The Duty to Mitigate Loss: How Does It Apply on Anticipatory Breach of Contract?

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AIM: This research considers whether general contract law supports the **payment of damages upon anticipatory breach.** The findings will feed into a wider project on whether insurers should pay policyholders for **loss prevention measures** under insurance contracts.

WHY DOES THIS MATTER: Moving from compensating loss to preventing loss has the potential of reducing the consequences of insured risks while simultaneously encouraging more **proactive risk management**. This will be an **area to watch** especially in domains where risk is rapidly rising such as **climate change** and **cybersecurity**.

KEY TERMINOLOGY

- **Anticipatory breach** occurs when before the contractual date of performance, a party indicates that they will not perform their contractual obligation.
- **Mitigation**: the rule that the innocent party post acceptance of the anticipatory breach must take reasonable steps to minimise their loss to prevent the accumulation of avoidable damages.

Q1: When does the duty to mitigate arise on anticipatory breach?

Finding: The majority view is that the duty to mitigate arises **when the innocent party accepts the repudiation** (aka the warning of breach).

Key case:

- *Hochster v De La Tour*, the innocent party may:

(1) demand performance* (2) accept the repudiation and sue

*so long as there is a 'legitimate interest' in doing so: *The Aquafaith*

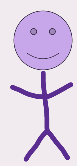
Knowledge (not) as a factor:

- *Schering Agrochemicals Ltd v Resibel NV SA* suggests that **reasonable knowledge** of the breach may be enough:
  - Notion of legal responsibility (Raz)
  - Concept of 'reasonable inference' (Liu)
- HOWEVER, the **right to elect affirmation** trumps the knowledge requirement.

Q2: Are avoided losses recoverable in anticipatory breach?

Finding: Avoided losses resulting directly from mitigating efforts are to be put against the damages owed to the innocent party.

The 'reasonable person': *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London*



"Obligation to take any step which a reasonable and prudent man would [...] take in the course of his business."

This position assesses the reasonable person **objectively**: specialist skills and knowledge.

Bunge SA v Nidera BV: market speculation is a risk that is borne by the innocent party.

Limitations:

- *New Flamenco*: there must be a **sufficient** link.
- *Golden Victory*: the role of retrospect.

ANTICIPATORY BREACH
Hochster v De La Tour, the **innocent party** may: (1) demand performance or (2) accept the repudiation and sue

ACCEPTANCE
If the innocent party refuses to accept there must be a **legitimate interest** in them doing so: *The Aquafaith*

MITIGATION
Innocent party must act **reasonably**: *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London*

ASSESSMENT OF LOSS
Generally, to be assessed as at the date of acceptance, however this is **not an invariable** rule: *Johnson v Agnew*

Q3: What happens when mitigation although reasonable is ultimately unsuccessful or leads to a greater loss?

Finding: As set out in actual breach, in theory, expenses are recoverable as long actions are reasonable.

Key cases:

- *Banco de Portugal v Waterlow and Sons*: the party in breach cannot criticise the chosen course of action merely because it proves to be unsuccessful.
- *Sharp Corp Ltd v Viterra BV*: Lord Hamblen highlights that so long as **reasonable** "there is recovery for loss incurred in taking reasonable mitigating steps, even if that increases the loss."

Caps on recovery: *Darbishire v Warran*

- The innocent party can act as extravagantly as they please but not at the expense of the party in breach.

Q4: What is the time of assessment of damages for loss incurred by the innocent party in reasonably attempting to mitigate its loss?

Finding: The date of acceptance of the repudiation is the presumptive assessment of damages subject to the **compensatory principle** that damages should reflect loss suffered.

When?	Applicable Cases
Acceptance of the repudiation	• *Johnson v Agnew** • *Bunge SA v Nidera BV* • *Sharp Corp Ltd v Viterra BV*
Date of repurchase or entrance into a new contract	• *Melachrino v Nickoll* • *Stanford International Bank Ltd v HSBC Bank PLC*
Date of contracted performance	• *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (A Firm)*
At litigation	• *Johnson v Agnew** • *The Golden Victory*

CONCLUSION: Mitigation is about **reasonable action, not guaranteed success**. The law as it stands protects reasonable efforts to minimise loss and justly applies the compensatory principle when assessing the resulting loss. However, since no actual breach has occurred yet, uncertainty remains in the timing of the assessment of damages which has the potential to pose a problem for compensating expenses incurred for loss prevention measures.

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