

MITIGATION OF LOSS FOLLOWING A BREACH OF CONTRACT

Need to know

- A failure by an innocent party to mitigate its loss following a breach of contract may reduce the amount of damages payable to that party. This usually occurs where the innocent party fails to take reasonable steps to minimise its loss.
- The “reasonable steps” which are required of an innocent party are not particularly onerous. The innocent party should do what it reasonably can to minimise the loss, while acting within the course of its business. It is not required to sacrifice or risk its property or rights in order to mitigate its loss.

Mitigation of loss following a breach of contract

1 The “duty to mitigate”

What is often called the "duty to mitigate" in the law of contract is really a shorthand way of expressing a legal principle about the calculation of damages for the effects of a wrongful act such as a breach of contract.

That general principle provides that damages will not be awarded by a court consequent on a wrongful act to the extent that the innocent party has not acted reasonably to avoid the loss.

The principle is often referred to as a "duty" although, strictly speaking, no obligation as such is placed on the innocent party. Rather, the principle simply provides that an innocent party will not be awarded damages in respect of “avoidable loss”, ie loss consequent upon the breach that could have been avoided by its reasonable actions. The onus of proving that the innocent party has not mitigated lies with the party in breach.

2 What is the test?

Ultimately the test for mitigation is not whether there was a better way of doing things but whether what the innocent party did do was **reasonable**.

In *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* (1976) 1 NSWLR 5 at 9, Yeldham J stated that the innocent party “is not under any obligation to do anything other than in the ordinary course of business, and the standard is not a high one, since the defendant is a wrongdoer.”

Although this is not an issue which has come before the High Court, both the propositions stated by Yeldham J have been quoted with approval by intermediate appellate courts: see eg *Knott Investments Pty Ltd v Fulcher* [2013] QCA 67, *Luxer Holdings Pty Ltd v Glenthams Pty Ltd* [2007] WASCA 209 and *Rockdale City Council v Micro Developments Pty Ltd* [2008] NSWCA 128.

Similarly, in *Banco de Portugal v Waterlow & Sons Ltd* (1932) AC 452, Lord Macmillan stated that the measures which an innocent party is driven to adopt to extricate itself “ought not to be

weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty.”

Again, while this statement has not been considered by the High Court, it has been regularly quoted with approval by intermediate appellate courts in Australia: see eg *Chand v CBA* [2015] NSWCA 181, *Knott Investments Pty Ltd v Fulcher* [2013] QCA 67 and *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507.

3 What does a party have to do to mitigate its losses?

What an innocent party is required to do to mitigate its loss will always be a question of fact to be considered in all the circumstances. Examples of what may be required might include:

- entering into a substitute contract;
- re-selling or re-letting property (or reasonably attempting to do so); or
- giving a builder a reasonable opportunity to rectify any defects (but not where the owner has reasonably lost confidence in the willingness and ability of the builder to do the work).

In any particular case, the obligation on the innocent party will not require it to act other than reasonably and in the ordinary course of its business. The circumstances will be all important.

Further, it is a long-accepted principle of the law relating to mitigation of loss that an innocent party is not required to sacrifice or risk its property or rights in order to mitigate loss (see eg *Portbury Development Co Pty Ltd v Otteidin Investments Pty Ltd & Ors* [2014] VSC 57).

If steps to mitigate are taken, an innocent party can claim its reasonable costs of doing so as damages in court proceedings.