PART XII – DAMAGES

I GENERAL PRINCIPLES

A *Introduction*

Establishing breach of contract confers a right to at least nominal damages upon the other party, regardless of loss. If that party can establish loss by reason of the breach, damages are awarded to compensate it.

The award of damages is a complex and largely intractable task, but is arguably the most important aspect of an action on a contract. The formulation of universal rules is thus a task of great difficulty, and routine and consistent application is nigh impossible:

> *It has been truly said that the assessment of damages in contract and tort is 'a pragmatic subject ... [which] does not lend itself to hard-and-fast rules'. The particular rules for assessing damages for breach of contract should be treated not 'as rigid rules of universal application' but 'as prima facie rules which may be displaced or modified whenever it is necessary to do so in order to achieve a result which provides reasonable compensation'* (*Commonwealth v Amann* per Deane J at 21-2).

At all times, the party not in breach (the plaintiff) bears the evidentiary onus of proving that loss has been suffered as a result of the breach.

B *Expectation Damages*

The basic approach, then, to the award of damages is to place the party suffering loss in the hypothetical performance position:

> *Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation … as if the contract had been performed* (*Robinson v Harman*; affirmed by the High Court of Australia in *Amann*).

Such a remedy protects the expectation interest of the injured party (their expectation that the contract would be performed).

In comparing the counter-factual position created by performance of the contract – including all associated gains and benefits, both direct and indirect – with the situation created by its breach, the court must consider whether the value of the hypothetical performance position is greater than that of the actual result. If it is, the difference amounts to the expectation loss of the injured party, damages for which the court awards.

Expectation damages differ from reliance damages in that, where reliance damages aim to restore losses incurred in reliance on the contract and place the plaintiff in the position had the breach contract occurred (or contract not been made), expectation damages fulfil the contract, placing the plaintiff in the position they would have occupied had the other party performed their obligations. A breach of contract may also yield an award of reliance damages; as where, for example, the party suffering loss sues only for pre-operational expenditure incurred in readiness for performance of the contract (as in *Amann*).

C *Effect of Termination*

A party can recover damages without terminating the contract if it can be established that an *actual* breach has occurred. If the injured party has a right to terminate for the breach, they may do so without affecting the award of damages. Termination is traditionally required for *anticipatory* breach. If a contract is terminated early, the main source of damages will address expectation loss.

The context in which an action for damages ordinarily arises is termination by the non-breaching party in respect of the breach complained of. The kinds of damages they are able to recover will depend on a contractual or legal right was relied upon to terminate the contract. In the case of a legal right validly exercised, damages for the loss of the contract's performance by virtue of the termination ('loss of bargain' damages) are recoverable.

However, where a purely contractual right is exercised, prima facie damages are limited to losses incurred prior to termination (reliance losses).[1] Of course, as was noted in *Shevill*, this rule is qualified by terms in the contract to the contrary. Terms providing for loss of bargain damages are commonplace, so the decision has effectively been subverted by modern transactions.

II RECOVERABLE LOSSES

A *Lost Profit*

Profit is defined as the margin by which gross income exceeds gross expenditure. Expectation damages include profits that would have been accrued had the contract not been breached. The plaintiff must establish that a profit would have been made had the contract been performed.

The basic principle, as set out in *Commonwealth v Amann*, is that if the actual benefit received up to and including the breach is less than the expected benefit (were the contract fully performed), a loss has occurred. Damages are provided with the intent of placing the plaintiff in the position that he or she would have occupied had the contract been performed.

B *Wasted Costs*

Costs or liabilities incurred in preparation for or in performance of the contact are recoverable to the extent that they are wasted by the breach. That is, the cost of preparation or performance less any residual value that can be obtained by sale or reuse forms a part of expectation loss.

However, wasted costs can only be recovered to the extent that they would have actually been recouped had the contract been fully performed. This prevents a party being placed in a position better than that which they would have occupied had the other party performed. If performance would have resulted in a net loss under the contract, the non-breaching party is not entitled to any damages. However, the breaching party bears the onus of establishing that performance would have resulted in a loss (*Commonwealth v Amann*).

[1] *Shevill v Builders Licensing Board* (1982) 149 CLR 620.

Commonwealth v Amann Aviation* (1991) HCA*:

Facts

- Amann Aviation ('A') agrees to provide coastal surveillance flights for the Commonwealth ('Cth') for an initial period of three years
  - A is replacing a previous contractor, Skywest
- However, on the day flights were meant to commence, A does not have all 11 aircraft ready to perform its obligations, as required by the contract
  - A has only 7 aircraft ready, and these do not comply with all requirements
- The Cth has been aware of this shortcoming for some time, and is prepared
  - However, the Cth wrongfully terminates the contract for this failure
  - The Cth intends to reinstate Skywest as operators of the flights
  - However, the Cth does not rely on the 'show cause' clause
  - Instead, it asserts a legal right to terminate at common law, despite A's breach not being serious (the 4 remaining aeroplanes were at most several days late)
- A treats the wrongful termination as a repudiation and elects to terminate the contract and claim damages
- A had incurred heavy expenditure in acquiring and fitting out aircraft for performance
  - However, A's ability to recoup these costs under the contract depends on the contract being renewed for a further term after the initial 3 years
  - The Cth is not contractually obligated to renew the contract, although had the contract not been terminated, A would probably have been able to apply successfully for a renewal of the contract
- Assessing damages on an expectation basis, A can only recover profit that would have been generated under the original contract
  - Because A faces a net loss under the contract, expectation damages do not cover the pre-performance expenditure A had incurred
  - A therefore seeks reliance damages to cover its wasted expenditure

Issue

- Can Amann recover damages for its pre-performance reliance on the contract, even though its contract with the Commonwealth would have resulted in a net loss?

Reasoning

- Trial judge:
  - No common law grounds for termination
  - Clause 7.24 in the contract excludes the legal right to terminate by specifying several requirements for termination
  - No legal right is available on which Cth is entitled to terminate because A's breach is trivial and not fundamental or substantial

- High Court of Australia:
  - By this stage, Cth is no longer denying A's right to terminate for its repudiation of the contract
  - The issue is the measure of damages to be provided
  - Net revenue expected over 3 years
    - Payments by Cth: 17.1m
    - Refund of security deposit 0.1m
    - Total 17.2m
    - Minus operating expenses 15.8m
    - Net revenue 1.4m
  - Damages claimed by Amann
    - Pre-performance expenses:

        - Net cost of aircraft 4.4m (5.3m less residual value 0.9m)
        - Other 0.9m
        - Security deposit 0.1m
        - Total 5.4m
      - Termination payments to employees 0.1m
      - Total damages 5.5m
    - Problem: expenses incurred prior to the operation period ($5.4m, plus $0.1m consequential loss) exceed by $4.1m the net revenue A would have received had the contract been performed
    - Even if Cth had not repudiated the contract, A would still be out of pocket by $4.1m
    - A is not suing for lost revenue but pre-performance expenses
    - The reason A entered into an unprofitable contract is that they expected that the contract would be renewed on a 3-yearly basis
      - Future earnings would offset the initial investments
      - Cth claims that the renewal was not a promised benefit, so the Court cannot take into account the later prospect of renewal
      - Instead, Cth argues that damages should only be assessed by reference to A's expected profits under the original contract (ie, $1.4m)
      - A concedes that the net profit of $1.4m, plus $0.1m consequential loss, should be paid, but no more
      - Of course, the $1.4m figure is not really profit – just the amount by which pre-performance expenditure would have been reduced by virtue of performance
    - Cth argues that a further discount should be applied to the damages award:
      - They should take into account the possibility that the Cth might have legitimately cancelled the contract under cl 7.24 before the 3 years had ended

- 'Expectation damages' normally means 'loss of profit damages':
  - Ie, the total expenditure is met or exceeded by the income
  - This results in the recovery of net profit

- In valuing what was to be earned by A, are un-promised benefits (such as renewals) to be considered?
  - Yes; the renewal was here likely to occur
  - It is stated unequivocally that when valuing the benefit expected by performance, we are dealing not only with promised benefits, but also derivative benefits (those not promised but in any case earned)

- Remoteness, mitigation, and causation constrain the benefits relevant to the enquiry:
  - Here, the renewals are not too remote a benefit because they are foreseeable
  - Ie, within the contemplation of the parties at the time the contract was formed

- Un-promised benefits, including the loss of a chance or opportunity, are to be taken into account when assessing damages:
  - The prospect of renewal is only a lost chance that it would have occurred
  - Ie, a lost opportunity for commercial gain
  - These are taken into account

- Hypothetically, if A had proved that – taking into account the value of renewal, including all payments – the value of the contract exceeded expenses (actual and putative) incurred in its performance then it would have had a profitable contract and be entitled to

sue for lost profits
  - However, it is very difficult to quantify future earnings
  - It is largely a matter of speculation
  - To avoid the problem of quantification, A is not suing for profit – just expenses

- Where the total income under a contract is greater than the total expenditure required to perform, the plaintiff *cannot* recover for expenditure – this would be to allow double recovery of costs

- However, where the contract is a 'losing contract' (where the plaintiff stands to make no profit from it), they are able to recover expenses wasted as a result of the defendant's breach
  - The onus rests upon the Cth to establish that expenses would not have been recouped anyway

- Mason and Dawson JJ, Gaudron J:
  - It just needs to be proven that the expenses were 'reasonably incurred'
  - Having done so, a 'presumption' arises that they would have eventually been recouped
  - This 'assumption' or 'prima facie inference' has the effect of shifting the onus to the defendant (Cth), who must show that the costs would not have been recouped by the plaintiff

- McHugh J:
  - The nature of Cth's breach makes it difficult to assess whether the contract would have been profitable
  - Terminating on the first day before any performance could occur makes it reasonable to shift the onus to the breaching party to show that costs would not have been recouped

Decision
- A succeeds, and is entitled to the $5.5m cost of pre-performance expenses

Amann makes it clear that damages for wasted expenditure will only be awarded where the contract is loss-leading. In such cases, the plaintiff needs to establish that the costs were reasonably occurred (per Mason, Dawson and Gaudron JJ). Having done so, a 'prima facie inference' arises that the costs would have been recouped, unless the defendant can prove otherwise. Such a presumption is especially likely to arise where the breach is of such a nature as to render speculation about the profitability of the contract impossible (per McHugh J).

C *Loss of an Opportunity*

The loss of a chance is compensable (*Amann*). Damages are awarded for loss of any chance or opportunity to obtain benefits of which the plaintiff has been deprived by the other party's breach.

The chance need not be certain, or even probable; it need not be promised under the contract. All that the plaintiff must show is that, on the balance of probabilities, the chance or opportunity was one to obtain something of some value or benefit. Thus, loss of a chance to participate in a lottery is unlikely to be treated as loss of the full prize; however, loss of a chance to run a horse in a race is, though not necessarily probable, loss of a non-trial chance of victory, and may thus carry damages for income to which the horse's owner may be entitled.

The probability of the chance eventuating into success is relevant to the question of the quantum of damages to be awarded (as opposed to their availability). Damages are awarded in linear proportion to the likelihood of success. So, for example, if the lost opportunity was a 20% chance of winning a $150 scholarship, damages of $30 would be awarded.

Sellars v Adelaide Petroleum NL* (1994) HCA*:

Facts

- Adelaide Petroleum ('AP') is seeking underwriters for a new share issue; it enters into parallel negotiations with two companies, Poseidon ('P') and Pagnini Resources ('PR')
- By May 1988, AP's directors had almost reached agreement with PR
- AP provides a draft contract to PR, which contains several conditions precedent to performance (obtaining approval from third parties, arranging finance, etc)
- In June 1988, AP's directors decide not to pursue negotiations with PR and instead contract with P
    - The agreement with P is procured by a Sellars, an executive of P, who is in fact acting outside his authority
    - P attempts to vary the terms of the agreement on this basis
    - AP treats this as repudiation of the contract, which it subsequently terminates
- AP enters into an agreement with PR on terms less favourable than those in the draft contract
- AP alleges that Sellars' conduct breached s 52 of the *Trade Practices Act 1974* (Cth)

Issue

- Can AP recover damages for their loss of the opportunity to contract with PR on more favourable terms?
- If so, what is the measure of damages to be awarded?

Reasoning

- The remedy is being sought under s 82 of the Act
    - The principles applied by a court in assessing damages for loss of a chance in the context of the Act are also applicable to breach of contract and tort

- Trial judge (French J):
    - On the balance of probabilities, the first PR contract would have been executed but for Sellars' misleading conduct
    - The nominated benefits would have been realised on completion of the contract with PR
    - However, because there is only a 40% chance that the contract would have reached completion (because it was subject to contingent conditions), AP is entitled to only 40% of the value of such benefits as would have been realised
    - Sellars and P appeal
    - The Full Court and High Court dismiss the appeals in turn

- Procedure for recovering lost chance or opportunity:
    - First, establish that a chance of some value ('not being a negligible value') would have been created *had the contract been performed*
        - Ie, on the balance of probabilities, the breach is *causally responsible* for the loss of the existence of a chance to obtain *a non-negligible benefit*
    - Having done so, the plaintiff is entitled to damages proportionate to the probability of the change being realised, unless it is 'virtually certain' or 'merely speculative'

- Mason CJ, Dawson, Toohey and Gaudron JJ:
    - '[355] The general standard of proof in civil actions will govern the issue of causation and the issue whether the applicant has sustained loss or damage.

      The applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. In a case like the present, the applicant shows loss by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.'

    - '[350] [*Malec*:] Unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing damages.'

    - Misleading conduct prevented the realisation of the chance of the benefit
        - Here the original contract with PR would on the balance of probabilities have been entered, but for the misleading conduct of Sellars and P
        - This would have created a 'significant chance' of its completion, resulting (again on the balance of probabilities) in significant chances for Adelaide and its directors
            - to dispose of and acquire shares,
            - to obtain payouts and options, and
            - to raise and invest capital
        - These chances were lost as a result of Sellars' misleading conduct (which induced Adelaide to abandon PR and to negotiate with P)
    - Damages are recoverable despite chance of completion being less than 50%
        - There would have been only a 40% chance of completion of the contract
        - Because of the contingent conditions, damages are recoverable for 40% of the value of the specified benefits on realisation

Decision
- On the facts, a 'significant chance' existed that the additional benefits would be realised
    - A 40% chance of realisation equates to 0.4 multiplied by the value of the chance if fulfilled
- It does not matter that the chance is less than probable (ie, 50%); it is still recoverable

D *Distress and Disappointment*

Expectation damages do not compensate non-pecuniary losses such as disappointment, anxiety, distress or loss of reputation arising out of the breach of contract (*Addis v Gramophone*). (Damages are, however, awarded if the breach causes personal injury.)

Damages for distress and disappointment caused by breach of the other party are awarded only in certain circumstances (*Baltic Shipping v Dillon*).

Baltic Shipping Co v Dillon* (1993) HCA*:

Facts

- Dillon ('D') is a passenger on a cruise ship owned and operated by the Baltic Shipping Company ('BSC')
- Unfortunately, the ship sinks on the 9th day of the 14 day cruise
- 123 of the passengers, including D, claim damages in respect of several losses suffered:
  - The remaining portion of her fare
  - Loss associated with personal injuries suffered and loss of property
  - $5,000 to compensate disappointment and distress at the loss of the remaining five days' enjoyment and relaxation to which she is entitled under the contract
- The action is successful despite a waiver of liability (which was held not to be part of the contract) and release from liability for the accident (the enforcement of which was held to be unconscionable)
  - The trial judge and Court of Appeal each award damages as follows
  - Damages for breach of the contract:
    - Loss of personal property $4,265
    - Personal injury [emotional trauma] $35,000
    - 'Disappointment and distress' $5,000
  - Restitution:
    - Restitution of the balance of the fare $1,417
- The amount of damages and restitutionary award are in dispute

Issue

- What is the measure of damages to be awarded in respect of disappointment and distress of the loss of the contract?
- Must the fare be refunded in whole or in part?

Reasoning

- Damages for disappointment and distress can only be recovered in an action for breach of contract where they relate to:
  - Pain and suffering arising from physical injury caused by the breach
  - Physical inconvenience caused by the breach
  - The express or implied object of the contract being provision of enjoyment, relaxation or freedom from distress

- A restitutionary award cannot be made for the balance of the fare:
  - Passengers are refunded for the 5 days of remaining cruise
  - However, the court declines to award for the previous 8 days
  - Restitution for the entire cruise would effectively allow double-recovery
    - Compensation for breach requires passengers to pay their consideration to get to the hypothetical performance position
    - To allow a refund of the fare would be inconsistent with the award of damages

- Prima facie, disappointment is too remote:
  - In general, disappointment or distress is too remote to be recovered; this is a pragmatic rather than logical rule:
    - Though it is probably foreseeable that a party would be distressed upon breach by the other, it is still prima facie too remote
    - Courts use the remoteness limit as a pragmatic way to deny damages
    - Its occasional overzealous application reflects a general fear of overcompensation (cf tort damages)
  - However, there are two exceptions:
    - Breach of promise of marriage [no longer available in Australia]
    - Distress caused by physical injury or inconvenience caused by breach
    - Distress caused by breach of an express or implied promise to provide

pleasure, entertainment or relaxation or to prevent molestation or vexation
    - If the loss falls under one of the recognised exceptions, then it will not likely be too remote and damages for distress and disappointment will be recoverable

Decision
- Dillon is entitled to $5000 to damages for distress and disappointment
    - On the facts, Baltic had impliedly promised to provide pleasure and relaxation
    - [Though not argued, that had also probably caused physical injury and inconvenience]
- Dillon is *not* entitled to restitution of the balance of the fare because
    (a) There has not been a total failure of consideration (9 full days of enjoyment)
    (b) Restitution of fare is inconsistent with damages for distress (double-recovery)

E *Calculation of Damages*

1 *Nature of the award*

Having determined the delta between hypothetical performance expectation and actual losses from the breach, a lump sum is awarded to remedy the discrepancy.

Damages are assessed from the perspective of the parties at the time of the breach. The award thus proceeds on the footing of events as then known or predicted.

2 *Quantification metric*

Normally, loss is quantified by reference to market values at the time of the breach. However, this principle is not always applied.[2] The onus is on the party claiming damages to provide evidence on which a valuation of the loss can be made (*Atkinson v Hastings Deering*).

Though a court may be entitled to refuse damages if no evidence of quantifiable loss is provided by the plaintiff, not all losses can be quantified (meaning it is not always necessary to adduce such evidence). It will not always be possible or appropriate to calculate loss by reference to prevailing market values (as where, for example, the primary value of the contract as expected is one peculiar to the plaintiff or non-pecuniary in nature: *Bellgrove v Eldridge*).

Bellgrove v Eldridge* (1954) HCA*:

Facts
- Bellgrove ('B'), a builder, breaches his contract with Eldridge ('E'), the owner of the building being constructed, by building a house substantially at variance with the contractual specifications
    - B fails to adhere to concrete and mortar specifications resulting in grave instability of the foundations
- E claims damages of £4 950, comprising the cost of demolition and re-erection (plus unspecified consequential losses, minus demolition value and unpaid balance)
- B argues that because the building can be sold to other builders, damages should be the

[2] See *Johnson v Perez* (1988) 166 CLR 351.

difference between the value 'as is' and the value which it would have had if built to the specifications

Issue

- What is the measure of damages to be awarded to Eldridge for Bellgrove's breach of the contract?

Reasoning

- The appropriate measure of loss is one of expectation:
  - 'The owner was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the [builder] to perform his obligation to her'

- The normal measure (eg, for the sale of goods) is the difference between market value and hypothetical performance value

- However, loss here is not simply that of a marketable commodity, but the loss of the house on her land
  - This can only be measured by the cost of rectification
  - E is not buying a house for the purpose of resale, but for private use
  - The market value is thus inapplicable

- Costs of rectification must be reasonable
  - Ie, it must be reasonable to rectify in the circumstances
  - Eg, it's not reasonable to refuse new bricks in place of second-hand bricks (though there may, perhaps, be circumstances in which this is reasonable)
  - However, reasonability is not determined by reference to the requirement of 'economic waste'; this is irrelevant, and at any rate inherent in an award of damages
  - That E might keep the damages and sell her house anyway is immaterial

Decision

- Eldridge is entitled to the cost of rectification

3 *Contingency discounts*

If it can be shown that, because of some contingency in the transaction, the loss for which the plaintiff seeks damages might have occurred anyway – even if the breach had not occurred – then damages should be reduced accordingly.

Contingency discounts are thus applied where there is a chance that the loss being recovered would have occurred even without the defendant's breach. In *Commonwealth v Amann Aviation*, for example, a contingency was applied to account for the possibility that the Commonwealth would have exercised a contractual right to terminate anyway.

The minority (Deane, Toohey and McHugh JJ) estimated this chance at 20%, and reduced damages accordingly. It is conjectured that, as occurs in the context of assessing damages for loss of a chance, the fact that eventuation of a contingency is less than probable does not preclude a reduction in damages corresponding to the likelihood that it will nevertheless occur (this is unlike the approach of the majority, which contradicts that taken in *Sellers*).

Further, Brennan J approved (at least in principle) a reduction for the 20% chance. However, on the facts, it should not be applied (since Cth bears the onus of establishing that expenses would not have been recovered). It is thus the opinion of the majority in *Amann* that, regardless of the likelihood of a contingency coming to fruition, damages are to be reduced by that amount.

4 *Vicissitudes discounts*

Damages may be reduced to account for the occurrence of general vicissitudes causing loss. The approach is similar to that taken in the context of tortious damages. However, unlike vicissitudes in tort law, contractual vicissitudes are normally for a specific, known contingency (rather than general reductions).

III RESTRICTIONS ON RECOVERY

A *Causation*

In addition to establishing quantifiable loss, the plaintiff must establish that the relevant loss was caused by the defendant's breach. The breach need not be the sole cause of the loss; it is enough if it is a contributing cause (*Alexander v Cambridge Credit Corp*).

Causation is approached from a commonsense (rather than scientific or philosophical) perspective. Some degree of pragmatism characterises judicial determinations of causation, which are openly influenced by evaluations of policy. There is considerable overlap between causation, remoteness and mitigation, because an event which casts doubt on causation is also likely to involve a failure to mitigate and render the resulting loss too remote.

Alexander v Cambridge Credit Corp* (1987) NSW SC*:

Facts

- Alexander ('A') is the auditor of Cambridge Credit Corp ('CCC')
- CCC's trust deed fixes the ratio of debentures to shareholders' funds at 5:1
  - Debentures are a kind of share that specify rights to assets
- By 1971, CCC had issued debentures amounting to $56m
  - According to the 5:1 ratio, the issue of only $15.6m is authorised
  - The 1971 accounts fail to disclose this because they show shareholders' funds at $12m when they were actually at about $3m
  - However, in their annual audit A nevertheless certifies the accounts
  - A thus fails to qualify CCC's 1971 accounts with a provision for doubtful debts
- If the provision had been included, it would have been apparent that CCC had breached a term of its trust deed and CCC would have automatically been put into receivership by the trustee
- However, the breach goes unnoticed and CCC continues to trade until 1974, when a receiver is appointed
- During the period from 1971 to 1974, CCC purchases large areas of land for development and sale
  - During this time, the property market slumps and the Queensland government prohibits development on the relevant, which is subject to flooding
  - CCC's land is devalued considerably as a result

- CCC's receivers sue A for breach of contract
  - They claimed to be entitled to compensation to the full extent that CCC's assets had deteriorated in between A's 1971 breach of contract and the appointment of receivers in 1974
- In 1971, CCC's liabilities exceed their assets by $10m
- In 1974, the shortfall is $155m
- Trial judge:
  - If the truth had been known the trustee would have appointed a receiver forthwith
  - Instead, CCC continued to trade until liquidated in 1974
  - Awards the difference, $145m, as damages

Issue

- Is CCC entitled to full compensation for the extent to which their assets had deteriorated between the 1971 breach and the 1974 receivership?

Reasoning

- Approach to assessments of causation:
  - In general:
    - The inquiry is not scientific or philosophical but commonsense
    - It is not necessary to show dominant, efficient or real cause
    - It is enough if the breach is 'a' cause
  - McHugh JA:
    - 'The legal cause is to be determined not by employing the "but for" test but by asking "whether the breach was the dominant or real or efficient cause of the damage"'
    - The 'but for' test may be a useful guide but it is not a necessary condition of recovery
    - The causative effect of the 1971 audit was soon spent, as it was followed by further audits and reports
    - CCC did not suffer just a single loss
      - There were independent causal chains leading to separate losses (eg, flooding in Queensland)
      - The causative effect was not thus 'dominant or real or efficient'
  - McHugh and Mahoney JJA:
    - It is not commonsense to say that the company's position deteriorated because it continued to exist
  - Glass JA (dissenting):
    - Applies the 'but for' test as the determinative test, rather than as a guide
    - It is commonsense to say that the company's position deteriorated because it continued to exist
  - 'But for' test:
    - McHugh and Glass JJA: to be applied according to commonsense and policy
    - Mahoney JA: rejects 'but for' test

- Novus actus interveniens:
  - McHugh and Glass JJA:
    - 'An intervening act or event breaks the causal link if it is 'in a practical sense' the only cause of the loss – unless it should have been foreseen as a serious possibility.'
    - Disagree on the facts
  - McHugh JA:
    - The chain of causation is broken by economic factors (the 1974 crash)
    - 'The package of economic factors, starting with an expansionary budget

in 1972 leading to rapidly rising interest rates in 1973 and the collapse of land prices in 1974, together with the decisions of the directors of Cambridge to increase its borrowings and investment in real estate constituted, a novus actus interveniens.'
    - Glass JA (dissenting):
        - The 'but for' test is still satisfied, so causation is established
        - 'The auditor's breach remained a cause but for which the loss could not have occurred.'

- Remoteness:
    - McHugh JA:
        - The 1974 economic situation could not have been in A's contemplation
    - Glass JA (dissenting):
        - There was a serious possibility
        - Auditors of land development companies should reasonably contemplate that a boom will be followed by a slump

Decision

- Causation: the loss sued for was not caused by the breach
    (a) Not 'commonsense' causation (McHugh, Mahoney)
    (b) There had been a novus actus interveniens (McHugh)
- Remoteness
    - The loss was too remote (McHugh)
- [Side note: mitigation might also have been a possible restriction on recoverable damages; after all, why didn't CCC mitigate their loss by stopping their issue of debentures?]
- The appeal succeeds; causation and remoteness are not established by the plaintiff

Note that the causal link between breach and loss can be severed by an intervening or supervening act or event subsequent to the breach (a 'novus actus interveniens').

B *Remoteness*

The scope of damages recoverable is limited by reference to the concept of remoteness. The concept of remoteness has seen some development:

- *Reg Glass v Rivers* (1968):
    - The loss must be 'when the contract was made, reasonably foreseeable as likely to result from such a breach'

- *Wenham v Ella* (1972); *Burns v MAN* (1986); *Alexander* (1987):
    - '[O]n the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss flowed naturally from the breach or that loss of that kind should have been within his contemplation' (*Hadley v Baxendale*)

According to *Hadley v Baxendale*, as applied by the High Court, a loss is not too remote if it relates to:

- Loss arising 'naturally' or 'according to the normal course of things' (measured by reference to the reasonable person); or

- Losses that 'may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract' (measured subjectively by reference to the actual parties).[3]

The defendant need not contemplate the precise extent of damage suffered or specific details of how the loss arises. It is sufficient that the defendant contemplate the general kind of damage that results from the breach of contract. This being the established, the defendant will be liable for the full extent of loss arising out of his or her breach.

For example, in *Alexander*, the loss was held to be too remote by McHugh JA (Glass JA dissenting):

- McHugh JA:
  - It is to be noted that the *Hadley v Baxendale* test is based on contemplation not foreseeability; there is a difference between the concepts
  - The loss (ie, the slump in property values) was not within the reasonable contemplation of the parties
  - In determining whether loss is too remote, consider what the defendant could be fairly regarded as having contemplated and been willing to accept

- Glass JA (dissenting):
  - 'The changes in market conditions would have been contemplated as serious possibilities in the event of failure [by Alexander]'
  - A boom is expected to be followed by a slump

C *Mitigation*

Mitigation consists of a party taking reasonable steps towards preventing, ameliorating or otherwise reducing the extent of loss suffered as a result of the other party's breach. Damages are not recoverable to the extent to which they reasonably could have been mitigated by the plaintiff (*Burns v MAN Automotive*).

The party in breach bears the onus of establishing a failure to mitigate. The plaintiff need only take reasonable steps to avoid loss; they need not take costly, complex or extravagant steps.

Burns v MAN Automotive (Aust)* (1986) HCA*:

Facts

- MAN Automotive ('MAN') sells a prime mover to a finance company, who then leased it to Burns ('B')
- MAN warrants that the engine is fully reconditioned
- MAN knows that B would use the prime mover for interstate haulage and also knows of B's financial difficulties
- The engine has not, in fact, been reconditioned
- Between July 1977 and June 1978, B uses the move for interstate haulage
- In July 1978, the engine breaks down and B becomes aware that the engine has not been reconditioned as warranted
  - The engine overheats and the vehicle is slow
  - The movie is taken off the road for repairs in August and November 1977, and

[3] *Hadley v Baxendale* (1854) 156 ER 145, 151.

again in June 1978
- B cannot afford to further repair the engine and the seller refuses to do so
- B is forced to use the mover to perform less lucrative, intra-state travel, which he performs from June 1978 to November 1979
- In November 1979, the mover breaks down again; this time it is repossessed by the finance company
- B sues MAN for breach of an express warranty and claims damages for lost earnings
- MAN argues that it is only liable for lost earnings up to July 1978 on account of B's failure to mitigate his loss by discontinuing his business
- Trial judge:
  - Awards $220,000
  - $2000 for nervous stress
  - Profits from interstate haulage for the life of the engine as warranted (4 years)
  - Losses incurred whilst engaging in intrastate haulage

Issue
- Did B's continuation of trucking operations – even after discovering the problems with his vehicle's engine – constitute a failure to mitigate the loss caused by MAN's breach of contract?

Reasoning
- Full Court and High Court (4:1): award $70,000
  - No damages are recoverable for nervous stress
    - Its causation by MAN's conduct is not proven
  - The cost of reconditioning the engine is recoverable
  - Loss of profit is recoverable for 1 year only
    - The rest is too remote
  - No intrastate losses are recoverable
    - They are too remote

- Gibbs CJ:
  - Not reconditioning is not a failure to mitigate because B's impecuniosity renders him unable to perform the work himself or pay to have it done
  - However, not stopping work altogether in November 1979 *is* a failure to mitigate (therefore, intrastate losses are unrecoverable)
  - The critical fact is B's failure to stop his business
  - [In this sense, there is overlap between remoteness and failure to mitigate: here, B's failure to mitigate constitutes the dividing line between what is too remote and what is recoverable]

- Brennan J (dissenting):
  - Neither omission constituted a failure to mitigate because impecuniosity prevented B either conditioning the motor or breaking his hire/purchase agreement
  - Causation:
    - 'Burns' decision to continue operations by engaging in intra-state haulage was not a novus actus which destroyed the chain of causation, as the breach caused or contributed to Burns' impecuniosity which led him to make this choice'
  - Remoteness:
    - 'Losses incurred in intra-state haulage were also not too remote'
    - 'Foreseeability extends until it would be unreasonable to fail to act to mitigate'
  - Mitigation:

- The onus is on the contract breaker to show a failure to mitigate
- MAN therefore must have shown Burns to have acted unreasonably in engaging in intrastate haulage
- Reasonableness must be assessed in light of the party's actual financial situation
- Here, given his impecuniosity, which precluded him from reconditioning the engine, or terminating the hire/purchase agreement (which would leave him with a debt), it was not unreasonable for Burns to act as he did in continuing to engage in hauling operations

Decision

- B has not established that the nervous shock was caused by the failure to recondition because many months elapsed in between the breach and the nervous stress
- The cost of reconditioning the engine (cost of rectification) is awarded, and not market value, since B's impecuniosity means he is unable to sell and purchase another one
- Losses after one year are two remote because B should have stopped his business by that time; no-one could have contemplated that he would persevere in his struggle with the engine

D *Liquidated Damages*

In addition to restricting (or excluding altogether) the right to damages for breach of contract, parties can, by means of contractual provisions, stipulate specific amounts of damages or guidelines for the assessment thereof, to be awarded or applied in the event of a breach. Damages are liquidated (modified) by reference to the terms set by the parties.

Where a plaintiff seeks liquidated damages, they do not need to establish quantifiable loss. They need only establish that the relevant provisions are applicable on the facts.

However, there are restrictions placed on liquidated damages. Where a clause imposes a 'penalty' or reflects an unrealistic or unconscionable measure of the relevant loss, the contractual provisions are unenforceable. However, the plaintiff is still entitled to damages representing the actual loss (*Essanda Finance Corp v Plessnig*).

Essanda Finance Corp v Plessnig* (1989) HCA*:

Facts

- Essanda Finance ('E') loans $44 000 to Plessnig ('P') with which he intends to acquire a second-hand prime mover under a hire/purchase contract
  - The total rent for the vehicle is payable in 36 instalments (to a total of $67 640)
- P pays instalments for 14 months (totalling $25,000), leading $32,640 outstanding
  - P now fails to pay the June, July and August instalments in 1983 (4 successive instalments)
- E terminates the agreement under cl 5 and repossesses the vehicle, selling it for $27,000
  - E claims to be contractually entitled to $13 000 damages calculated pursuant to cl 6 of the contract:
- Clauses 5 and 6 provide that, in the event of termination, P would pay the total rent due, minus the sum of monies already paid, the value of the goods (best wholesale price reasonably attainable, and a rebate of charges
  - Payable

▪ Total instalments payable	67 640
▪ Plus repossession costs	70
	67 710
o Minus	
▪ Instalments paid	24 900
▪ Sale proceeds	27 000
▪ Rebate	6 520
	58 410
o Amount of loss	9 300
o Plus interest	3 700
o Total	13 000

- P argues that cls 5 and 6 are unenforceable because they in effect impose a penalty

Issue
- Is cl 6 unenforceable because it amounts to a penalty?

Reasoning
- Esanda's receipts after 16 months (on a principal of $44,000) are as follows:

o Instalments paid	25 000
o Sale of truck	27 000
o Amount due under cl 6	13 000
o Minus repossession costs	70
o Total	64 930
o Profit	20 930
Profit under the contract after 3 years	23 000

- The Plessnigs argue that cl 6 was a penalty because:
  - It could give Esanda a windfall if at the time of termination the truck was worth more than the unpaid instalments
    - However, it wasn't here
  - It defined the value of goods as wholesale value
    - Ie, the truck was worth more than $27 000 at retail

- Wilson and Toohey JJ:
  - An agreed sum is a penalty only if it is 'extravagant, exorbitant or unconscionable'
  - It must be 'out of all proportion to the damage likely to be suffered' and not a 'genuine pre-estimate'
  - 'There is much to be said for greater latitude'
  - The mere possibility of windfall is not enough

- Deane J:
  - Unjust enrichment may, however, be available

Decision
- The wholesale value is reasonable as Esanda is not a dealer
- (5:0) Clause 6 is not a penalty and can be enforced to recover $13 000