been performed: *Koufos v C Czarnikow Ltd [1969]*
  - However, it does not entail specific performance of the contract: *Marks v GIO Australia Holding Ltd (1998)*
- Particular expectation are presumed to apply, for instance, in case of non-delivery of goods and non-acceptance, the plaintiff will be able to recover the difference between the market price and the contract price: s 52, 53 ***Sales of goods Act 1923 (NSW)***).
- Difficulty in assessing damages does not prevent a court from assessing damages: *Howe v Teefy (1927)*
- If a party has a contractual right to termination, it is allowed to exercise the right, but it cannot gain expectation damage for the loss that was caused by its desire to terminate the contract, because the loss were caused by the termination, not the breach of the other party: *Shevill v Builders Licensing Board (1982)*

a. Contract for sale of goods

- s 54 of the ***Sale of Goods Act 1923 (NSW)*** deals with the damages recoverable by a buyer for breach of warranty on the part of the seller.
- Under s 52 of the ***Sale of Goods Act 1923 (NSW)***, where a buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action for non-acceptance.
- s 53 of the ***Sale of Goods Act 1923 (NSW)*** provides that the buyer may claim damages for non-delivery where the seller fails to deliver the goods.
- In a contract for the sale of goods, the expectation interest is often calculated by reference to market price.
  - The concept of an 'available market' for goods is relevant to both non-acceptance and non-delivery. It means:
    - From the purchaser's perspective, the 'circumstances, including conditions of time and place, are such that a purchaser having money in his hands can, then and there, if he so desires, buy other goods of the same quality: *Francis v Lyon (1907)* (Griffith CJ)
      - The goods must be of the same description.
    - From the seller's perspective, for there to be an available market the circumstances must be such that the seller can sell goods of the description and quality provided for by the contract.

SALE OF GOODS ACT 1923

PART 6 - ACTIONS FOR BREACH OF THE CONTRACT

54 Remedy for breach of warranty

(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but the buyer may:

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated ***loss directly and naturally resulting in the ordinary course of events from the breach of warranty****.*

(3) In the case of breach of warranty of quality such loss is ***prima facie*** *the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.*

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent the buyer from maintaining an action for the same breach of warranty if the buyer has suffered further damage.

52 Damages for non-acceptance

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against the buyer for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting in the ***ordinary course of events from the buyer's breach of contract****.*

(3) Where there is an available market for the goods in question, the measure of damages is ***prima facie*** *to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.*

53 Damages for non-delivery

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting in the ***ordinary course of events from the seller's breach of contract****.*

(3) Where there is an available market for the goods in question, the measure of damages is ***prima facie*** *to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.*

s 54 is not concerned with cases where the buyer has validly rejected the goods, because the buyer is then entitled to damages for non-delivery.

- *Also applies to the breach of a term classified as a condition if the buyer has accepted the goods or otherwise lost the right to reject them.*
- *Similarly, applies to breach by the seller of an intermediate term if there is no right to reject, or the right of rejection has been lost.*

The first limb of the rule in Hadley v Baxendale (1854)

Only if the prima facie rule does not give a satisfactory result need there be a general consideration of the first limb of the rule in Hadley v Baxendale.

For example, in Hasell v Bagot Shakes & Lewis Ltd, the damages were ascertained by reference to 'what a reasonable person, acting sensibly on his own behalf and at his own risk, would be willing to pay in order to get the goods at the place and at the time stipulated'. (Contract Law in Australia, page 846)

b. Date of assessment -- usually at breach

- The general rule in contract is that damages are assessed, on a once and for all basis: *Johnson v Perez (1988)*, at the date of breach: *Wenham v Ella (1972)*.
  - In terms of the date of breach, there are two possible dates:
    - the date of the plaintiff's election to terminate; and
    - the date fixed in the contract for performance by the defendant.
    - ★Although in one sense the defendant's breach occurs at the time of termination by the plaintiff, the plaintiff's cause of action arises in respect of obligations which would have been due for performance at a later date.
      - ➡The later date is generally chosen as the date for assessment because choice of the earlier date would, in effect, accelerate performance by the defendant: *Hoffman v Cali [1985]*
- ★However, there are exceptions for the general rule, it will not be applied if to do so 'would give rise to injustice'.

1. *Hoffman, the respondent, entered a contract with the appellants, to buy a unit in a multi-storey block of home units.*
2. *The appellants are the builders of the multi-storey block and due to the change of their program, they sold the project to another company and repudiated the contract with the respondent.*
3. *Evidence showed that the respondent accepted the repudiation.*

Issue:
Whether the trial judge was right in assessing damages as at the date of acceptance of the repudiation?

Hoffman v Cali [1985] 1 Qd R 253

Where there has been wrongful anticipatory repudiation by the vendor of an executory contract for the sale of land, the correct measure of the purchaser's damages is the difference between the contract price and the market value as ***at the time for performance*** *(subject to questions of mitigation), and not the difference between the contract price and the market value as at the date of the acceptance of the repudiation.*

c. Difficulty in assessing damages is no reason not to do so

- The fact that damages are difficult to asses on one basis may lead the court to award a sum on some other basis. For example, on a reliance basis: *McRae v Commonwealth Disposals Commission (1951)*
- There are three categories of case in which damages for breach of contract may be awarded on a ***loss of chance basis***:
  - where the principal object of the contract, from the plaintiff's perspective, was to provide the chance of obtaining a benefit: *Chaplin v Hicks [1911]*
  - where the contract (expressly or impliedly) included a promise by the defendant of a chance to obtain a benefit: *Commonwealth of Australia v Amann Aviation Pty Ltd (1991)*
  - in any other case where a business opportunity is lost as a consequence of the defendant's breach and the loss of the opportunity is within the rules on remoteness of damage: *David Securities Pty Ltd v Commonwealth Bank of Australia (1990)*
- In terms of assessing damages for loss of a chance, damages are 'ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued, i.e., the calculation "was not how much he would probably have made...but how much his chance of making that profit...was worth in money: *Howe v Teefy (1927)*

1. *The plaintiff lost the opportunity of competing in a contest due to the late delivery of the defendant's notification for interview.*

1. *The defendant leased a race horse to the plaintiff, who was a trainer, for a period of three years.*
2. *After about three months the defendant removed the horse from the plaintiff without justification.*
3. *The plaintiff brought an action for, inter alia, breach of contract.*
4. *The plaintiff claimed damages for the loss of opportunity to win prizes with the horse, to win bets place by himself on the horse and to make profits from supplying information to other people.*
5. *The jury awarded the plaintiff $250 in damages and the defendant appealed.*

Issue:
Whether the plaintiff, by having the horse wrongfully taken out of his possession sustained any loss which had a monetary value and which he was entitled to have estimated by a jury?

Judgment for the plaintiff.

Howe v Teefy (1927) 27 SR (NSW) 301

The injury which he sustained was the deprivation of his right under his agreement to train and race the horse, and make what profit he could out of doing so. ...The calculation which they had to make was not how much he would probably have made in the shape of profit out of his use of the horse, but how much his chance of making that profit, by having the use of the horse, was worth in money. He was willing to pay for the right when he entered into agreement, and, though the subsequent failure of the horse to win races was an element to be taken into consideration in calculating the value of the chance or right of which he was deprived, I do not think that it can be said that in being deprived of that right he did not suffer an injury which was capable of being calculated in money.

The presence of contingencies, then, even when the volition of a third person comes into the matter, 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. ...but 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.

Reliance Damages

Subject to rules preventing double recovery, if the defendant breaches the contract the plaintiff may find that the expenditure is wasted and therefore seek to recover the wasted expenditure as damages.

- Reliance damages are not usually claimed because in most cases the plaintiff is sufficiently covered by expectation damages. However, reliance damages are primary claims where:
  - there is no basis for quantifying the expectation basis for loss of the bargain: *McRae v Commonwealth Disposals Commission (1950)*
  - no profit would have been made on the transaction: *Commonwealth v Amann Aviation Pty Ltd (1991)*
- Where a vendor of land is unable to convey good title to the land, there is a common law rule (the rule in *Bain v Fothergill (1874)*) that often restricts the purchaser to reliance damages. This rule has been abolished in NSW (see s 54B of the ***Conveyancing Act 1919 (NSW)***)

1. *The plaintiff, Amann and the defendant, Commonwealth, entered into a three-year contract under which Amann was to provide coastal surveillance flights for the Commonwealth.*
2. *When the time for the performance came, Amann did not have all its aircraft ready to perform its contractual obligations, nor did any of its aircraft comply in every respect with the specifications in the contract.*
3. *Commonwealth terminated the contract and Amann sued for wrongful termination to recover its losses spent in preparing the aircraft.*
4. *The trial judge ruled for Amann and gave fairly low damages.*
5. *The Full Court ruled for Amann and greatly increased the damages.*
6. *On appeal by Commonwealth.*

Appeal dismissed, judgement for the plaintiff. (Amann)

- *The court awarded damages based on reliance damages, as it could not quantify whether Amman would have made profits on the contract.*

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64

Deane J:

In a case where a plaintiff has incurred expenditure either in procuring the contract or in its performance but it is impossible or difficult to establish the value of any benefits which the plaintiff would have derived from performance by the defendant, considerations of justice dictate that the plaintiff may rely on a presumption that the value of those benefits would have been at least equal to the total detriment which has been or would have been sustained by the plaintiff in doing whatever was reasonably necessary to procure and perform the contract.

- *The presumption enables the recovery by a plaintiff of what are commonly referred to as "reliance damages", that is to say, damages equivalent to the wasted expenditure which has been reasonably incurred in reliance upon the assumption that the contractual promises of the defendant would be honoured.*

➡ *The presumption will be rebutted it it be self-evident or established that the plaintiff would have derived no financial or other benefit from performance of the contract or that any financial or other benefit which would have been derived from future performance would not have been sufficiently in value to counterbalance the past expenditure.*

➡ *Even in a case where it is established that the plaintiff would have incurred a loss if the contract had been fully performed, reliance damages can be recovered in respect of wasted expenditure to the extent (if at all) that the past net expenditure exceeds that ultimate loss since, to that extent, the expenditure would have been recouped if there had been no breach.*

- *The basis of an award of reliance damages is the ordinary one in an action for repudiation or breach, namely, that the plaintiff is, so far as money can do it, to be placed in the same situation with respect to damages as if the repudiation or breach had not occurred.*

Mason CJ and Dawson J:

The general rule at common law, as stated by Parke B in Robinson v Harman (1848) is "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".

- *The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance.*
  - *The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained.*

➡ *A plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation.*

- *Damages recoverable as lost profits are constituted by the combination of expenses justifiably incurred by a plaintiff in the discharge of contractual obligations and any amount by which gross receipts would have exceeded those expenses.*

★ *The expression "damages for loss of profits" should not be understood as carrying with it the implication that no damages are recoverable either in the case of a contract in which no net profit would have been generated or in the case of a contract in which the amount of profit cannot be demonstrated.*

- If the performance of a contract would have resulted in a plaintiff, while not making a profit, nevertheless recovering costs incurred in the course of performing contractual obligations, then that plaintiff is entitled to recover damages in an amount equal to those costs in accordance with Robinson v Harman, as those costs would have been recovered had the contract been fully performed.
- Similarly, where it is not possible for a plaintiff to demonstrate whether or to what extent the performance of a contract would have resulted in a profit for the plaintiff, it will be open to a plaintiff to seek to recoup expenses incurred, damages in such a case being described as reliance damages or damages for wasted expenditure.

★ The corollary of the principle in Robinson v Harman is that a plaintiff is not entitled, by the 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.

- Onus of proof
  - ★ It is prima facie sufficient for that plaintiff to prove his or her expenditure and that it was reasonably incurred.
    - ➡ The onus then shifts to the party in breach of contract to establish that such expenditure would not have been recouped even if the contract had been fully performed.
    - ➡ If this onus is not discharged, a plaintiff's entitlement to reliance damages remains intact.

1. McRae, the plaintiffs, won a tender where the Commonwealth Disposal Commission promised that there had been an oil tanker on Jourmaund Reef.
2. In fact, there was no oil tanker lying anywhere near this location, the defendant had made a "reckless and irresponsible" mistake in thinking they had a tanker to sell. They had relied on mere gossip.
3. The plaintiffs commenced an action claiming damages against the commission.

Issue:
For our purpose, the issue is whether a contract was made between the plaintiffs and the Commission.
How to assess the damages?
Appeal dismissed, judgement for the plaintiffs

McRae v Commonwealth Disposals Commission (1950) 84 CLR 377

Reliance damages may be applied where it is difficult to estimate expectation damages.

Mistake

- Uses the constructional approach.
  - In a case where both parties had equal knowledge as to the existence of the subject matter, and it turned out to be false,
    - ➡ then it would justify the implication of a condition precedent.
      - ★ In that case, the contract would be void for the failure of the condition precedent, and parties would be restored to their original position.
  - However, in a case where only one party has the knowledge, and the other simply relies on what the first party tells it,
    - ➡ then there could be no condition precedent.
      - ★ The first party promises or guarantees the existence of the subject matter and will be in breach if it does not exist.
- "A party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party.".
- "The buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence. It is not a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations. The officers of the Commission made an assumption, but the plaintiffs did not make an assumption in the same sense. They knew nothing except what the Commission had told them."
- "The only proper construction of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there."

Damages

- It is impossible to give the usual expectation benefits, because it was impossible to assess the expected benefit from a non-existing stranded oil tanker.
  - This is because the Defendant did not contract to deliver a tanker of any particular size or condition etc.
- However, the "mere difficulty in estimating damages did not relieve a tribunal of fact from the responsibility of assessing them as best it could."
  - ➡ Instead, we measure damages in reliance. This includes all expenditure which the Plaintiff incurred in reliance on the Defendant's promise.
  - ★ The Plaintiff was awarded reliance damages to compensate him for all his expenditure.