Contract

Step 1: Cause of Action

Here, the cause of action is breach of contract/breach of negative covenant in contract.
D breached the contractual obligation of ____.

Step 2: Identify the losses (Moore)

- Direct loss: arise directly from the non performance
- Consequential loss: loss of profit caused by failure to deliver, incidental expenses, loss of rent, distress arise from physical injury

P suffer the direct/consequential loss of ____ from the breach.

Step 3: General principle

Expectation damages are available to P as of right. The general principle is to put P in the same situation, so far as money can do, had the contract not been breached (Robinson; Clark).

Exemplary damages are not available for breach of contract (Gray).

Step 4: how to measure damages?

Here, the subject matter of the contract is _____.

Difference in value (goods, services, shares)

The prima facie measure is the difference in value between the promised and actual performance (aka anticipated profit/value) + any wasted expenditure, assessed **at the status of the market at the time of the breach.**
Here, if the promise had been performed, P would get ___. However, P actually get ____.

- For breach of warranty: the measure was the difference in value of the goods at the time of delivery and the value they would have had if they conformed to the warranty (Clark).

Clark v Macourt (breach of warranty)

- The court used **the market value** to calculate the value sperm would have had if it had answered to the warranty (promised value), namely what it cost Dr Clark purchasing substitute straws from America (1M+).
  Irrelevant
  - Whether the contract is described as sale of goods or business
  - If the replacement cost is higher than the contract price
  - Potential profits: the extent to which Clark could have turned the performance of the promise to profit would be relevant **if P had claimed for loss of profit**
  - **Passing on the costs** to patients
    - Gageler J (dissent): should be considered

Rectification damages (cost of cure)

Rectification damages are the default measure for construction contract, given such remedial work is **both necessary and reasonable** (Bellgrove).

- If unreasonable or unnecessary in **rare and exceptional circumstances**, then the measure of damages is **difference in value** (Ruxley; Tabcorp)
- Same for commercial construction (Tabcorp)
- It does not matter how P actually use the money

Reasonable course
Bellgrove (residential property, **subjective preference** are important, rectification necessary)

- D had breached the contract by substantially departed from the supplied building specification. The defective foundations **seriously threaten the stability of the house**, and **the threat can only be removed by demolition and re-erection**. Then it is obviously reasonable to demolish and rebuild. Damages were awarded based on the cost of demolish and rebuild the house with the specification.
  - Difference in value rule doesn't not fit. The building might be equally valuable in the market. **The owner's contractual right is to performance according to the agreed specificities, not just a certain market value**.

Tapcorp (the landlord's **personal emotional value** to the foyer)

- The landlord is contractually entitled to preservation of the premises without the **unconsented alterations** by D. The loss P suffered is the loss sustained by the tenant's failure to comply with the contractual obligation. Therefore, **the loss is the cost of restoring the premises to the condition (+ loss of rent during that period)**

    - Such interest may be **having these particular premises in this particular condition, not just a financial asset of a certain value**, irrelevant that the work in question did not significantly affect the value of the property.
    - Distinguished Ruxley, saying Ruxley falls under the exception, but also reject loosening of principle of reasonableness
    - **No betterment discount (focus on subjective value rather market value)**

Unreasonable course (high bar)

- Where rectification would be **obviously pointless or perverse**, and cannot **use a technical breach to secure an uncovenanted profit** (Tabcorp).
    - Bellgrove: if a contract requires walls of second-hand bricks with cement render, builder instead uses new, first-quality bricks, the owner cannot insist on demolishing the new walls and rebuild with second-hand bricks, and then recovering that costs as damages.
        - Here, rectifying (ie demolish and rebuild with cheaper, inferior materials) would be unreasonable. The owner already has a better building that what was promised. There is no sensible justification for that extreme remedial step.

Note UK approach (disproportionate of the cost)

Ruxley (exceptional case for claiming high cost)

- Although the depth of the pool was different from what was promised under the contract, it was **still able to use it to dive**. There was **no adverse effect on the value** of the property. The court held that measure of damage should be diminution in value. Importantly, **when P argues for a high-cost measure of damages**, the court must consider where that is reasonable in the circumstance, and **one relevant factor us the 'genuineness of the P's desire' to take that expensive course**. If there is no genuine desire, it will undermines the reasonableness of awarding the higher-cost measure.

Reliance damages (wasted expenditure in reliance on the contract)

Reliance loss may be awarded in circumstance where D's breach makes it difficult or impossible to work out the expectation loss (Amann, Cessnock). The court utilises **the facilitation principle** where P can prove breach this difficulty more easily because an 'assumption or inference' applies to the extent uncertainty caused by D's breach (Cessnock). Here, since D ____, P would argue that this make it impossible/difficult to assess the loss had the contract been properly performed.

- When subject matter never exist (McRae)
- It was highly speculative/difficult to assess (Amann)
    - D's breach 'denies, prevents or precludes the existence of circumstances which would have determined the value of the plaintiff's contractual benefits'

P would need to demonstrate that expenditure incur in performance of contract (as opposed to expenditure would have to make anyway to set up the business; McRae), and that expenditure was reasonable (Cessnock)

- Expenditure that 'might naturally be incurred in preparing for, performing, or exploiting the benefit of the contract, or that is or ought to have been contemplated by the defendant.' (Amann; Cessnock)

Here, the relevant contingencies that prevent accurate assessment of loss would be__, together with any available evidence about their likelihood of occurring (eg expert or industry assessments).

- P entitled to rely on the presumption that in a commercial contract, a party expects to **at least recoup his outlay** (Amann; Cessnock).
    - The majority all relied on this presumption that it would have been renewed, and the party wouldn't have entered into it if it wasn't profitable, ie Amann would not have made the expenditure without the assumption of renewal.
- However, Amann revealed the Court's **reluctance to discount reliance damages based on probabilities**. The judgement, reached only by a bare majority (4:3), did not factor in whether the damages should be reduced by 20% for the **possibility of valid termination (20%) but did account for the likelihood of renewal**. It remains arguable that all contingencies should be evaluated.

If D proves a prospect of non-recoupment even if the contract was properly performed, the wasted-expenditure may be reduce to that extent (McRae).

Impossible to value a non-existing salvage

McRae (non-existence of the subject matter)

- This is a contract where the commission promises that there is a tanker at or near a specific place, in reliance upon this, P expended a considerable amount of money and there is no tanker. D's breach makes it impossible to value the promised performance, courts may allow wasted expenditure as a prima facie measure.
    - Cannot put a market value on a tanker that does not exist at all.

Difficult to calculate the future profit

Amann

- D's breach (wrongfully terminated) created uncertainty about future events, making projected profits difficult to calculate (3 years contract with a prospect of a 2 year renewal). Here, Amann would, based on the commercial assumption, recover the wasted expenditure incurred in reliance on the promise of the party in breach, with two contingencies:
    - Option to renew: assumption or inference that in a commercial contract, a part expects to at least recoup his outlay, and thus to award reliance damages puts party in the position as if the contract had been performed. Thus Amann **would not have made the expenditure without the assumption of renewal.**

Cessnock

- D's breach (made no effort to register the subdivision as promised in the contract) has caused or **increased uncertainty about P's position**, then court can assume that P would have recover expenditure 'reasonably incurred in anticipation of, or reliance on, performance of the contract' (constructed an aircraft hangar for over 3.6M).

Loss of chance/opportunity damage

Loss of chance

A claim for loss of chance may be available if P can show, on the balance of probabilities, that D's breach causes them to loss a chance to gain a certain contractual benefit. Court will adjust the expectation damages to reflect the likelihood of the chance occurring.

- In other words, the recoverable loss is calculated as: **expected benefit x % the chance occurring.**
    - Amann: breach of contract caused loss of a chance to pursue a potentially commercially valuable opportunity

Loss of opportunity

P have to show that he or she would have entered into a different transaction**, discounted by the probability that it would have happened**

- Or taken up another opportunity (and it would have been successful) but for the breach

Damages for distress/disappointment (for contract of enjoyment)

Aggravated damages are usually not available for contract. Exception is when the purpose of the contract is to provide enjoyment, relaxation or freedom from molestation (Baltic; confirmed in Moore). Here, the purpose of the contract is ___, which is/not a purpose for providing enjoyment, analogous/distinguish to Baltic___. Therefore, damages for disappointment should/not be awarded.

Edelman J in Moore said that damages for mental harm arising from breach of contract fell into 3 broad categories, and unlike in contracts generally, a promisor will usually be taken to have assumed the risk of liability for such distress

1. 'pain and suffering' consequent upon **physical injury**
2. 'vexation and discomfort' consequent upon **physical inconvenience**
3. 'distress or disappointment' in contracts for the **provision of pleasure or relaxation**

Baltic

- P claimed for mental distress/loss of enjoyment since the ship sank on day 9/11 of the cruise. The court held that if at the time of contracting, it was **within the parties' contemplation that a breach would likely cause vexation, distress, disappointment or frustration**, then in principle there is no reason damages can't be awarded for that. In the present case, the purpose of the contract was for what in essence was **a 'pleasure cruise'**, must be characterized as a **contract the object of which was to provide for enjoyment and relaxation**. Therefore, P was entitled to damages for disappointment and distress, and physical inconvenience flowing from the breach.

Moore

- Damages for distress are awarded to P because Moore spent many hours travelling by bus, and cruised for only three days instead of ten. The holiday fell far short of the promise '**once in a lifetime cruise' in "all inclusive luxury'.**

Step 5: limiting factors

Causation

D must have caused P's loss, assessed using the 'but for' test and common sense. It is enough that the breach was one contributor, it does not need to be the main or sole cause (Alexander).

- Counter-factual inquiry as to what would have happened had the wrong not occurred

Did a NIA (by P or third party) break the chain of causation?

Here, the NIA is ___, which breaks the chain of causation.

- If there is a NIA present, the test would be 'but for' plus common sense (McHugh JA in Alexander).
- Cf normal reaction to a risk or involuntary conduct

Alexander (collapse of the land market)

- The negligent certificate was not, in common sense, a cause of the huge trading loss. Those losses were overwhelmingly **driven by the collapse of the land market**, instead of auditor fail to audit properly.

March (a negligence case not contract)

- Parking a truck in the middle of the road created a situation of danger, the risk being that a careless driver would hit it. Since **the NIA was the very kind of risk D was supposed to guard against** (ie D owe a duty of care), D will still be liable.
    - McHugh J: **are really questions of policy** and should be regarded as a question of cause in law. The question could be seen as 'does the NIA render any subsequent loss as too remote?'

Remoteness

In Contract, remoteness considerations are different to tort or statute.

- Predictability of outcome
- Extent of D's control over events
- Whether D 'assumed the risk' of the event
- Whether D would be subject to an unreasonable burden
- Social utility or lack thereof of certain conduct

Contractual damages to be recoverable must be foreseeable (Alexander). Remoteness is conventionally treated as a two-limbed test (Hadley). Losses are not too remote if they are:

Natural loss: arising 'naturally' or 'according to the usual course of things'.

The court will assess whether the loss arise naturally from the breach, namely, whether the type of loss was **reasonably foreseeable** to the breach party when the contract was made, or whether it was a **serious possibility** (Elisha). Here, [evidence of what the parties knew and in common sense, what loses would flow naturally from the breach of contract at the time of formation].

Hadley

- Carrier was not liable for loss of factory profits arising from the failure to deliver the crankshaft to the factory on time. **The loss was not brough to the carrier's attention the time the contract was formed**, if he had known he **might have charged more**.

Victoria Laundry (knowledge imputed for ordinary contracts with third parties)

- A reasonable person in Newman's position must be taken to foresee that if delivery of a vital boiler to a going commercial laundry is delayed for five months**, a business which required the laundry machine for operation** it is likely to cause loss of business and profits. Therefore, **ordinary lost profit from being unable to run/expand the laundry/dyeing business** during the delay were recoverable.

Special losses (higher from general risk of loss of profits): Losses that 'may reasonably have been supposed to have been in the contemplation of the parties'.

The court will examines whether D had specific knowledge of P's situation at the time of contracting, such knowledge can expand D's liability. Here, [evidence show whether D had such knowledge at the time of contracting].

- Parties don't need to foresee, the degree/extent of loss; or the precise details of how it happens. It is enough that they contemplate the kind or type of loss (Victoria Laundry).

Hadley

- The loss was not brought to the carrier's attention at the time of contract, if he had known he might have charged more.

Victoria Laundry

- Supplier would not know the specifies of **the lucrative dyeing contract**. To recover the profits specifically, Newman would need to have actual knowledge of those 'special contracts' when the contract for the boiler was made. Vendors would have **regarded profits on those contracts as a different and higher form of risk than the general risk of loss of profits** by the laundry. Since Newman didn't, the specific head of loss, the extra high profit from that particular lucrative deal, is too remote.

Elisha (affirmed Hadley, a more progressive/relax approach)