

EQUITABLE COMPENSATION

STEP 1: IDENTIFY LOSS SUFFERED & EQUITABLE CAUSE OF ACTION

EQUITABLE CAUSE OF ACTION?

- Breach of trust (*Re Dawson; Youyang*).
- Breach of fiduciary duty (conflict rule, disclosure, good faith) & participation in fiduciary breaches (*Nocton v Lord Ashburton*).
 - Conflict of interest (*Boardman v Phipps*).
 - Conflict of duty/duty.
- Failure of fiduciary or trustee to exercise reasonable diligence, care & skill (*Nestle v National Westminster Bank*).
- Breach of obligation of confidence & other types of equitable fraud.

LOSS?

- Pecuniary? E.g. A overpayment to B for property.
- Non-pecuniary loss is recoverable in Australia, e.g. nervous shock & injury to plfs feelings (*Giller v Procopets*).

[Plaintiff] has suffered [loss] as a result of a breach of [equitable cause of action].

STEP 2: THE GENERAL RULE

*The general rule and aim of equitable compensation is to put [PLAINTIFF] in the position they would have occupied had the duty not been breached (*Libertarian Investments v Hall*).*

STEP 3: SUBSTITUTIVE OR REPARATIVE COMPENSATION?

3A – SUBSTITUTIVE?

- *Substitutive comp aims to rectify wrongful acts by process of account & operates in specie (restore the thing itself) or by paying full value of asset back into trust fund.*
- **STRICT LIABILITY** to restore infringed right & **limiting factors** (i.e. causation, remoteness, supervening/sub events, mitigation) are **IRRELEVANT** (*Re Dawson; Youyang*).
- **EXAMPLES:**
 - Trustee fails to follow trust instructions exactly.
 - Trustee misapplies trust money.
 - **Apply Youyang & Re Dawson.**
 - *T might try argue AIB to reduce liability to B* (but AIB is UK and Youyang & Re Dawson Aus – so weak argument).
- **WHAT IF BREACH OF TRUST IS PROFITABLE?** B can authorise disbursement & trace proceeds to restore back into trust fund (*Libertarian Investments v Hall*).
- **3P STEALS TRUST PROPERTY? NOT T?**

Unclear if T must reconstitute. *Jones v Lewis* says T is **LIABLE** while *Eaves v Hickson* says T is **NOT liable**.

- **T RELIEF FROM LIABILITY?**

Aus court power to relieve T from liability for breach of trust where acted honestly, reasonably & ought fairly be excused for breach of trust (**Trustees Act 1962 (WA), s 75**).

CASE FACTS	PRINCIPLES	EXAM APPLICATION
<p>AIB Bank v Redler: UK AIB Bank lent 3.3M for re-mortgage.</p> <p>Solicitors (Redler) held money on trust to</p> <ol style="list-style-type: none"> 1) Pay off Barclays' prior mtg then 2) Pay balance to borrowers. <p>Solicitors failed to pay Barclays full amount.</p> <p>AIB didn't get first-ranking mtg it was meant to.</p> <p>Property value later fell; after sale AIB recovered less than it would have.</p> <p>AIB sued for negligence & breach of trust (claiming whole 2.5M (loan minus what was recovered)).</p>	<p>EQUITABLE COMP = REPARATIVE. Restore trust to where it would've been if breach not happened (not full reconstitution every time).</p> <p>BUT FOR CAUSATION TEST: Only compensate loss CAUSED by the breach (not unrelated market losses).</p> <p>TRUSTEE NOT INSURER: If loss is from other causes (i.e fall in property value), trustee NOT liable.</p> <p>CONFIRMS TARGET HOLDINGS: Focus on causal link, not just trust money misapplied</p> <p>CONTRAST TO YOUYANG (AUS):</p> <ul style="list-style-type: none"> - Youyang = full trust reconstitution. - AIB = causal loss only. <p>CRITICISM: Blurs distinction bw equity & CL damages.</p>	<p>BREACH OF TRUST = Money paid away wrongly.</p> <p>WOULD LOSS HAVE HAPPENED ANYWAY?</p> <p>YES? i.e a fall in value? Apply AIB & recover only amount directly caused by breach.</p> <p>NO? loss entirely from breach? Apply Youyang, full fund reconstituted.</p> <p>Youyang takes stricter, more restitutionary view than AIB.</p>
<p>Youyang</p> <p>Y invested \$500k into financial product run by ECCCL.</p> <p>Money paid to trust account of Minters (who acted for ECCCL).</p> <p>Trust terms: Minters cld only release funds to buy bearer deposit cert, then give balance to ECCCL.</p> <p>Minters released \$256,800 to another bank WITHOUT the cert, then released rest to ECCCL.</p> <p>LATER Minters obtained replacement cert, but issued in ECCCLs name not Ys.</p> <p>ECCCL went into liquidation & cert gave no protection to Y.</p> <p>Y sued Minters for breach of trust.</p>	<p>MORE IN FULL NOTES</p>	<p>MORE IN FULL NOTES</p>

<p>Re Dawson Dawson died 1932, leaving property in Aus & NZ.</p> <p>D's son, Percy = executor & trustee.</p> <p>1939, P sold NZ for NZ4,700. P wanted to transfer funds to Aus & lend to fam cos.</p> <p>Currency transfers were prohibited, but P withdrew money & gave to Mr Nelson to transfer SECRETLY. Nelson disappeared with the money. P's estate admitted he had breached trust by misapplying funds.</p>	<p>MORE IN FULL NOTES</p>	<p>BREACH = T misapplied trust property (unauthorised transfer, loss).</p> <p>Per Re Dawson, T must restore full value, no excuses.</p> <p>Measure amount at time of recoupment (trial), not when breach occurred.</p> <p>Add interest if appropriate (espec for dishonest / reckless conduct).</p> <p>Re Dawson support strict restitutionary liability & aligns w Youyang. Contrasts w/ causation-based approach in AIB.</p>
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STEP 4 – ANY DISCRETIONARY BARS TO RELIEF?

RESTITUTION FOR UNJUST ENRICHMENT

Following **Redland City Council v Kozic**, restitution for unjust enrichment (UE) is a category of cause of action allowing recovery by one person of a benefit retained by another.

STEP 1 – IS THE CONTRACT DISPOSED OF?

- **VALID & ENFORCEABLE CONTRACT EXISTS?** No restitution, must seek compensation instead (**Pavey & Matthews**)
 - If there's an accrued contractual right existing under contract, simply go for that right instead.
 - Justified exclusion to prevent undermining of contract by restitution & give effect to parties' contractual allocation of risk as set in their contract.
 - *E.g. B is entitled to \$100K payment before commencement of works. A never paid and B has now completed works. B has a contractual claim against A for \$100K and no restitutionary claim.*
- **IS CONTRACT DISPOSED OF?**
 - *When contract is DISCHARGED OF then restitution is available (**Mann v Paterson**).*
 - Inherently ineffective, unenforceable at law, void etc.
 - Ineffective, rescinded for vitiated factors, discharged for frustration or breach.
 - *Given the contract has been terminated for breach, restitution for unjust enrichment may be available (**Pavey & Matthews**).*

STEP 2 – HAS DEFENDANT BEEN ENRICHED?

A – DEF ENRICHED?

MORE IN FULL NOTES

B - SUBJECTIVE DEVALUATION?

MORE IN FULL NOTES

STEP 3 – IS ENRICHMENT AT THE EXPENSE OF THE PLAINTIFF?

- Ps loss need not correspond to Ds gain.
- 3P cases?
 - E.g. **A pays B by mistake** → B uses money to pay C → **C enriched at B's expense** not A's.
 - Def enrichment at expense of party from who it comes **DIRECTLY (*Investment Trust Companies*)**.
- Sub-contractors? **Lumbers case**:
 - **Sub-contractor does work for building** owner via head-contractor.
 - Head-contractor insolvent.

- Building owner enriched by head contractor not sub-contractor.
- Sub-contractor = indirect enrichment & no claim against building owner. Claim must be against direct recipient (the head contractor).

*[DEFENDANT] is direct enrichee so this element is satisfied (**Investment Trust; Lumbers**).*

SPECIFIC PERFORMANCE

- *Specific Performance (SP) is a court order compelling a party to perform the contract as agreed. Failure to comply is contempt of court (possible imprisonment). SP is discretionary.*

STEP 1 – IDENTIFY WRONGDOING SUBJECT OF SPECIFIC PERFORMANCE

- Identify what obligation the plf seeks to enforce (E.g. sale of land, goods, shares, services, money etc).

STEP 2 – ARE DAMAGES INADEQUATE?

- *The test is not whether damages are adequate, but whether SP is the fairer remedy (Sachs LJ in **Evans Marshall v Bertola SA**)*
- *SP not be ordered if damages are adequate (**Argyll Stores**).*

- WHEN ARE DAMAGES INADEQUATE?

- (1) IS SUBJECT MATTER UNIQUE, IRREPLACEABLE, HARD TO VALUE? YES = INADEQUATE
- (2) NO OPEN MARKET? Inability to value the thing & money is not adequate substitute because either under-compensatory or impossible/very difficult for plf to go onto open market & purchase substitute.

- **CONTRACTS FOR LAND** – More likely SP

- LAND = PECULIAR & UNIQUE & damages can't compensate (**Adderley v Dixon**).
- Irrelevant if land is for commercial or investment use (**Pianta v National Finance & Trustees**).
- Still consider whether land is READILY AVAILABLE (**Semelhago v Paramadevan**).

- **CONTRACTS FOR GOODS / CHATTELS** – Less likely SP

- SP only if goods are UNIQUE or substitutes not easily found (**North v Great Northern Railway Co**).
- SCARCITY or NO MARKET strengthens the case for SP (e.g. in **Howard Perry v British Railways**, steel was scarce because of a general strike & unavailable on market. Damages would have been inadequate so SP granted).

- **CONTRACTS FOR SHARES/STOCK** – Less likely SP

- PUBLIC SHARES – SP generally not available – can buy on market (**Hyer v Richmond Traction**).
- PRIVATE COMPANY SHARES: SP more likely as shares not publicly traded.

- SP more likely if:
 - UNCERTAIN MARKET PRICE OR ILLIQUID.
 - SUBSTITUTE PURCHASE would PREJUDICE PLF or 3Ps (**Georges v Wieland**).

- **CONTRACTS TO LEND / PAY MONEY**
 - Normally, no SP & damages suffice.
 - EXCEPT SP may be ordered where money payment has special purpose, such as:
 - (1) To relieve someone of a debt (**McIntosh v Dalwood**).
 - (2) Contract creates an annuity (**Keenan v Hnadley**).
 - (3) Payment to 3P who can't enforce due to privity (**Coulls v Bagot's Executor & Trustee**)
 - (4) Contract to give a mortgage/security where money already advanced (**Hermann v Hodges**).

- **CONTRACTS FOR SERVICES** – Courts generally refuse SP for personal service contracts **Rigby v Connol**
 - RATIONALE – Forces unwilling relationship – half-hearted performance (**Atlas Steels v Atlas Steels**).
 - Needs constant supervision which is impractical.
 - *Coerced performance is half hearted performance & difficult to police (Tattenborn).*
 - EXCEPTIONS – There's no fixed rule against SP of service contracts (**Quinn v Overland**)
 - Damages may be inadequate if employee loses access to non-pecuniary as a result of termination which is difficult to compensate by damages (**McCain Foods**).

CASE FACTS	PRINCIPLES
Dougan v Ley: - Buyer sought SP for tax licence. - Taxi licences SCARCE, no market substitute.	SP GRANTED: Goods unique & damages inadequate – use for unique chattels.
JC Williamson v Lukey: - Exclusive rights to sell confectionary in theatre - Vague & ongoing obligations.	SP REFUSED: Requires supervision, cooperation, lack of mutuality – use for service / continuous contracts.

STEP 3 – CONSIDER DISCRETIONARY FACTORS

Since SP emanates from equity, SP is always subject to discretion of court & considerations are relevant in determining the appropriateness to award SP.

- **HARDSHIP TO DEFENDANT** if contract were to be specifically enforced (**Patel v Ali**)
 - Hardship may arise after contract entered into.

- Hardship assessed at time of making the order, not at time of entering contract.
- **LACK OF CLEAN HANDS:**
 - Plf has misled the court, abused its process or attempted to do so; or

LIQUIDATED DAMAGES & PENALTIES

- **LIQUIDATED DAMAGES CL = is a genuine pre-estimate of the losses suffered (*Dunlop Pneumatic*).**
- The penalties doctrine purpose to stop party from enforcing an agreed clause that is punitive not compensatory. Law allows compensation not punishment for default.

STEP 1 – DOES THE PENALTIES DOCTRINE APPLY?

DOES THE AGREED REMEDY CLAUSE **SECURE PERFORMANCE OR PUNISH DEFAULT?** If **YES, PENALTIES DOCTRINE APPLIES.**

- Look at SUBSTANCE not just the label/form (*Andrews v ANZ*).
- A clause can apply even without breach – it's *enough that is secures performance* of an obligation or condition.
- If the clause enforces payment to ensure performance, may be a penalty (*Ringrow v BP Australia*).
- Doctrine applies even if no strict 'breach', if B is responsible for condition not met (*AMEV-UDC Finance v Austin*).

EXAMPLES WHERE DOCTRINE APPLIES:

- ✓ Forfeiture of deposit or upfront payment (*Commissioner of Public Works v Hills*).
- ✓ Transfer of property / money to A (*Re Dagenham Dock Co*).
- ✓ Loss of accrued contractual right/payment (*Bysouth v Shire of Blackburn; PC Developments v Revel*).

STEP 2 – IS CLAUSE PUNITIVE?

Question whether the clause punitive (penalty) or a genuine pre-estimate of loss (liquidated damages)?

2A – DUNLOP TEST:

- Is the clause a genuine pre-estimate of A's likely loss from default?
- It's **extravagant or unconscionable** versus possible loss (*Dunlop; Ringrow*).
- If not, and it's designed to scare or punish (in *terrorem*) it's a penalty (*Dunlop Pneumatic*).

2B – PACIOCCO TEST:

- Even if not compensatory, clause is not a penalty if it's not out of all proportion to A's legitimate interests (eg commercial, financial, reputational, 3P interests).
- It deprives B of rights or payments FAR EXCEEDING what's needed to secure performance? **Kay v Playup.**

COURTS CONSIDER: