Remedies
Exam Notes

Table of Contents

CONTRACT

Compensatory Damages

1. **Has there been a breach of a contractual promise?**

2. **Identify the relevant losses**

- **Be specific**: lost profit; disappointment or distress; loss of amenity etc

- Identify both primary and consequential losses

3. **State the general principle ['expectation' loss]**

- **General principle ['expectation' loss]:** damages in contract are given to place the plaintiff in the same position as if the contract had been performed (as far as money can do it) (Hayne J in *Clark*, citing *Robinson v Harman*)

- **'Expectation' loss** is *constructed* by the law to give effect to a normative order (Fuller and Perdue, cited by Hayne J in *Clark*)

- **Note theoretical conception of expectation loss as a form of 'normative damages'** which compensate for the breach of the right to performance in itself

4. **What is the appropriate measure of expectation loss?**

- **In exam, examine tensions as to which approach is most applicable (eg should rectification measure be awarded for purely commercial properties?)**

- **[a] Loss of expected profit (*Amann*)**

    - Appropriate for commercial contracts where the aim is to profit
    - Correct measure is **net profits**: total revenue less costs that would be incurred in earning that revenue
    - Would have been appropriate in *Amann*, had if it had been possible to assess profits

- **[b] Difference in market value**

    - Principal method applied in cases of **defective goods or failures to deliver goods** (*Clark*; *Tabcorp*)

- Calculation is the market value of what was contracted for less the market value of what was received

- Market value is measured at **time of breach**

- **[c] Cost of restoring or rectifying ('cost of cure')**

  - **Theoretical point re 'normative damages':** rectification measure also arguably conforms with the idea that expectation damages seek to compensate for the breach of the right to performance in itself, rectification damages being the **amount required to secure what was actually owed under the contract**

  - Plaintiff should seek **(1) rectification measure; then (2) difference in market value**; then **(3) *Ruxley*/*Stone* 'loss of amenity' award**

  - Most appropriate in cases involving **defective work (especially building work or damage to property) and personal aesthetic preferences** (eg *Bellgrove*; *Tabcorp*)

  - **Not generally** applicable in goods cases or run-of-the-mill commercial contract cases where profit is the sole aim

    - **Consider tension with *Tapcorp***, in which rectification measure *was* applied despite facts suggesting that this was purely a commercial property, and the breached clause was a standard lease provision [ie not indicative of unique/personal preference]

  - **[1]** The court should only award rectification damages to the extent strictly **necessary** to bring about the outcome promised under the contract (*Bellgrove*; *Tabcorp*)

  - **[2]** The measure will be the cost of rectification minus the value of what has been received by the plaintiff

    - ***Bellgrove*:** cost of demolition and reconstruction minus salvage value of demolished house and outstanding purchase price. **Note**: no need for demolition if it's possible to rectify without such a drastic measure (eg wrong bathroom fittings)

    - ***Tabcorp*:** cost of restoring the building's foyer to its original state

  - **[3]** Rectification must be **reasonable** to produce conformity with the contract (*Bellgrove*)

- **'Reasonableness' exception** is viewed **narrowly** and only in an **exceptional case** would the court deny rectification measure on the basis of the 'reasonableness' criterion (*Tabcorp*)

    - **Example of unreasonableness:** where the plaintiff relied on a *technical breach* to seek an 'uncovenanted profit'

- **[4]** If the rectification measure is considered **inapt**, the difference in market value measure will be applied instead

- **[5]** Whether the rectification measure ought to be applied does not depend on what the plaintiff will in fact use the damages for (*Bellgrove*; *Tabcorp*)

- **[6]** Consider the approach of the UK House of Lords in *Ruxley* [seemingly rejected in *Tabcorp*]

    - **[i] *Ruxley* approach** is to consider proportionality in two dimensions:

        - Rectification damages ***v*** difference in market value damages

        - Benefit of having the work rectified ***v*** rectification damages [would it be **unnecessarily wasteful** to provide rectification damages?]

            - In *Ruxley*, not justified to incur such cost to create a pool that is only slightly deeper

    - **[ii] In *Ruxley*, House of Lords offers 'loss of amenity' damages of £2,500** [seems largely declaratory in nature]

        - **In exam:** consider whether this is alternatively explicable as a form of physical inconvenience/mental distress damage parasitic on physical inconvenience

    - **[iii] Note Supreme Court of South Australia in *Stone***: holds rectification unreasonable on *Ruxley* proportionality grounds [raising ceiling by 40mm wasteful]; awards $30,000 for **'loss of amenity'**

        - Note HCA would almost definitely overrule *Stone* given *Tabcorp*'s insistence that 'reasonableness' exception is **narrow**
        - **Seem more readily conceptualised as 'loss of amenity' than the *Ruxley* damages**

- **[d] Distress**
    - There is a **general exclusionary rule** against recovery of mental distress damages for breach of contract (Mason CJ in *Baltic Shipping*). **Exceptions** to the general rule exist:
        - **[1]** Breach of promise of marriage
        - **[2]** Where mental distress is **connected to physical injury** caused by the breach of contract
        - **[3]** Sometimes, where the breach of contract causes **physical inconvenience** (eg train doesn't deliver you to stipulated location)
        - **[4]** Where the breach of contract causes mental distress that is **directly related to the physical inconvenience** (eg train's failure to deliver you causes distress associated with missing best friend's wedding)
        - **[5]** Where the specific object of the contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation
            - ***Baltic Shipping*:** contract for the provision of a pleasure cruise; ship was negligently navigated; Mrs Dillon, having recently suffered bereavement after husband's death, ends up in water fighting for her life; sentimentally valuable letters from her husband were lost in the incident
    - **If you have a novel category, argue by *analogy* to one of the five above**
- **[e] Reliance**
    - **Applicable** where the plaintiff **cannot establish expectation damages**
    - Not for the plaintiff to ***elect*** between the ordinary expectation measures or the reliance measure. It is **for the court** to **determine the appropriate measure on the facts**
    - **Rationalised by the** assumption that the plaintiff would not have entered the contract if it could not have at least expected to recoup expenditures made in reliance on the defendant's performance
    - **Identifying reliance loss:** would the plaintiff have incurred this expense if the defendant had never made their contractual promise?

        - If ***no***, the expense is recoverable in principle
        - If ***yes***, the expense is not recoverable

    - **[1] Are reliance damages appropriate? [BOP: plaintiff]**

        - Expectation measure must be impossible to calculate (*McRae* — impossible to value something that does not exist) or difficult to assess (*Amann* — lost profits too difficult to assess given uncertainties around renewal and termination of contract)

    - **[2] What expenditure was incurred in performance of the contract? [BOP: plaintiff]**

        - Would the money have been expended if the defendant had never made their contractual promise? (*McRae*)

        - Capital expenditures, or expenses that would been incurred anyway, do not count (*McRae*)

    - **[3] Was the expenditure reasonable? [BOP: plaintiff]**

        - It must have been reasonable for the plaintiff to incur the expense in anticipation of the defendant's performance **and** the sum expended must be reasonable (*McRae*)

        - ***McRae***: the court counted as 'reliance loss' the quantum that could *reasonably* be expended on **flights and hotel**; did *not* count *entire* expenditure on flights and hotel

    - **[4] Had the contract been fully performed, would the plaintiff have recouped that expenditure? (*Amann*) [BOP: defendant]**

        - Needs to be shown on the balance of probabilities that the plaintiff would not in fact have recovered expenditures made in reliance even if there had been performance
        - This will typically be very difficult to prove (but see high probability of contract renewal in *Amann*)

- **[f] Loss of amenity**

    - See above discussion of *Ruxley* and *Stone* under **distress** and **rectification** measures
    - As in *Ruxley* where there was an award of £2,500 for disappointed expectations (applied by NSWCA in *Stone* with a $5,000 for solatium, though this pre-dates *Tabcorp*, which casts doubt on the precedential value of *Ruxley* in Australia)

5. **Apply <u>limiting</u> principles**

- **Factual causation**
    - ‘But for’ causation applies in the law of contract damages (*Alexander*)
        - Arguable that it applies differently according to the ***type of loss*** in question
        - In certain cases, this will be satisfied as a matter of course **(eg in failure to deliver goods cases)**
    - **[a] Expectation loss (*Alexander*)**
        - **For difference in value and rectification measures**, factual inquiry is automatically answered in favour of the plaintiff because loss is inherent in the breach of contract
            - Where the duty is breached, this necessarily entails that the plaintiff did not have their contractual expectations met
        - **For loss of profits and distress**, ask whether there are other possible causes for loss than the defendant’s wrong
            - Defendant’s wrong need only be **<u>a cause</u> of** (ie needs to have ‘causally contributed’ to) the plaintiff’s loss for factual causation to be established (*Alexander*)
            - Consider whether there is **causal underdetermination, causal overdetermination, scientific uncertainty**
    - **[b] Consequential loss [parasitic on the expectation loss]**
        - **Relevant principle:** would the expenses or losses have been incurred but for the defendant’s breach of duty? (*Alexander*)
    - **[c] Reliance loss**
        - **Relevant inquiry:** would the expense have been incurred but for the defendant’s promise of performance? (*McRae*; *Amann*)

- **Legal causation (novus actus + remoteness)**
    - **Note:** we're generally concerned with the ***type*****, not the *quantum***, of loss, but this can sometimes appear stretched (see, eg, *Victoria Laundry* discussion below)
    - **[a] Is there one or more intervening act (novus actus)?**
        - Generally, applies only to events which come ***after*** the wrong
        - **Includes:** unreasonable acts by the plaintiff that exacerbate loss; deliberate third party acts; some other causally independent event (eg natural disaster)
    - **[b] Apply the *first* limb of *Hadley***
        - **Objective test:** Loss is too remote if it may fairly and reasonably be considered to arise naturally, that is according to the usual course of things, from the breach of contract
        - **Ask:** what type of loss would a reasonable observer consider would naturally or invariably flow from breach of the relevant contractual duty?
        - **Generally:** *expectation loss*, the principal head of loss in contract, will fall under this limb
        - **Note:** generally it's the *type* of loss (rather than its *extent*) which must be foreseeable
    - **[c] Apply the *second* limb of *Hadley***
        - **Subjective test:** Loss is too remote if it is such as may reasonably have been in contemplation of both parties at the time the contract was made as a not improbably consequence of breach
        - **Stand in the shoes of the parties** to the contract at the time the contract was formed and ask what types of loss they reasonably would have contemplated as being a not improbable consequence of the breach
        - May consider the ***subjective*** knowledge of each party at the time they were negotiating the contract
        - Market knowledge may be relevant here (*Hadley*)
        - **Note:** generally it's the *type* of loss (rather than its *extent*) which must be foreseeable

- **[d] Consider the *Victoria Laundry* case**

    - If there are two sources of lost profit: (1) *direct* profits and (2) *lucrative* other profits, consider *Victoria Laundry* analysis
    - Suggests that profits lost in the ***ordinary course of business*** are recoverable (*Victoria Laundry*)

        - Seems to run against the grain of *Hadley*, but might distinguish on the basis that the delay in *Victoria Laundry* lasted five months (lengthier than delay in *Hadley*)

    - But may be necessary for the defendant to have had *actual knowledge* of the terms of ***lucrative government contracts*** for lost profits associated with those contracts to be within the scope of liability (*Victoria Laundry*)

        - **Criticism:** This seems to go to the *quantum* of the loss rather than the *type* of loss [they are both really **lost profits**, so suggestion that they invite distinct analyses might be flawed]

- **[e] Consider the agreement-based 'gloss' on *Hadley* provided by Lord Hoffmann in *The Achilleas***

    - After applying *Hadley*, ask whether the facts are such as to implicate Lord Hoffmann's 'gloss' (*The Achilleas*)

    - Applicable if facts are such as to give rise to **ordinary market expectations** on the contractual allocation of risk
        - *Achilleas* examples are markets for shipping and banking

    - In discerning the scope of liability, court should give effect to an allocation of risk contained in **<u>ordinary market expectations</u>** unless contract's terms expressly provide otherwise
    - No precedential value in Australia, but possibly persuasive

- **Mitigation**

    - Mitigation is only invokable in relation to the plaintiff's conduct ***after*** she gains notice of the breach

    - **[1]** The plaintiff **cannot** recover for loss that would have been **reasonable to avoid** (*Clark*)

- **[2]** The plaintiff **can** recover for loss incurred in **reasonable attempts** to avoid loss (*Clark*)
- **[3]** The plaintiff **cannot** recover for **avoided loss** (*Clark*)

- General trend of authority is in favour of considering the plaintiff's means in judging the reasonableness of their actions (Brennan J in *Burns*; *Lagden*), especially where the defendant's breach has *led* to the plaintiff's impecuniosity (Brennan J in *Burns*)

- **Onus** is on the defendant to prove that the plaintiff has not taken reasonable steps to mitigate their own loss (*Burns*)
- Foreseeability for the defendant extends until it would be unreasonable for the plaintiff to fail to act to mitigate their loss (*Burns*)

- **Contributory negligence**

  - **Apply this limiting principle *last* —** apply the contributory negligence discount to the final damages sum provided by application of all the other limiting principles
  - Only concerned with the plaintiff's conduct ***prior to*** the breach
  - **Defendant bears the onus of proving** all elements of contributory negligence, as it is in the nature of a **defence**
  - Only applies to a contract claim where the duty of care under a contract is **concurrent and coextensive with a duty in tort** (*Wrongs Act* ss 25)

  - **Section 26:**
    - (1) If a person (the claimant) suffers damage as the result partly of the claimant's failure to take reasonable care (contributory negligence) and partly of the wrong of any other person or persons—
      - (a) except as provided in section 63, a claim in respect of the damage is not defeated by reason of the contributory negligence of the claimant; and
      - (b) the damages recoverable in respect of the wrong must be reduced to such extent as the court thinks **just and equitable having regard to the claimant's share in the responsibility for the damage.**

6. Action for debt

- **Preliminaries**

  - **Debt:** a definite sum of money which, under the terms of the contract, the defendant is due to pay the plaintiff either in return for the plaintiff completing

a specified obligation under the contract or the occurrence of a specified event (*Jervis*)
    - **In an action for debt**, there is no need for the plaintiff to prove any loss (*Jervis*)
    - The rules of **remoteness and mitigation do not apply** (*Jervis*)

- **Liquidated damages and the penalties doctrine**

    - **Preliminaries**

        - Liquidated damages allow one party to sue for a fixed sum on breach
        - However, if the liquidated damages clause infringes the **penalty doctrine**, it is wholly unenforceable or void, and damages would be assessed as usual

    - **[1] Is this a clause to which the penalties doctrine applies?**

        - Ordinary common law rule is that the doctrine applies where payment is stipulated as contingent on breach
        - However, the equitable doctrine of penalties can operate more broadly (*Andrews*)
        - It is the **substance** of the clause which matters, not the form (*Andrews*)
        - Prima facie penalty if, as a matter of substance, the stipulation **(1)** is **collateral** to a primary stipulation and, **(2)** upon failure of the primary stipulation, imposes upon the first party an **additional detriment** [the penalty] to the benefit of the second party (*Andrews*)
        - Doctrine does not apply if the prejudice to be suffered upon failure of the primary stipulation is **not 'susceptible of evaluation' in money terms** (*Andrews*)
        - **Distinguish** between ***alternative*** and ***collateral*** stipulations: alternative stipulations not subject to penalties doctrine as they can be **concurrent with primary stipulation** [ie not *dependent* on failure of primary stipulation]

    - **[2] If the penalties doctrine applies, is the clause in fact a penalty clause?**

        - A clause is likely to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach (*Dunlop Pneumatic*, adopted in *Andrews*)
        - **Overarching test suggested by *Paciocco*:** Does the party imposing the detriment have a **legitimate interest** in performance of the primary stipulation? If yes, unlikely to be a penalty.

- **Seven elements in** Lord Dunedin's test in *Dunlop*, with modifications by the majority in *Paciocco*:

    - **[1]** whether the contract describes the payment as a penalty or liquidated damages is not decisive
        - [*Paciocco*: this principle remains good law; one must look past any formal descriptions of a clause in a contract to determine whether it is penal]

    - **[2]** the essence of a penalty is a payment '*in terrorem*' (means to *deter* offending party from committing the breach), whereas the essence of liquidated damages is a **genuine pre-estimate of damage**
        - [*Paciocco*: this distinction not conclusive or necessarily instructive. Correct inquiry is whether the clause is a penalties clause, not whether it is a genuine liquidated damages clause]

    - **[3]** question is one of 'construction' (more accurately, of *characterisation*) of the terms of the contract having regard to the inherent circumstances of the contract at the time it was made
        - [*Paciocco*: majority emphasises **commercial interests of bank** as important aspect of 'inherent circumstances' of the contract, which are salient to construction of the contract, included whether the stipulated sum is a penalty. Nettle J notes that inequality of bargaining power between parties might be an important background consideration in determining whether a clause is a penalty or not]

    - **[4A]** The agreed sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach
        - [***Paciocco***: 'extravagant and unconscionable' means **'out of all proportion'**, not 'mere disproportion'. 'Out of all proportion' inquiry is conducted with reference to the **defendant's legitimate interests**]
        - ***Paciocco***: the late fees served to protect the bank's legitimate commercial, business and economic interests: eg by maintaining an undisturbed revenue stream at a certain level of profitability. The late fee **was not out of**

all proportion to the goal of protecting the bank's legitimate interests
    - **Gageler J in *Paciocco*:** unlikely to prove that a sum is a penalty unless there is no other possible justification for the clause than a *penal rationale*

- **[4B]** The agreed sum may be held to be a penalty where the breach consists only in not paying a sum of money and the stipulated sum is greater than the sum which ought to have been paid
    - **[*Paciocco*:** not enlivened in *Paciocco* because plaintiff's obligation viewed as not merely an obligation to pay but to pay *on time* (note this is almost *always* the case with obligations to pay).
    - **Nettle J in *Paciocco*** views this rule as a mere manifestation of **4A**

- **[4C]** Presumption that a single lump sum is a penalty if it is payable on the occurrence of one or more of several events of which some may occasion serious damage and others do not
    - **[*Paciocco*:** majority hold this is only a **weak presumption.** Weakness of presumption visible in majority's conclusion that the fee was not a penalty despite it being a lump sum (ie not varying with the seriousness of the breach)]

- **[4D]** Where the consequences of breach make the precise pre-estimate of damage almost impossible, it will be less likely that the clause is a penalty
    - **[*Paciocco*:** majority endorses and applies this proposition. It's precisely when loss is hard to estimate that the court ought to defer to the remedial consequences contractually agreed by the parties]

Specific Performance

1. **Preliminaries**

- Coercive court order requiring defendant to take positive steps to perform contractual obligations, granted in equity's auxiliary jurisdiction
- This is a **discretionary** award
- **Note distinction: (a)** specific performance v **(b)** order *in the nature of* specific performance:
    - **'Specific performance': requires all parties to perform all outstanding obligations under the contract**
    - **'Order in the nature of specific performance':** an order which orders performance of a particular *aspect* of the contract [it's actually an injunction, but all of the principles applying to specific performance apply]

2. Jurisdictional hurdle: inadequacy of damages

- **[a] Specific performance is available only if common law remedies — specifically damages — would be inadequate**

    - ***Jurisdictional requirement*:** if damages are adequate, the court has no jurisdiction to grant an equitable remedy

    - ***Classic statement on inadequacy*:** damages are inadequate if they 'would not put [the claimant] in a situation as beneficial to him as if the agreement had been specifically performed' (*Harnett* per Lord Redesdale)

    - ***General indicia of inadequacy*:**
        - **No ready market substitute** for the performance owed under the contract (eg if the good owed under the contract is unique or had sentimental value)
        - If damages would be **speculative**

    - ***Category-based indicia of inadequacy*:**

        - **[a] Land (and loans)**

            - Absent special facts, a contract for the sale of land will generally be specifically enforced [ie damages viewed as inadequate] (*Patel*) due to the unique value that the law attaches to land

            - ***Bonner*:** vendor sold land to purchaser under a contract pursuant to which the vendor loaned (unsecured) most of the purchase price to the purchaser at a high rate of interest. Plaintiff (purchaser) seeks specific performance of (1) transfer of land and (2) making of the loan.

                - **Lord Pearson in *Bonner* (majority position)**: damages *are* adequate because the contract is properly classified as a 'composite' contract comprising two transactions: sale of land and an unsecured loan. While

the contract concerned land, it was properly conceptualised as a contract for a long-term unsecured loan [cf a contract for sale of land with ancillary term for a loan secured against the property]. Further reasons: specific performance would be **one-sided** [really just refusing to enforce a bad bargain?], and this was **predominantly a commercial bargain** (land was to be used for commercial purposes).

- **Sir Garfield Barwick (dissenting):** Contract should be specifically enforced as it *was* one for the sale of land. **Rejects idea that commercial sales of land should be treated differently (see support in *Pianta*).** Further, if damages would be inadequate for *any part* of the contract, **then damages should be viewed as inadequate for the contract as a whole.**

- **[Note]** Fact that the land is to be used for exclusively *commercial* purpose does not make damages adequate **(Sir Garfield Barwick in *Bonner*; *Pianta*)**

- **[Note 2]** Damages are likely to be adequate for bare loan transactions as they are readily substitutable on the market (see Lord Pearson in *Bonner*)

- **[b] Goods**

  - **General rule:** damages considered adequate remedy for contracts concerning the sale and delivery of goods
  - **Exceptions:**
    - Where the good is rare or unique such that there is no ready market substitute (*Dougan*)
      - ***Dougan*:** contract for the sale of a taxi along with a taxi licence. Characterised as the sale of a **valuable privilege (the licence)** annexed to a good. Because taxi licences are limited in number and not freely available on the market, specific performance should issue.
      - **[Note]** That the plaintiff has, in the interim, acquired a substitute for the good in relation to which specific performance is sought is ***immaterial*** to whether damages are considered adequate (*Dougan*: P managed to acquire a taxi licence from a third party in the interim)

- **[c] Shares**

  - **General rule:** where shares are readily available on the market (eg publicly listed company), damages will generally be

considered an adequate remedy and specific performance will not issue (*Dougan* per Dixon J)
- Position might be different if the shares are limited in number and not generally available on the market **(eg private company)**

- **[d] Services**

  - **General rule:** damages likely to be considered adequate (especially for personal services: ie employment contracts), as a substitute for the services is likely available on the market

    - **Might** be an exception where the service is unique or only able to be performed by a particular person, or **where the service is essential to the value of a proprietary right** (see *Gillespie*)

  - **Specific performance is usually barred on discretionary grounds anyway (see below *Byrne*)**

3. Generally applicable equitable factors

- **[a] Hardship**

  - **[1] Relevant question:** would the grant of an order of specific performance cause hardship to the defendant which would outweigh the hardship to the plaintiff if they are left to an award of damages?
    - The important and true principle is that only in **extraordinary and persuasive circumstances** can hardship supply an excuse for resisting **performance of a contract for the sale of immovable property** (*Patel*)
    - **The relevant *hardship*** has to result from the order of specific performance
    - **Mere hardship** is not enough; the effect of specific performance on the defendant has to be *oppressive or highly unreasonable* (*Wedgwood*)
    - Significant weight placed in defendant's reliance on the neighbouring community as ***support network*** (*Patel*)

  - **[2] Timing:** in general, only hardship which (a) existed at the time the contract was entered into, or (b) which is attributable to the plaintiff, is relevant (*Patel*)
    - **For example,** contract terms themselves are substantively unfair and oppressive [for instance, where contract price is grossly inadequate or there is a serious imbalance in the terms of the contract]
    - **Exception:** subsequent events can be taken into account, even if not attributable to the plaintiff, but can only operate to deny specific performance of a contract for the sale of land where specific performance would result in **extraordinary hardship for the defendant** (*Patel*)