Week 2 - Damages in Contract

In order for the court to award the plaintiff compensatory damages in contract, it must find that:

a) Does the plaintiff have a cause of action in contract (e.g breach of contract)?

- The plaintiff simply needs to show that there was a breach of contract
- Actual damage is not necessary – only that there was a contractual breach. However, actual loss has to be demonstrated if damages are not to be nominal: *Erie County Natural Gas & Fuel Co Ltd v Samuel S Carroll* [1911] AC 105
- Damages in contract are awarded to place the plaintiff in the position they would have been in had the contract been performed: *Robinson v Harman* (1848) 154 ER 363.
- In order to claim damages for the defendant's breach the plaintiff should be 'ready and willing' to perform their side of the contract: *Foran v Wight* (1989) 168 CLR 385 at 408 per Mason CJ. NOTE: But, where the plaintiff terminates the contract following an anticipatory breach (where a party repudiates the contract prior to performing contractual obligations), the plaintiff need only show that this intention existed prior to termination (*Foran case*).

b) Has the defendant's breach of contract injured or caused a loss to the plaintiff (Causation)?

- The plaintiff must show that the loss suffered was caused by the defendant's breach of contract: *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310
- In *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 Cambridge Credit argued that its auditors were in breach of contract because of their failure to demand an adjustment to its balance sheet, had that adjustment been made, a receiver would have been appointed to wind up Cambridge Credit. *McHugh JA held that, in order to establish a causal connection between a breach of contract and the damage suffered, the plaintiff only needs to show that the breach was a cause of the loss; it need not be the exclusive cause, it need only have 'causally contributed'*

to the loss. **NOTE:** his honour accepted the 'but for' test as the 'leading test', but the ultimate question is whether, as a matter of common sense, the relevant act or omission was a cause.

- Operation of the *'but for'* test- In *Reg Glass Pty Ltd v Rivers Locking Systems Ltd* (1968) 120 CLR 516, the defendant agreed to supply the plaintiff with a security door and locking system. The defendant breached the contract by installing a door not reasonably fit for its purpose. The plaintiff's property was subsequently burgled. The High Court said the breach did not necessarily imply that the defendant was liable to compensate the plaintiff for the loss caused by the burglary. *The court was satisfied that had such a door 'reasonably fit' for its purpose been installed, the burglary would not have occurred. Thus 'but for' the defendants breach, the loss would not have been suffered.*

- Other tests - When considering multiple causes or intervening events, the 'but for' test is 'inadequate or troublesome' and that it is not the exclusive test of causation - due to its inflexibility: *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 516. In these cases, the courts refer to the *chain of causation* between the wrong complained of and the loss or damage suffered. Thus, if something intervenes between the wrong and the loss to 'break the chain', the defendant will not be responsible or will only be held partly responsible. It was recognised by the High Court case of *March v Stramare* that these tests were both limited, and that a *common-sense-based* analysis of causation is necessary to offset the rigidity of the tests aforementioned.

- Contributory negligence - If the plaintiff is negligent this may satisfy the court that the 'chain of causation' between the defendant's breach of contract and the plaintiff's loss has been broken ie. the plaintiffs loss was in fact caused by his/her own doing, rather than the defendants breach. In *Lexmead (Basingstoke) Ltd v Lewis* (1991) 171 CLR 506 the plaintiffs negligence in continuing to use the towing hitch in the knowledge that it was unsafe, 'broke the chain' of causation between the defendant's breach and damage suffered.

    - What if the plaintiffs negligence does not sever the chain of causation, but is merely a contributing cause in conjunction with the defendants breach? In *Astley v Austrust Ltd* (1999)

197 CLR 1 the High Court rejected the notion that the courts could reduce the defendants liability in both tort and contract if the negligence or 'fault' of the plaintiff contributed to the loss or damage. The High Court found that the apportionment legislation did not allow for a reduction in damages in any contract case. As a result of the case the apportionment legislation was revised.

- The effect of the revised apportionment legislation is that whether the claim is made in contract or tort if the plaintiffs negligence contributed as a cause of the loss, the court will reduce the plaintiff's damages 'to such an extent as the court thinks just and equitable': s9(1) of the *Law Reform (Miscellaneous Provisions) Act 1965 (NSW)*. However there will be no apportionment where there is only a duty in contract; or where the claim is made in contract and the duties in contract and tort are not 'concurrent and co-extensive': s9(2) as per the *Law Reform (Miscellaneous Provisions) Act 1965 (NSW). [See pg 96 of text]*.

- <u>Intervening events (novus actus interveniens) -</u> The issue is whether an intervening event will break the chain of causation or merely diminish the effect of the defendants breach, as a cause has been held to be determined by a consideration of whether the event was 'reasonably foreseeable' by the defendant *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 316:

  - McHugh JA held that, in order to establish a causal connection between a breach of contract and the damage suffered, the plaintiff only needs to show that the breach was a cause of the loss; it need not be the exclusive cause, it need only have 'causally contributed' to the loss. *In this regard his honour accepted the 'but for' test as the 'leading test', but in those cases where a number of factors combined to produce the loss or damage it is only a 'guide' and 'the ultimate question is whether, as a matter of common sense, the relevant act or omission was a cause'.*

c) Is the loss suffered by the plaintiff too remote in law?

- 'The crucial question is whether, on the information available to the defendant when the contract is made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation' as per *C Czarnikow Ltd v Koufos* [1969] 1 AC 350, 385. See also Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653

- The two limbs of *Hadley v Baxendale* (1854) 156 ER 145:

  1. In determining whether something arises naturally the court considers the actual and imputed knowledge of the party in breach so that every person is taken to know what losses arise in the ordinary course. In *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 the House of Lords suggested asking whether the defendant ought to have known, that as a consequence of the breach, the loss was 'liable to result', 'not unlikely', 'a serious possibility' or 'a real danger'.

  2. The defendant must possess actual knowledge of the special circumstances or indirect loss which would flow from a breach. The following are required:

  a) actual knowledge of the special profit that could be made and

  b) the plaintiff must prove the defendant foresaw that increased loss was liable to occur following a breach.

- In *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 the defendant engineering company agreed to supply the plaintiff with a boiler by June to assist the plaintiff in its laundry business. In breach of contract the defendant delivered the boiler in November, some 20 weeks late. The plaintiff sued both for loss of normal profits and loss of a lucrative dyeing contract for the government. The Court of Appeal held that the plaintiff was entitled to recover, under the first limb of *Hadley v Blaxendale*, normal business profits, that is, losses arising 'naturally' from the breach.

But the claim for the dyeing contract or extra profits was unusual in that it was work not normally undertaken by the laundry, and therefore it was disallowed. For such a claim to succeed the plaintiff needed to show that the defendant knew of the potential extra loss and knew that such loss was likely to occur. See also *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd's Rep 187 (Covell pg 104).

d) Has the plaintiff breached his or her 'duty' to mitigate unnecessary loss?

- The plaintiff always bears a legal responsibility or 'duty' to avoid unnecessary losses.
- In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 Viscount Haldane stated that the principle of mitigation imposes on a plaintiff: "...the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps". *Therefore if the defendant's breach enables the plaintiff to obtain benefits not otherwise available, the plaintiff's gain reduces the defendants liability*.
- In *TCN Channel 9 v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 the appellant dismissed a television celebrity and offered him new employment, but on the condition that he release the appellant from any claims arising out of the dismissal. It was held that it was reasonable for the celebrity to reject this offer and, in so doing, there was no breach of his duty to mitigate.
- An <u>*anticipatory breach*</u> occurs where, prior to the date set by the contract for its performance, one of the parties makes it clear that its obligations will not be performed. This will amount to a repudiation or renunciation of its contractual obligations: *Sunbird Plaza Ltd v Maloney* (1988) 166 CLR 245. An anticipatory breach may also be constituted by an 'inability to perform' the contract.
    - If the plaintiff accepts the repudiation and terminates the contract prior to the time for performance, a duty to mitigate arises immediately: *Sunbird Plaza Ltd v Maloney* (1988) 166 CLR 245.

e) Assessment of Damages

- Generally, the *date of assessment* is the date of the breach. The Court may be flexible if the altering of this date would best protect the innocent party: *Johnson v Perez* (1989) 166 CLR 351, 355-356, 367, 371, 380.
- Traditionally, damages in contract are given on one lump sum occasion where the defendant is completely discharged of liability, therefore an award of damages is an award '*once and for all*': *Todorovic v Walker* (1981) 150 CLR 402.

  There are 3 exceptions:

  1. Instalment contracts - Where contract calls for the payment of instalments, each instalment may constitute a separate cause of action.

  2. Continuous contracts – Each breach of contract will give rise to separate cause of action.

  3. Statute – When a series of payments is specified in an Act, for example monthly payments (such as in cases involving personal injury).

- Consider the **heads of damage {** pg 112-127

1. Expectation damages – represent the loss of profit expected to be derived from the contract.
2. Reliance damages – costs the plaintiff threw away by relying on contract: *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

- Loss of opportunity – whether social or commercial.
- Gratuitous benefits – where implied into a contract.
- Mental distress – for contracts of relaxation.
- Physical injury – stemming from unsafe goods.
- Injured feelings & loss of reputation – theoretically possible