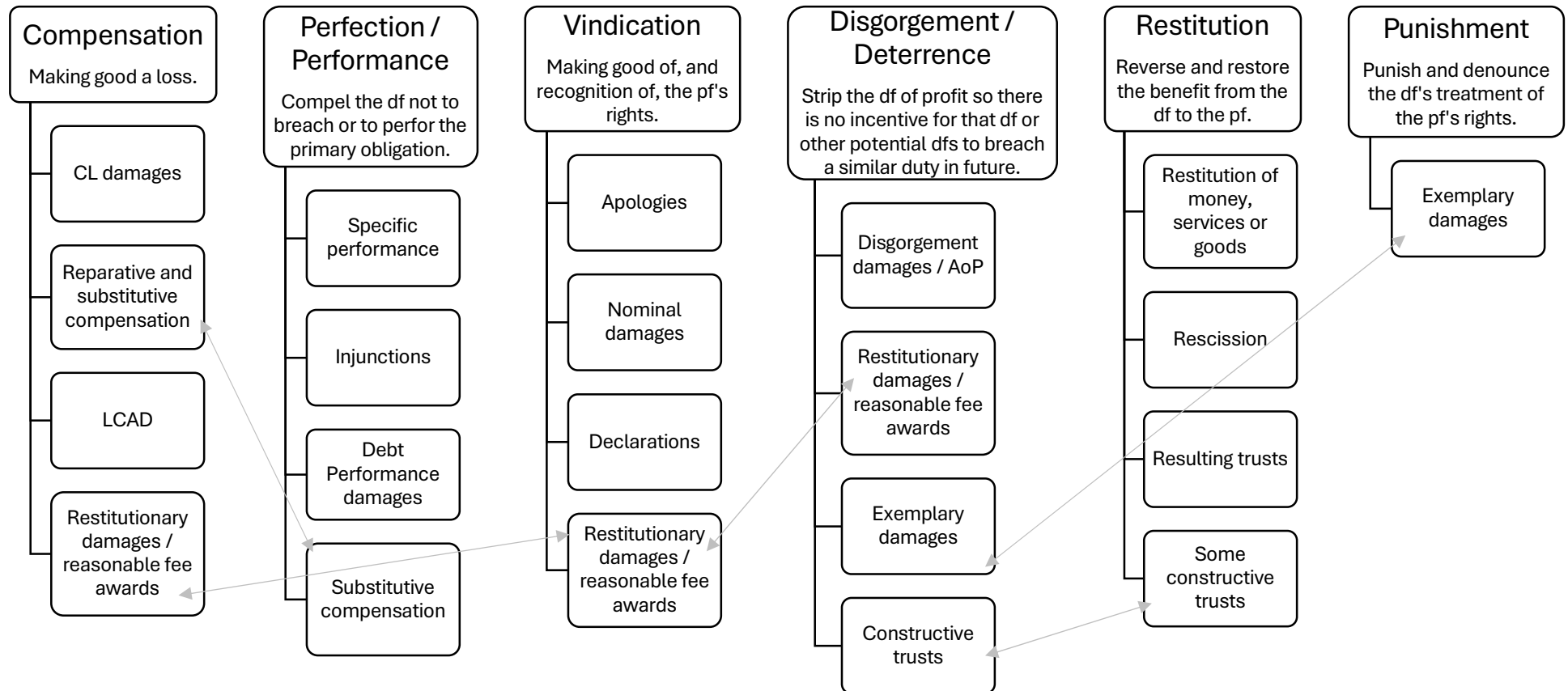


LAWS 5105 REMEDIES

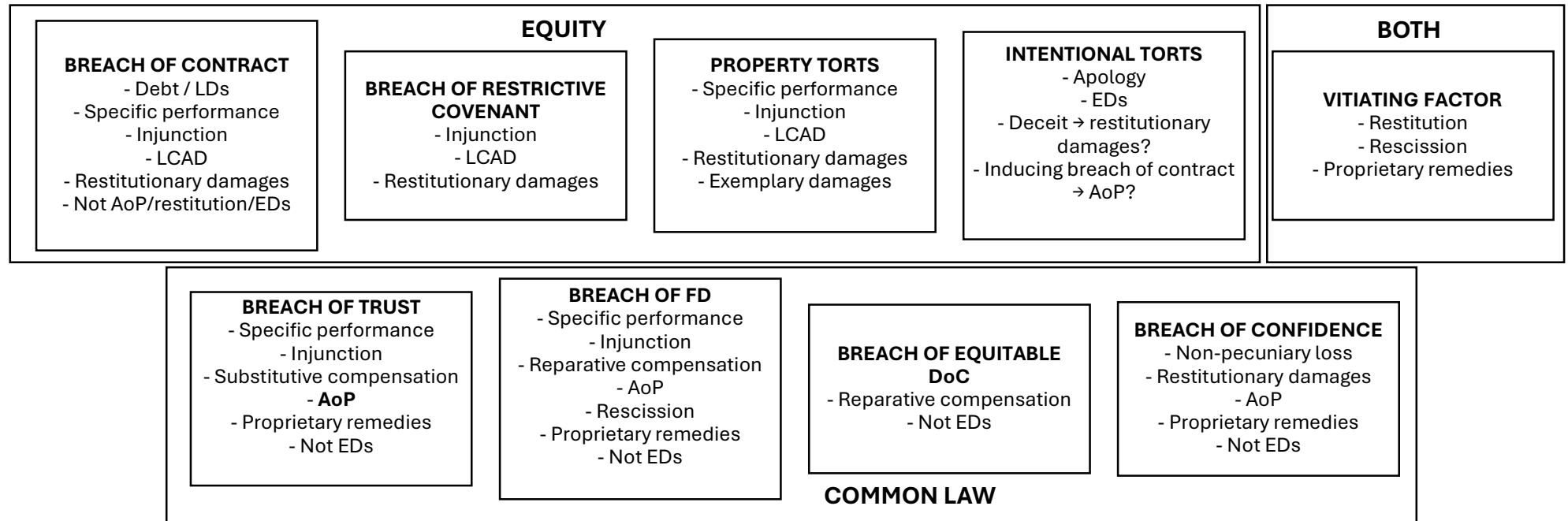
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FUNCTIONAL CLASSIFICATION



MIND MAP – CAUSES OF ACTION & REMEDIES



DEBT & LIQUIDATED DAMAGES

DEBT

A definite sum of money which the df is due to pay the pf under a contract.

- Much simpler than seeking compensatory damages for breach of contract.
- Definite sum → sufficient if ascertainable when payment is due (*Jervis v Harris*).

Test: Is the sum of money due? (*Jervis v Harris* – Millett LJ)

- (1) Contractual conditions which trigger payment have arisen.
 - (a) Pf has completed a specified obligation under the contract.
 - Independent obligation → perform without reliance on other party performing obligation.
 - Dependent obligation → perform in reliance on/responding to other party performing obligation.
 - (b) Specified event or condition has occurred.
 - Loan contract – principal due on certain date
 - Lease agreement – rent is due on a certain date
 - Breach of contract – liquidated damages payable
- (2) Pf has not received payment.
 - Don't need to prove breach or causation.
 - Don't need to prove loss.
 - Remoteness, scope of liability, mitigation is irrelevant.
 - Limited defences eg “tender before claim” (before pf began proceedings, the df unconditionally offered to pay the amount due).

Debt illustrates the relationship btwn compensatory and specific/perfecting relief.

Specific relief	Debt	Damages
Proof of breach. Proof damages inadequate. Discretionary. Bars to relief.	Available as of right if conditions are satisfied. No consequential loss. No discretion. No bars to relief.	Performance damages = debt. Proof of breach. Causation, remoteness, scope of liability rules. Consequential loss.

Jervis v Harris:

- Tenant defaulted on a repair covenant in a lease.
- Landlord entitled to carry out repairs and recover costs from the tenant. Avoids loss by reason of tenant's failure to repair.

- Under statute, claims for damages for breach of tenant's repair covenant subject to specific restrictions.
- Claim classified as a debt. Statutory restrictions did not apply.

LIQUIDATED DAMAGES

NATURE OF REMEDY

Liquidated damages clause: Stipulates damages available for breach of contract.

- Self-help remedy:
 - Parties estimate losses flowing from breach.
 - Sue for a fixed sum rather than judicial assessment of losses.
- Parties can include any terms they want in a contract, incl LD clause (*Ringrow v BP Australia*).

PENALTIES DOCTRINE

Exception: Penalties doctrine (*Andrews v ANZ*; *Paciocco v ANZ*)

LD clause unenforceable if a penalty!

- (1) Is this a clause to which the penalties doctrine applies? [CITE *Andrews v ANZ*]
- (a) Collateral stipulation [YES] → used to promote performance of the primary stipulation by imposing additional detriment eg *Unless you do X by Friday, you must pay \$Y*.
 - (b) Alternative stipulation [??] → allows for a higher payment if further services or rights are provided by one party eg *You cannot do X generally but you can do X if you pay additional \$Y*.

Andrews v ANZ (2012, HCA) → broadened application of equitable penalties doctrine.

- ANZ customers argued that fees the bank charged in relation to transactions made on their accounts were penalties.
- Late payment fees, honour fees, dishonour fees, over limit fees, non-payment fees.
- Not all of these a breach of contract.
- HCA did not decide whether penalties but clarified penalties doctrine:
 - Equitable doctrine has survived, not subsumed into CL doctrine.
 - Equitable doctrine does not require a breach.
 - Substance of the clause matters (not form).
- Appellate courts tended to minimise impact of *Andrews v ANZ*.

- (2) Is the clause a penalty?
- (a) New test → detriment is **out of all proportion to legitimate interest** in performance of primary stipulation of party in whose favour it is made [CITE *Paciocco v ANZ*]
 - As long as there is a reasonable explanation ≠ penalty
 - Criticised (1) relevant legitimate interest is difficult to identify and (2) what qualifies as a legitimate interest?
 - (b) Old test → sum is extravagant and unconscionable in comparison with the greatest damage likely to be caused by the breach [CITE *Dunlop*]
 - Sum stipulated is greater than what ought to have been paid = penalty

- Lump sum payable on the occurrence of one or more events (some serious some less serious) = penalty

Evolving doctrinal space – old test (*Dunlop*) vs new test (*Paciocco*)

Dunlop (1915, UKHL)

- Tyre supply contract included an obligation not to resell the tyres at prices less than the current list price supplied by the manufacturer.
- Clause required payment of £5 for every tyre offered in breach of the contract.
- UKHL held clause was not a penalty.
 - Damage to manufacturer if tyres prices cut was certain but indirect.
 - Impossible to ascertain damage from any one sale of tyres. Reasonable for parties to estimate damage.
 - £5 not extravagant. No reason to suspect that it was not truly a bargain to assess damage.

Ringrow v BP Australia (2005, HCA) → HCA reaffirmed *Dunlop* tests.

- Agreement with BP for purchase of service station.
- Collateral agreement required Ringrow to purchase fuel exclusively from BP and Ringrow obliged to transfer service station to BP if breach.
- Ringrow claimed penalty.
- Penalties doctrine applies where the sum stipulated is “out of all proportion” to the damage likely to be caused by the breach.
 - Not merely disproportionate.
 - Need for a high bar.
 - Emphasis on freedom of contract (*AMEV-UDC* (1986, HCA); *Cavendish* (2016, UKSC)).

Paciocco v ANZ (2016, HCA) → most clauses will not be penalties if “legitimate interest”

- ANZ customers argued that fees the bank charged in relation to transactions made on their accounts were penalties.
- Late fee the same whether payment was late by a day or week, related to \$0.01 or \$100.
- ANZ didn’t calculate the fees according to what was recoverable as damages.
- HCA held ANZ entitled to late fees.
 - **Legitimate interest** in receiving timely payment of credit.
 - Commercial interests → obtaining a profit, protecting shareholder interests.
 - Sole interest was recovering losses, no reason to apply legitimate interest test (dissent).
 - Amount of the fees was **not out of all proportion** to that legitimate interest.

Kay v Playup Australia:

- Clause provided that late payment of sum that was due resulted in deprivation of other accrued rights under the contract.
- The clause operated to encourage *in terrorem* timely payment.
- Legitimate interest in timely payment could not extend to deprivation of other accrued rights.
- Suggests the death of the penalty doctrine may have been premature.

Critique of penalties doctrine:

FOR	AGAINST
Standard form contracts → consumers not aware of ramifications of LD clauses. Procedural unfairness. Prevent weaker party being oppressed by use of bargaining power by stronger party.	Paternalistic flavour → court remakes bargain in a way inconsistent with other contract law doctrines. Penalties increase efficiency in contracting. Problems of inequality of bargaining power better dealt with by other contract law doctrines (eg unfair contract terms).

EQUITABLE COMPENSATION

DEFINITION

Equitable compensation: An equitable remedy awarded for loss following breach of equitable duties and for other equitable wrongs.

- Breach of trust (*Youyang* 2003, HCA)
- Breach of fiduciary duty – conflict rule, no profit rule (*Pilmer* 2001, HCA)
- Knowing participation in breach of fiduciary duty (*Ancient Order* 2018, HCA)
- Failure of fiduciary or trustee to exercise diligence, care and skill (*Wheeler* 1991, WASC)
- Breach of confidence (*Smith Kline* 1990, FC)
- Equitable “fraud” (*Nocton v Lord Ashburton* 1914, UKHL)
- Breach of equitable obligation (*Hospital Products* 1982, NSWSC)

cf LCA damages → awarded in respect of CL wrongs

TYPES OF EQUITABLE COMPENSATION

SUBSTITUTIVE COMPENSATION	REPARATIVE COMPENSATION	
	BREACH OF CORE FDs	BREACH OF DoC
Trust assets disbursed without authorisation. Restore what is taken from the trust. <ul style="list-style-type: none">• Analogous to debt/performance damages.• Strict liability – no causation analysis, no limiting factors	Compensation for breach of no conflict/no profit rules. <ul style="list-style-type: none">• Factual causation.• Can’t be rebutted by argument pf would have incurred loss anyway (<i>Brickenden</i>).• Equity will cease to hold someone liable if pf not taking care of their own interests (scope of liability).	Compensation for breach of equitable DoC. <ul style="list-style-type: none">• Arguably same as CL negligence claims re causation / scope of liability (nature of duty is the same).

TRADITIONAL APPROACH

Seek an “account” for breach of trust (*Glazier Holdings* 2001, NSWSC)

- (1) Two forms of an account:
 - (a) Common account → requires T to account only for what they received.
 - (b) Account on the basis of wilful default → requires T to account for what they have received AND what they would have received but for the misconduct.
 - (2) If account reveals a discrepancy, B may surcharge or falsify the account.
 - (a) Falsification → allegation that disbursement was made without authorisation
[SUBSTITUTIVE COMPENSATION]
 - (b) Surcharge → allegation that T has omitted something for which credit ought to be given
[REPARATIVE COMPENSATION]
 - (3) T obliged to reconstitute the trust (*Halford v Halford* 2001, WASC)
- (a) Falsification → disallow or delete the disbursement and T must make good the deficit *in specie* or in money.

- (b) Surcharge → surcharge the trust and T must pay the surcharge.

OBJECT OF EQUITABLE COMPENSATION

Compensation	Disgorgement	Performance
Restoration of the trust (sometimes referred to as “restitution” in the cases). Mostly measured by reference to the plaintiff’s loss inflicted by an equitable wrong. Restore to position they would have been in had there been no breach of the equitable obligation.	Some cases say can be measured by reference to the defendant’s gain. Blurs distinction between equitable compensation and account of profits.	Account available as of right where trust or fiduciary relationship. Enforcing performance of an obligation.

PECUNIARY LOSS

BREACH OF TRUST → SUBSTITUTIVE COMPENSATION

Trust assets disbursed without authorisation. Restore what is taken from the trust.

- (1) Does the trust need to have suffered loss?

- (a) **Substitutive compensation not compensation for loss** → restitutionary or restorative (like specific performance or debt).

- Substitutive compensation discharges T’s primary obligation to hold the property on trust.
- Compensation for infringement of B’s primary right to have the trust administered in accordance with its terms.

- (b) **Strict liability** → focus on defendant’s wrongful conduct

- (2) Causation / scope of liability issues

- (a) **Aus position → Strict approach [CITE *Youyang*]**

- Substitutive compensation requires T to restore trust regardless of loss suffered (*Jackson* 2014, WASC, Edelman J).
- Independent non-wrongful event is irrelevant (*Youyang* 2003, HCA; *Re Dawson* 1996, NSWSC).
- Arguments:
 - Not concerned with loss.
 - T’s obligation to perform the trust.
 - Limiting factors irrelevant (*Re Dawson*; *Maguire v Makaronis* 1997, HCA).
- Defence for Ts acting honestly and reasonably (s 75 *Trustees Act* 1962 (WA)).

Re Dawson (1966, NSWSC):

- Father died and son acted as executor and trustee for properties in Aus and NZ.
- Some NZ assets sold. Son wanted sum transferred to Aus. Son withdrew entire sum from NZ acc, gave to Nelson to transfer to Aus. Nelson absconded.

- When son died his estate conceded he was in breach of trust and liable to repay the NZ funds.
- Son's estate liable to pay funds to father's estate.
 - Strict obligation to effect "restitution" to the estate. **Considerations of causation, foreseeability, remoteness irrelevant.**
 - If assets not restored *in specie*, quantification determined at the date the trust assets are to be restored in money.
 - Interest may be awarded in addition to amount T deprived the estate. Appropriate to include component of interest where use-value lost.

Youyang (2003, HCA):

- Youyang invested in product with minimum subscription payment of \$500k. At the end of 10-year period, investor would receive back \$500k (at minimum). Facilitated through a bearer deposit certificate purchased with proportion of subscription moneys.
- Subscription moneys were to be paid to Minters trust acc. Minters authorised to release money from trust acc to third party bank to purchase bearer deposit certificate.
- Minters released \$256,800 to a third party bank without obtaining bearer deposit certificate. Released balance to product provider.
- Product provider told Youyang it could save tax by moving money to an overseas bank.
- Product provider went into liquidation. No security for Youyang in seeking to recover its funds.
- HCA held Minters in breach of trust and **must repay Youyang \$500k with interest.**
 - Supposed to be a guarantee that Youyang would get its money back at end of 10 years.
 - Substitutive analysis: Minters had power to disperse \$500k in accordance with trust, misapplication of trust moneys resulted in obligation to restore trust fund in full.
 - Approved *Redfern* BUT distinguished on the facts → **was irrelevant that Youyang's losses were aggravated by moving funds to overseas bank after the breach.**

Agricultural Land Management v Jackson (2014, WASC)

- Goff and Jackson were Ds of ALM and another co Bunbury. Goff was also Bunbury's co secretary.
- Bunbury entered into contract to sell land to ALM for \$2.25 million. Contract signed by Goff and Jackson on behalf of both parties.
- Contract provided that Bunbury would grant ALM a non-exclusive licence to use all info and know-how in Bunbury's possession to develop the land.
- Goff and Jackson breached fiduciary duty to ALM (no conflict rule).
- No order for reparative or substitutive compensation. ALM failed to prove that promised purchase price/licence fee were at an undervalue re rights ALM obtained in exchange.