REMEDIES EXAM NOTES

<table>
<tr><th colspan="2">CONTRACTS</th></tr>
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- Breach of contractual obligation
- “D has breached [obligation] by [conduct]”

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<tr><th colspan="2">PRIMARY REMEDY: COMPENSATION</th></tr>
<tr><td>What is the loss?</td><td>

- Identify the direct and any consequential losses

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<tr><td>Damages</td><td>

- Expectation damages available as of right - put P in position as if contract is performed *(Clarke v Macourt)*
- It is actionable per se so at the very least you will get nominal damages
- P bears the onus of proof showing they suffered a loss on the balance of probabilities *(Amann)*

Amann
Facts

- Amman was to conduct aerial coastal surveillance for the Commonwealth, which repudiated; evidence showed Amman would have made the contract work and had incurred wasted expenditure
- question of whether the prospect that the Commonwealth might not have renewed Amman’s contract should be a factor for reducing damages

Mason CJ and Dawson J

- “The award of damages for breach of contract protects a plaintiff’s expectation of receiving the defendant’s performance. That expectation arises out of or is created by the contract...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” [80]
- Ammann would have made a profit from the contract, but there was a chance the Commonwealth was going to terminate regardless, so damages were reduced on this basis, after being calculated on the basis of its wasted expenditure

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<tr><td rowspan="4">Which measure is applicable?</td><td>

- Where a party ‘sustains a loss by reason of a breach of contract, they are - so far as possible - to be placed in the same situation, with respect to damages, as if the contract had been performed’ - *(Robinson v Harman)*
- Different measures of expectation loss will be applied depending on the circumstances of the case, and the type of contractual duty breached

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<tr><td>LOSS OF PROFIT</td></tr>
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- The general measure - value of what P was promised - value of what P got (*Clarke v Macourt)*

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<tr><td>DIFFERENCE IN VALUE</td></tr>
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- Most common
- Difference in value between what was promised and what was provided (plus any wasted expenditure if relevant) - *(Clark)*
- Cases of defective goods or failure to deliver
- Eg - you contract to buy something from D for $200 but they don't provide it. So you buy it from someone else for $300 and only make $100 profit. Expectation damages would be $100 bc if contract was executed you would have $200 profit

CLARKE V MACOURT

Facts
- M sells IVF business to C for $386k
- Cl 5.1(a) of contract warranted that the sperm straws sold with the business complied with certain guidelines - however most of them did not
- C had to purchase substitute sperm from America at short notice for over $1million → cost passed on to patients

Issues
- How do we measure the value of the loss?
- Is passing the cost to patients relevant?

Court
- Majority refers to s 54(3) of SoG Act NSW which said for breach of warranty, the measure was the difference in value of the goods at the time of delivery and the value of they would have had if they conformed to the warranty
    - Court awarded what it would cost C to buy replacement = $1.2mill
- Gagelar J dissent
    - Says the measure is correct for goods but this is sale of business not goods
    - Thus measure should be difference in value bw the business with functional sperm straws and the value of the business without it

RECTIFICATION DAMAGES

- P may seek remedy for the cost of rectifying defective contractual performance
- Arises where cost of fixing damage is greater than the difference in value *(Bellgrove; Tabcorp)*
- For construction contracts, **the default measure is cost of cure as long as it is necessary and reasonable** *(Bellgrove)* - unreasonable only in exceptional circumstances
- Not necessary that funds be used for actually curing the breach *(Tabcorp)*

Reasonable
- Demolition and re-erection to remedy defects, esp if heritage etc *(Bellgrove)*
- Re-building a foyer for $1.38 million despite only a $43k drop in value *(Tabcorp)*

Unreasonable
- Modifying a pool in size *(Ruxley)*

- If change is out of all proportions to the benefit to be obtained *(Ruxley, UK)*

BELLGROVE V ELDRIDGE (1954) 90 CLR 613

Facts
- B enters contract with E to build house for 3.5k pounds
- E not happy with the quality of the house and refuses to pay the last 500 pounds - B sues in debt, E counter sues for defective performance
- To repair house it would cost 4950 pounds - more than original contract

Court
- You have to look at what the expectation or aim of performance is and how money would substitute for that
- Only way to substitute in this case is to provide money to repair

TABCORP HOLDINGS V BOWEN INVESTMENTS

Facts
- T leases office to B
- Cl in contract said to not amend the foyer without landlords consent - special care into making foyer
- B destroys it in 'contumelious disregard' of Ts request not to

Court
- Confirms Bellgrove, presumptive measure is cost of cure subject to being reasonable and necessary
- Efficient breach idea in US - court says no, contracts are made to be performed
- Reasonable and necessary
    - It is because a) contracts are made to be performed and b) they had a clause that said don't ruin the foyer
- Betterment discount
    - No in this case
- LCA
    - No bc cost of cure was sufficient

Ruxley Electronics [1996] AC (UK)
- Homeowner orally varied the contract for backyard pool to provide that the depth of the pool should be changed from 6' 9" deep to 7' 6" deep (wanted to be able to dive).
- Pool was 6' 9" deep (still able to dive).
- Refused to make it deeper
- HoL awarded loss of amenity damages, 2.5pounds only

RELIANCE DAMAGES

- Where P is unable to demonstrate their loss of profit, it may seek to recoup wasted expenditure in reliance on the contract as a proxy for Ps loss

- D must have generally made it impossible or difficult to calculate profits in

some way. Value of recoverable amount is money P spent in reliance of performance of the contract *(McRae; Amann)*

Questions to ask:

1. **Are reliance damages appropriate in the circumstances?** (P onus)
    a. Ordinary assessment must be incredibly difficult or impossible
        i. *McRae* - impossible bc the 'thing' did not exist (ship)
        ii. *Amann* - possibility of future contract made calculating loss difficult - presumption in commercial contract that parties would recoup their outlay at least
2. **What expenditure did P incur in performance of the contract (as opposed to capital expenditure)?** onus on P
    a. 'What is involved is an assumption that the loss is no less than that which has been outlined and wasted by reason of repudiation or breach' *(Cth v Amann)*
    b. Does not include capital expenditure that would have incurred anyways for business *(McRae)* - in McRae, equipment costs etc was not accounted for, only costs of travelling, wages was accounted for
    c. P would not have incurred this expenditure if D had not made their contractual promise
3. **Was the expenditure reasonable?** (P onus)
    a. Expenditure reasonable incurred
        i. The course which D would naturally expect P to take in reliance on the contract (*McRae)*
        ii. Was it within the parties' reasonable contemplation at the time the contract was made that the relevant expenditure would be incurred and wasted if the contract was breached *(Cessnock)*
        iii. Had the contract been performed, would the P have recovered the expenditure they reasonably incurred in anticipation of, or reliance on the performance of the contract? *(Cessnock)*
4. **If the contract had been performed would P have recouped the expenditure? (D onus)**
    a. Law assumes P would at least have recovered their expenditure had the contract been performed *(Cessnock)*
        i. Council argued that contract probably wouldn't have been renewed, court found that a 'mere prospect' that the contract would not have been renewed is not sufficient to show lack of recoupment
    b. Amann - if the contract had continued, would P have recouped the expenditure?
    c. McRae - if the tanker existed, would P have recouped the expenditure?

DAMAGES FOR DISAPPOINTMENT AND DISTRESS

- Generally contractual damages are not awarded to compensate for disappointment, distress of loss of reputation occurring as a result of a breach of contract
- Except if the purpose of the contract is to provide enjoyment, relaxation or freedom from molestation *(Baltic Shipping; Moore v Scenic Tours)*

3 broad categories (Edelman J in *Moore)*

1. Pain and suffering consequent upon physical injury
2. Vexation and discomfort consequent upon physical inconvenience that arises from the breach
3. Distress or disappointment in contracts for the provision of pleasure or relaxation

Moore v Scenic Tours

- Appellant booked holiday cruise tour supplied by the respondent which was disrupted due to weather, and claimed damages for disappointment and distress; it was decided that the award include this component of damage
- Edelman J
    - Disapproves of the term 'expectation loss'
    - "Where contract damages provide compensation directly based on the performance interest, that component of the award is not concerned with loss in any real or factual sense...aim of this component of the award is to provide the promisee with the difference between the value of what was promised and the value of what was received. The promisee had a primary right to performance of the contract so, upon termination, the law generally provides for a secondary right for the value of the performance that was not received or the difference in value due to the defect" [64]
    - Different from "true, consequential loss from a breach of contract" which may be economic or non-economic, so long as "they go beyond the value of the promised performance and are within the boundaries of legal responsibility" [66]

DAMAGES FOR LOSS OF AMENITY

- Ruxley Electronics, bc of a shallow pool
- Stone v Chappel - translate this loss into monetary figure is incapable of precision or even substantial explanation

LOSS OF CHANCE AND LOSS OF OPPORTUNITY

- Courts may attempt to put a figure on Ps loss of a chance
- P must show that on the balance of probabilities that the chance would have occurred *(Sellars v Adelaide Petroleum)*
- Adjust expectation damages to reflect the probability of chance occurring; total expectation x probability of obtaining expectation = loss of chance *(Chaplin v Hicks)*
- *Amann*
    - Breach of contract caused loss of a chance to pursue potentially commercially valuable opportunity
    - Not necessary to make similar adjustments for reliance damages

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- May get damages for loss of opportunity if can prove that P would have taken up another opportunity but for the breach of contract

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- Contractual damages are available as of right subject to three relevant limitations
  - Causation
  - Remoteness
  - Mitigation

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CAUSATION

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- Only losses causally connected to Ds wrong can be recovered
- Court will consider whether the breach of contract was a ‘cause’ of the loss, using but for + common sense test *(Alexander v Cambridge credit)*

1. **Would P have suffered the injury but for Ds breach of contract?**
   a. Usually easy to establish
   b. But for counter factual enquiry as to what would have happened had the wrong not occurred
2. **If there is a NIA as a matter of common sense, did the NIA break the chain of causation?**
   a. Test is strict in private law - NIAs likely to be taken into account
   b. Less generous than torts
   c. If the NIA was the kind of risk D was supposed to guard against, D will still be liable
   d. Human conduct must be voluntary to be a NIA
   e. 3P conduct may be an NIA if it is unreasonable of criminal - however, it may not be an NIA if D was supposed to control the 3p

Alexander v Cambridge credits

- Didn’t audit accounts properly, if it had would have known it was insolvent
- Economic downturn, co went insolvent
- The commonsense approach led McHugh JA to conclude that the false certificates which allowed the company to keep trading were not the ‘cause’ of the loss of $145m since “the existence of a company cannot be a cause of its trading losses or profits” [358] - the cause was the underlying breach of the trust deed

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REMOTENESS

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- Question of whether D should be held responsible for the harm. The enquiry involves asking whether the harm P alleges to be caused by Ds breach of contract is too remote
- Main concerns in contact cf torts
  - Predictability of outcome
  - Extent of Ds control over events
  - Whether D assumed the risk of the event
  - Whether the D would be subject to an unreasonable burden
  - Social utility or lack thereof of certain conduct

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Losses are not too remote if they *(Hadley):*

1. **Ordinarily or naturally flow from the breach, or;**
    a. *Hadley*
        i. Delivery of crankshaft to factory, crankshaft was not known to be essential, losses were not natural losses for the carrier to foresee
    b. *Victoria laundry*
        i. Reasonable person in the shoes of D must be taken to foresee that a business which required the certain goods for operation, would be likely to suffer lost profits for 5 months delay in delivery. While ordinary contracts were recoverable, lucrative dyeing contract was not recoverable bc D did not know.
    c. Only the type of loss needs to be foreseeable

2. **May reasonably be supposed to have been in the contemplation of both parties at the time they the contract as a probably result of the breach (depends on Ds knowledge)**
    a. So if it's not a normal loss then D has to be made aware for them to be held liable
    b. Loss of lucrative contracts
        i. To recover specifically on lucrative contracts, D must have known the prospect and terms of the contract (*Victoria laundry)*
    c. *Transfield (UK case)*
        i. 'Did the parties assume the risk of that particular event occurring'?

- Academics have a problem with this test - taxi driver problem - Is a taxi driver who knows that a person needs to get to a meeting to sign a contract for $1 million then liable for the $1 million if he misses the meeting.

Transfield v Mercator Shipping (The Achilleas) 2008 UK

- Issue of 'assumption of responsibility'
- Ship charter hired and brought back late
- Lord Hoffman
    - The test for whether someone should be liable for certain amounts should be: did the parties assume the risk of that particular event occurring?
    - Found that didn't in this case so wasn't awarded full damage, only the few days they were late
- Lord ROdger
    - Hadley enough to deal with this
    - RF but not quantum of loss not RF
        - But this does not square with Hughes and Lord Advocate
        - Only necessary to foresee the kind of loss, not anything else, so doesn't really square

IN Australia

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- Transfield has been ignored mostly - so ignore in hypos unless it works in your Ps favour
- But note that this is UK law and has not been adopted in Aust yet

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<tr><td>MITIGATION</td></tr>
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- Although there is no duty to mitigate, Ps damages may be reduced if there has been a failure by P to take reasonable steps to reduce the loss, or where the steps have been taken which reduced the loss
- McGregor says the doctrine of mitigation has 3 aspects
  - Avoidable loss
    - The P cannot recover costs they ought to have avoided
  - Avoided loss
    - The P cannot recover damages for a loss she did avoid

Did P do everything they should have done to mitigate or prevent the loss?

- Once they have noticed the wrong, P is expected to take reasonable steps to reduce their loss or damages *(Burns, broken down car case)*
  - If P suffers from breach but fails to take reasonable steps to reduce loss, damages may be reduced
    - Not reasonable to carry on operating a business running at a loss *(Burns)*
    - Burns was awarded for 2 years instead of 4 bc he should've repaired the car
    - Brennan J dissented and awarded 4 years bc P was too broke to repair bc of the faulty car in the first place so should be granted full damages
  - Where P attempts reasonable mitigation and this increases the loss, the increases loss is recoverable
  - If P suffers a loss as a result of Ds breach, P must attempt to alleviate the losses by obtaining a substitute performance where possible; cannot sit back and let losses accrue

P cannot recover for avoided loss *(Clark v Macourt)*

- Where it appears that P has recouped loss, consider whether - assessing loss at moment of breach - P doesn't receive value owed under the contract
- Facts going to recover loss may instead of to market value of what should have been received under contract; esp where P doesn't profit from mitigation
- P only avoids loss if better off from the substitute performance
  - Clark case not avoided loss case bc it was exactly what he would have received, not better or worse

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<tr><td>Conclude</td><td>What would the court conclude?</td></tr>
<tr><td rowspan="2">Things that look like compensation but are not</td><td>DEBT</td></tr>
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- Debt is a definite sum of money which, under the terms of the contract, the D is due to pay the P either in return for the P completing a specified obligation under the contract, or upon the occurrence of a specified event

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- when the event which triggers the debt occurs, the debt is said to have accrued
- don't need to have specified the sum - can have eg value of.. for the month
- when P claims a debt the q is whether the sum is due
    - no q of breach, causation, remoteness etc

Ask

1. Did they have to pay?
2. Have they paid?

If answers are yes and no, then relief is available. Ie pay back amount

PENALTIES

- contract law says it's fine to agree on what happens when there is a breach, as long as it's not a penalty
- doctrine against penalty is alive and about substance not form (*Andrews v ANZ)*
    - cannot ask for a sum that is intertuerom - ie designed to make party terrified and perform
    - has to bear some form of relation to loss

2 questions to ask

1. **Is this a clause to which the penalties doctrine applies?**
    a. The presence of a primary stipulation and collateral stipulation which imposes an additional detriment is sufficient to trigger the application of the penalties doctrine
    b. However, a primary stipulation and alternative stipulation which provides for a fee for a greater rights is not a penalty *(Metro-Goldywn v Greenham)*
2. **On the facts, is this a penalty?**
    a. Post *Dunlop,* common law has shifted to ask whether the party imposing the detriment has a legitimate interest *(Paccioco)* in doing so
    b. Ask - whether the sum or remedy stipulated as a consequence of the breach of a contract is exorbitant or UC when regard is had to the innocent party's interest in the performance of a contract
        i. If yes, then penalty

Andrews v ANZ

- A group of ANZ customers sued the bank, arguing that certain fees (honour fees, dishonour fees, non-payment fees, overlimit fees, and late payment fees) were **penalties** rather than legitimate charges. They claimed these fees weren't based on actual losses suffered by ANZ but were instead unfair punishments.
- The trial judge ruled that only **late payment fees** could be penalties because they were charged when a customer breached their contract (at [21]). The

	other fees weren't triggered by a breach - they applied under normal banking terms - so they couldn't be penalties (at [22]). ● The **High Court overturned this reasoning**. French CJ, Gummow, Crennan, Kiefel, and Bell JJ ruled that the penalty doctrine isn't just limited to contract breaches. It also applies when a **collateral obligation** (a separate requirement in a contract) imposes an unfair additional cost (at [10]). If a clause creates an extra financial burden that isn't a fair estimate of actual loss, it may be struck down (at [12]). ● French CJ, Gummow, Crennan, Kiefel & Bell JJ: A penalty is a **punishment** for failing to meet a contractual obligation (at [9]). A clause is a penalty if it **adds an unreasonable financial burden** beyond the original obligation (at [10]). If a fee is based on **real financial harm**, it can be enforced - but if the loss is impossible to calculate in money terms, penalties don't apply (at [11]). Penalty rules apply to more than just **breaches of contract**; they also cover extra charges imposed in other ways (at [12]). ● The trial judge followed a **previous NSW Court of Appeal case** (Interstar) in deciding the penalty doctrine was limited, but the High Court took a broader approach (at [29]).
If compensation is not adequate then we look to specific relief, ie secondary remedies	
SECONDARY REMEDY: SPECIFIC RELIEF	
SPECIFIC PERFORMANCE	
● SP refers to a discretionary coercive court order which requires the D to take positive steps to fulfil their obligations under a contract ● To be awarded SP, P must show that damages are inadequate - that damages would put P in a situation which was not as beneficial as if the agreement was SP (*Harnett v Yieldings)* ○ Question of substitutability - to what extent can money substitute for the performance of the contract, if it can't, then SP may be available	
Re Land	● SP always presumptively available for contracts involving land (Barwick CJ in *Pianta)* ● reflects fact that rival is a limited resource - and one bit of land is not the same as another **Corps of Aust v Bonner** ● TBC **Semelhago v Parmadevan (1996)** ● Canadian case, apartments where they look the same