MODULE 5: DAMAGES (BREACH OF CONTRACT)

EXPECTATION DAMAGES / LOSS OF PROFIT DAMAGES

- **COMMON LAW PRINCIPLE FOR ASSESSMENT OF DAMAGES- To be placed in the same situation, with respect to damages, as if the contract had been performed- *Robinson v Harmon* (1848) 154 ER 363**

One way to value the expectation interest of the plaintiff is to ask: **how much would it cost the plaintiff to obtain that performance from someone else on the market as at the date of the breach?**

SEMINAL CASE: ***Joseph & Co Pty Ltd v Harvest Grain Co Pty Ltd*** **(1996) 39 NSWLR 722**

Commonwealth v Amann Aviation Pty Ltd **(1992) 174 CLR 64- If P sues for net benefits lost because of D's breach of contract, then P must show that their expectation of that outcome had a likelihood of attainment (not a mere expectation)**

- Expectation damages are the **net profits** or the **net value of the bargain** that the plaintiff expected to receive, but which have been lost because of the defendant's breach.

SALE OF GOODS

Section 53: Damages for non-delivery **(remedy for purchaser)**

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- **DISPLACEMENT OF PRIMA FACIE RULE UNDER S53(3)**
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.

EXAMPLE

- Purchaser agrees to buy a good for $100 – seller refuses to deliver.
- On date of breach, **it would cost purchaser $120 to buy the same good elsewhere.**
- Damages = $20.
  - **Purchaser** should be in position s/he would have been in had contract been performed.
  - **If contract had been performed, purchaser would have spent $100 & become owner of good.**

- Purchaser will spend $120 to buy replacement: **if seller pays $20 to purchaser, the purchaser will be in same position s/he would have been in had contract been performed.**

E.g. Ian agreed to sell Barbara a car for $25,000. The parties agreed that the price was to be paid on delivery. On the day delivery of the car was due, Ian repudiated the contract. On that day, Barbara could have purchased the same car on the market for $27,000. How much will Barbara receive in damages?

S53(3): Difference between the contract price and market price= $27,000-$25,000= $2000.

Section 52: Damages for non-acceptance (remedy for seller)

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) … same as s53
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.

EXAMPLE

- Purchaser agrees to buy a good for $100, but then refuses to take the delivery and pay.
- On date of breach, the seller could sell the good for only $80 on the market.
- Damages = $20.
  - **Seller** should be in position s/he would have been in had contract been performed.
  - If contract had been performed, seller would have earned $100.
  - Seller will sell elsewhere for $80: if purchaser pays $20 to seller, the seller will be in same position s/he would have been in had contract been performed.

E.g. Ian agreed to sell Barbara a car for $25,000. The parties agreed that the price was to be paid on delivery. On the day delivery of the car was due, Barbara repudiated the contract. On that day, Ian could have sold the car on the market for $22,000. How much will Ian receive in damages?

S52(3) Sale of Goods Act 1923 (NSW): Difference between contract price and market price- $25,000- $22,000= $3000 (he will be ripped off $3000 if he sells for $22,000- Barbara should supplement the additional amount she would've paid in her contract to Ian after he on sells)

- **If the market price of the good at the date of the breach benefits the plaintiff, then they have not suffered loss- can get nominal damages.**

EXAMPLE

- Purchaser agrees to buy a car for $50,000 – seller refuses to deliver the car
- On date of breach, the market price for the car is $40,000.
- **No loss: purchaser is *better off* for the breach because s/he can buy the same good at a lower price. The buyer has been spared from paying more than the market value of the car.**
- Nominal damages available

EXAMPLE
Ian agreed to sell Barbara a car for $25,000. Barbara paid a deposit of $2,500 to Ian on contract formation with the balance to be paid on delivery. On the day delivery of the car was due, Barbara repudiated the contract. On that day, Ian could have sold the car on the market for $22,000. How much will Ian receive in damages? S52: To put Ian in the position he would have been had the contract been performed, we need to account for the fact that a deposit has been paid, which will be kept by him on Barbara's repudiation. CONTRACT PRICE AFTER DEPOSIT- $22,500. $22,500- $22,000= $500.

- **Purchaser takes and pays for goods but not of the quality contracted for-** purchaser can keep the goods and sue for damages **(s54 Sale of Goods Act)-** measure of loss is the difference between the value of the goods at the time of delivery to the buyer and the value they would've had if they answered to the warranty

Section 54: **Remedy for 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**.

SALE OF LAND

- Assessed the same way for damages for the sale of goods- P gets difference between purchase price and market value of the land as at the date of the breach
- Remedy of specific performance is routinely awarded

***Ng v Filmlock Pty Ltd* (2014) 88 NSWLR 146-** [14] The general rule is that damages for breach of a contract for sale of land are **assessed as at the date of the breach of contract.**

CONTRACTS FOR SERVICES

- How much would it cost the P to obtain replacement performance on the date of the breach?
- **If the service was failed to be provided for $1000 and it would cost $500 to obtain the service elsewhere, damages of $500 would be received.**

Clark v Macourt (2013) 253 CLR 1	
FACTS	- Clark purchased a fertility clinic from Macourt for $387,000 - Included was a stock of frozen sperm though the parties did not apportion any of the purchase price against the sperm - Clark found the sperm was unusable - Only one other supplier that could replace it - **$1 million** - She passed the cost of purchase onto patients so she wasn't out of pocket - She sued for the $1 million being the actual cost of replacing the sperm

RATIO	How much would it cost to replace the unusable sperm at the date of the breach? Legitimate to value the cost of replacement at $1million due to the limited replacement avenues for the P HELD: Under the contract which the appellant made, she should have received 1,996 more straws of sperm having the warranted qualities than she did receive. **The relevant question in the litigation was: what was the value of what the appellant did not receive? The answer she proffered in this Court was that it was the amount it would have cost (at the date of the breach of warranty) to acquire 1,996 straws of sperm from Xytex. That answer should be accepted.** (Hayne J)

LOSS OF PROFITS– emphasis on net benefit **(how much the P expected to spend on the contract v gross benefit expected to receive had the contract been performed)**

EXAMPLE

> Mechanic breaches contract to repair coach by failing to have it repaired by Friday – causes plaintiff to cancel coach trip to Newcastle.
> Plaintiff would have made $25,000 from fares that weekend if coach had been repaired on time.
> Plaintiff would not sue for the full $25,000 (would be in a better position): only net profit claimable- $25,000 minus petrol; paying employees etc.

LOSS OF OPPORTUNITY

***Chaplin v Hicks* [1911] 2 KB 786**

FACTS

- D advertised for women to apply for acting contracts
- P shortlisted as one of 50 out of 6000 applicants
- D organised second round of interviews; breached contract by refusing to interview P
- She lost her chance to be considered for one of the 3 acting contracts
- P compensated for lost opportunity

RATIO: 'Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one…'

RELIANCE DAMAGES / WASTED EXPENDITURE

Claimed where it is **impossible for P to prove value of their expectation**; or **whether any net benefit would've been achieved at all**

***Commonwealth v Amann Aviation Pty Ltd (1992)* 174 CLR 64**

- If it is impossible for the plaintiff to prove the expected net benefits they would have received had the contract been performed, then the law **presumes that the plaintiff would have at least recouped any money spent on performing the contract.**
- Onus is on the D to prove the P would've made a LOSS had the contract been performed