

Continuing Professional Development Seminars

Damages and Equitable Compensation in a Commercial Setting

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Barrister and Member of Victorian Bar

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CONTINUING PROFESSIONAL DEVELOPMENT SEMINARS

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About the Presenter

The presenter at this seminar will be John Arthur, Barrister-at-Law. John completed his articles with Price Brent and signed the Bar Roll in 1989. His principal areas of practice are general commercial, property/sale of land, Equity/Trusts, Probate and Wills/TFM. John has published numerous articles in the Law Institute Journal and is an author of "Civil Procedure Victoria" and the current author of a number of titles in the Lexis Nexis publication, "Court Forms Precedents and Pleadings Victoria.

Seminar Programme

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|---------------------|--|
| 9:15 am – 9:30 am | Registration |
| 9:30 am – 9:40 am | Introduction |
| 9:40 am – 11:10 am | Session One |
| 11:10 am – 11:30 am | Morning Tea |
| 11:30 am – 12:45 pm | Session Two |
| 12:45 pm – 1:00 pm | Concluding comments – Questions and Review |

The above programme is flexible and will be subject to change on the day depending on the requirements of the group who are in attendance. The times used are intended to be indicative only.

Introduction

1. By way of introduction, conceptually in the law a distinction is drawn between a right and a remedy (Principles of Remedies, Covell & Lupton, 2008, Lexis Nexis at p. 3). A right (in the sense of a cause of action) is viewed as a prerequisite to a remedy. Thus it has been said for every right there is a remedy. Again, remedies are seen as the “ends” and procedure, the “means”, for achieving those ends (ibid, Principles of Remedies at p. 6). In another sense, the right is viewed as the primary obligation, and the remedy, as the secondary one. In contract the failure to perform the primary obligation is the breach of contract and the secondary obligation is the liability to pay damages (see Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849; ibid, Principles of Remedies at p. 5).

2. In this seminar, there will be a practical discussion of the measure and assessment of damages and equitable compensation in a range of commercial contexts, including:
 - the measure of damages in contract, tort for negligent and fraudulent misrepresentation, and under the Trade Practices Act for misleading and deceptive conduct;
 - the assessment of equitable compensation for breach of fiduciary duty and other claims;
 - the distinction between debt and damages and between damages and restitution and related remedies;
 - the rules in relation to causation, remoteness, mitigation of damages in contract and in tort and in other contexts;
 - contributory negligence;
 - liquidated damages and penalties;
 - damages for loss of use of money;
 - interest pursuant to statute;
 - the proof of damages in different contexts.

3. At the outset it must be said that this survey covering so broad a topic must be impressionistic, subjective and cursory. As it is attempted to cover a wide range of useful topics, it has not been attempted to find a common or unified theme but rather to discuss related topics of relevance and interest to practitioners.

General principle and approach

Damages are compensatory

4. The central principle governing the award of damages at common law is that they are compensatory (HLA [110-11060] eg. *Johnson v Perez* (1988) 166 CLR 351 at 355).
5. In *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 116 Deane J stated:

The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct.

.. While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances.

6. Traditionally the test for remoteness in contract and tort were the same but now the test of remoteness in contract is said to be narrower than that applied in tort, at least where damages are based on negligence. Remoteness is the means by which courts can limit the damages that are payable by a defendant.

General approach – pragmatic and case specific

7. At the outset it must be noted that the awarding of damages in contract and in tort is “largely a pragmatic exercise and is not subject to hard and fast rules” (“*Damages in a Commercial Context*”, S Jacobs, LBC, 2000 at p. 50 referring to Deane J in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 116). Rigid rules “must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered” (*Johnson v Perez* (1989) 166 CLR 351 at 355-56 per Mason CJ). In some cases it is difficult to determine the precise amount of loss or damage that has been suffered in a given case. Sometimes this will involve some estimation falling

short of certainty. The court will seek “as much precision as the subject matter reasonably permit(s)” (*Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10 at [37]-[38]; (2003) 196 ALR 257 per Hayne J). Indeed sometimes it may be “largely a matter of impression .. on the material available” (*Griffiths & Beerens Pty Ltd v Duggan* [2008] VSC 201 at [200] per Pagone J).

8. Notwithstanding these matters, the plaintiff “at the barest minimum.. must .. establish a rational foundation for a proper assessment of damages”(*Griffiths & Beerens* at [173]).

Restitution and unjust enrichment – where does it fit in?

9. It has been pointed out that until recently it was thought that the common law of Australia governing civil liability was made up of contract and tort and equitable claims, with quasi-contract as an adjunct or appendix to the former (Mason CJ in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 356; *Halsbury’s Laws of Australia* (HLA) at [370-1] referring to *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 184-5; [1994] 3 All ER 506; [1994] 3 WLR 761 at 780 per Lord Goff). Restitution now forms the doctrinal basis of quasi contract. Quasi contract or “money claims” included *quantum meruit*, *quantum valebat*, moneys had and received, recovery of moneys paid under a mistake, or upon a total failure of consideration, and note restitution on a quantum meruit for terminating party where contract discharged for breach or repudiation as an alternative to suing for damages for breach of contract: *Renard Constructions Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; and recently applied in Victoria in *Sopov v Kane Constructions Pty Ltd (No 2)* (2009) 257 ALR 182, [2009] VSCA 141. See *Principles of Remedies*, p. 131ff)
10. Generally, restitution is a response to an established unjust enrichment (HLA at [370-5]), the elements which are said to be: (1) the receipt by the defendant of a benefit (the enrichment); (2) that the enrichment was obtained at the plaintiff’s expense; and (3) that the enrichment (or its retention) is unjust (that it would be unjust to allow the defendant to retain the benefit)(Robert Goff J in *BP Exploration Co (Libya) v Hunt (No 2)* [1979] 1 WLR 783 at 839). While this is generally the case, there may be cases in which restitution is available even though one of the elements is absent (*ibid*). (see para [370-410] ff). Unjust enrichment should be “seen as a concept rather than a definitive legal principle” (*Roxborough v Rothmans of Pall Mall Australia Ltd* (2001)

208 CLR 516, 76 ALJR 203, 48 ATR 442, 185 ALR 335, [2001] HCA 68 per Gummow J at 545; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-7 per Deane J).

11. It may be possible to frame a claim in restitution as an alternative to a claim in contract or in tort, or a claim in restitution may be essential because an action in contract is not available.

Distinction between debt and damages

12. It may also be possible to frame an action as a claim for a debt, rather than a claim for damages. This may have distinct advantages. The action for a debt has a longer history than an action for damages for breach of contract HLA [110-11430]. The significance of the distinction today is threefold:

- a. the common law regarded indebtedness in a sum certain for an executed consideration as not a mere breach of contract, but rather, it was the detention of a sum of money, and this was so whether the creditor sought to recover by an action of debt or by *indebitatus assumpsit*. Accordingly, rules dealing with mitigation of loss, while they generally apply to actions for damages, do not apply where the plaintiff is seeking to recover a debt due under the contract;
- b. there are procedural advantages in suing to recover a sum as a debt rather than damages for breach. In the former action the plaintiff is not required to show that any loss or damage was caused by the defendant's breach, whereas in the latter action, a plaintiff who wishes to recover more than a nominal sum by way of damages must prove the matters referred to in paragraph 14 below;
- c. there may be advantages for a plaintiff by reason of the onus of proof, since where a plaintiff alleges that a debt earned under a contract is due for payment, but the defendant pleads the defence of payment, the onus is on the defendant to establish the defence, whereas it is said this may not be the case where the defendant raises the defence to a claim for damages (see,

Young v Queensland Trustees Ltd (1956) 99 CLR 560 at 568; [1956] ALR 939; (1956) 30 ALJ 300).

(HLA [110-11430]).

Measure of Damages in Contract

13. The discussion of the measure of damages in contract will be given some prominence as the law of contract is at the heart of commercial affairs.
14. The following elements must be established in order to recover damages for breach of contract:
 - a. a breach of contract;
 - b. causation, that is, the defendant's breach has caused a loss to the plaintiff;
 - c. the loss suffered by the plaintiff is not too remote; and
 - d. the plaintiff has acted reasonably in mitigating his or her loss.
15. The burden of proof in relation to the first three elements is on the plaintiff and is on the defendant for the fourth element (the failure to mitigate). The standard of proof is generally on *the balance of probabilities* (the standard may not be so strict where loss cannot be easily measured such as loss of chance)(see, *Principles of Remedies* at p. 86 referring to *Sellars v Adelaide Petroleum NL* (1994) 179CLR 332 at 355-6) and below.
16. Although damage is not an element of a cause of action for breach of contract, "a plaintiff bears the onus of establishing the extent of his loss or injury on the balance of probabilities. To satisfy the requirements of that rule, a plaintiff must, if he is to recover more than a nominal amount in such an action, affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms": *Amann Aviation* at CLR 118; ALR 38.
17. In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; (2009) 253 ALR 1; [2009] HCA 8 at [13], the High Court said that the "ruling principle", with respect to damages at common law for breach of contract, is that stated by Parke B in *Robinson v Harman* [(1848) 1 Exch 850 at 855 ; (1848) 154 ER 363 at 365:

The rule of the common law is that 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, with respect to damages, as if the contract had been performed.

(see, eg. Pape J in *Cowan v Stanhill Estates Pty Ltd No 2* [1967] VR 641 at 648; and *Haviv Holdings Pty Ltd v Howards Storage World Pty Ltd* (2009) 254 ALR 273; [2009] FCA 242; BC200901618 at [27]) per Jagot J).

18. In *Gates v City Mutual Life Association Society Ltd* (1986) 160 CLR 1 at 11-12 Mason, Wilson and Dawson JJ in joint reasons stated:

"(i)n contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss)."

The meaning of these expressions "expectation loss" and "reliance loss" is discussed below.

19. This principle was restated in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 116 ; 104 ALR 1 at 36 ; [1991] HCA 54 as referred to in para 5 above. Deane J continued describing how the general principle may be worked out in practice:

The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: what relevantly represents the position in which the plaintiff would have been if the wrongful act (ie the repudiation or breach of contract or the tort) had not occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act.

This approach was recently adopted in Griffiths & Beerens Pty Ltd v Duggan [2008] VSC 201 at [171] per Pagone J and in *National Foods Milk Ltd v McMahon Milk Pty Ltd (No. 2)* [2009] VSC 150 at [22-25] per Hargrave J).

20. In order to be compensable the loss or damage claimed must not be too remote. According to the rule in *Hadley v Baxendale* (1854) 9 Exch 341 ; 156 ER 145 at 151 a loss caused by a breach of contract is not too remote if it:

... may fairly and reasonably be considered either [as] arising naturally, that is, according to the usual course of things, from such breach of contract itself, or ... may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it

21. Accordingly to be recoverable the loss and damage, must be seen as arising naturally from the breach, or must be within the reasonable contemplation of the parties as the probable result of a breach at the time when the contract was made. Loss under the so-called first limb is that which arises naturally in the usual course of things as the probable result of the breach. To establish the second limb the plaintiff must prove that the defendant knew or ought to have known that such loss would be a probable result of the breach. (see, G C Cheshire, Fifoot, C H Stuart, N Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Australian ed, LexisNexis Butterworths, Sydney, 2008 at [23.34]).

22. "An important matter in ascertaining whether the loss or damage is too remote is the extent to which the parties may be taken to have contemplated the events giving rise to that loss or damage. The parties need not contemplate the degree or extent of the loss or damage suffered ... Nor need they contemplate the precise details of the events giving rise to the loss. It is sufficient that they contemplate the kind or type of loss or damage suffered (*Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365–6 ; (1987) 12 ACLR 202 at 254; 254 ALR 273 at 282.

23. In relation to the second causation element above, to establish a causal connection between a breach of contract and the damage suffered, a plaintiff needs to show that the breach was a *cause* of the loss. However, it "is irrelevant to inquire whether the defendants' default was the dominant, effective or real cause of the plaintiff's loss. If the evidence is suggestive of multiple causation, the inquiry to be made is whether the defendants' default was a *cause* of the plaintiff's loss ... The test of causation poses the question whether the plaintiff's loss would not have been suffered *but for* the defendants' default. The question is to be answered by applying that test in a practical commonsense

way”: *Alexander* at NSWLR 315; ALR 208; see also at NSWLR 350; ALR 239–40. (emphasis added). The “but for” test is not “the exclusive test of factual causation”: *Chappel v Hart* (1998) 195 CLR 232; 156 ALR 517; [1998] HCA 55 at [24].

24. An *intervening event* may break the causal nexus between the breach of contract and the damage. Where an intervening event arises “the intervention will not have the effect of terminating the defendants’ responsibility for the loss caused by it, if the parties should have contemplated at the time of the contract that in the event of the sort of breach which did occur an intervention of that general kind was a serious possibility or a not unlikely occurrence: *Koufos v C Czarkino Ltd* [1969] 1 AC 350; [1967] 3 All ER 686” (*Alexander* at NSWLR 315; ALR 208).

25. In *Poseidon Ltd & Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350 ; 120 ALR 16 at 26 ; [1994] HCA 4), the High Court explained the distinction drawn by the Court in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642–3; 92 ALR 545 at 548–9 ; [1990] HCA 20 per Deane, Gaudron and McHugh JJ) as follows:

In Malec, this court drew a distinction between, on the one hand, proof of historical facts — what has happened — and, on the other hand, proof of future possibilities and past hypothetical situations. The civil standard of proof applies to the first category but not to the second, particularly when it is necessary to determine future possibilities and past hypothetical situations for the purpose of assessing damages.

Loss of an opportunity or chance

26. In *Poseidon Ltd & Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350; 120 ALR 16 at 26; [1994] HCA 4, the High Court expressed the view that damages for the loss of a chance are capable of assessment in a breach of contract action where the contract deprives the plaintiff of the opportunity of entering into an alternative contract, even if the alternative contract only had a 40% chance of being successfully completed. (see *Principles of Remedies* at p. 109). An example is “the loss of a chance to win a prize in a competition resulting from breach of a contract to provide the chance is compensable, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition” (*Chaplin v Hicks* [1911] 2 KB 786;

McRae v Commonwealth Disposals Commission (1951), 84 CLR 377, at 411-412). As the Court stated in *Sellars* (at 349-50):

(A) contract to provide a commercial advantage or opportunity, if breached, enables the innocent party to bring an action for damages for the loss of that advantage or opportunity. So, in The Commonwealth v Amann Aviation Pty Ltd, Mason CJ and Dawson J [44], Brennan J [45] and Deane J [concluded that a lost commercial advantage or opportunity was a compensable loss, even though there was a less than 50 per cent likelihood that the commercial advantage would be realized. Damages for breach of contract were assessed by reference to the probabilities or possibilities of what would have happened. Damages in tort have also been assessed by reference to the probabilities or possibilities of what will happen or what would have happened. (notes omitted)

27. Substantial damages for the loss of opportunity were awarded in the New South Wales case of *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558, [2001] NSWCA 187.

Time to assess damages – generally at the date of breach

28. When are damages assessed? The general rule is that damages are assessed at the date of breach of contract but “this rule is not universal” and “must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered”: *Johnson v Perez* (1988) 166 CLR 351 at 355–6 ; 82 ALR 587 at 589 ; [1988] HCA 64. This is consistent with the approach that says rules which constitute “useful guidance in the ascertainment of damages” should not be treated “as rigid rules of universal application” incapable of being “displaced or modified whenever it is necessary to do so in order to achieve a result which provides reasonable compensation for a breach of contract without imposing a liability upon the other party exceeding that which he could fairly be regarded as having contemplated and been willing to accept: *Wenham v Ella* (1972) 127 CLR 454 at 466 ; [1972–73] ALR 353 at 358; see also *Amann Aviation* at CLR 119; ALR 39.

29. Loss of bargain damages are usually assessed at the time of breach except in special circumstances (*Amann* at 161).
30. The general rule that damages are usually assessed at the date of breach of contract does not mean that events that have occurred after that date may never be considered: *Wenham* at CLR 473; ALR 365.
31. Unless actual loss can be established, only nominal damages will be recoverable. However, “where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages”: *Fink v Fink* (1946) 74 CLR 127 at 143; see also *New South Wales v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133 at [72].
32. It should also be noted that in order to be entitled to remedies for breach of contract, including damages, the plaintiff must be able to show that he or she is ready, willing and able to perform his or her side of the contract (*Foran v Wright* (1989) 168 CLR at 408; 452).

Defining contract damages - expectation damages, reliance damages and restitution damages

33. The expressions *expectation loss* and *reliance loss* were referred to by the High Court in *Gates* (above) and provide a useful classification by which to analyse contract damages. However it should be borne in mind that these “expressions”.. are simply manifestations of the central principle enunciated in *Robinson v Harman* rather than discrete and truly alternative measures of damages which a party not in breach may elect to claim” (*Amann* at 82 per Mason CJ and Dawson J).

Expectation damages

34. *Expectation damages* are awarded to protect a plaintiff's expectation interest (also known as loss of bargain damages)(*Amann* at 81 per Mason CJ and Dawson J) eg. damages for defendant's breach of promise to employ contractor to do work equal to the price of the work less the cost of doing it: *Cardwell Shire Council v Calabrese* (1975) 33 LGRA 222; 49 ALJR 164; lessor's damages on termination of lease for sum sufficient to

make up difference between rent reserved for its total term and that which would be received on reletting: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; 57 ALR 609; 59 ALJR 373), that is, for deprivation of the benefit of promised performance (HLA at [110-11100]).

35. In cases of claims for expectation or loss of bargain damages and anticipatory breach, termination of the contract is required in order for the plaintiff to obtain damages. Except in these two cases, termination is not required (*Sunbird Plaza Ltd v Maloney* (1988) 166 CLR 245 at 260). As Mason CJ stated in *Sunbird Plaza* at 260-61:

“Loss of bargain damages are recoverable only if the contract is at an end. Once termination due to the defendant's wrongful conduct is established the plaintiff is entitled to damages for loss of bargain Dominion Coal Co Ltd v Dominion Iron & Steel Co Ltd [1909] AC 293, at p 311. Barwick CJ suggested in Ogle (1976) 136 CLR, at p 450, that termination is not an essential element in an action for loss of bargain damages, except in the case of anticipatory breach, but the preponderant opinion in Australia and England is against his view: see Ogle (1976) 136 CLR, at p 458, per Gibbs, Mason and Jacobs JJ; Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17, at p 31 per Mason J (with whom Wilson and Deane JJ agreed generally, and Dawson J agreed); Photo Production Ltd v Securicor Ltd [1980] AC 827, at pp 844-845, 849.”

Case example: Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272

36. An important recent application of these principles is *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; (2009) 253 ALR 1; (2009) 83 ALJR 390; (2009) 25 BCL 256; [2009] HCA 8; BC200900446. The case shows how applying a different measure of damages for breach of contract can produce markedly different results.
37. In *Tabcorp* the High Court held that the measure of damages, where the tenant had breached a covenant in a lease of office premises that it was not to make any substantial alteration or addition to the leased premises without first obtaining the written approval of the landlord (which was not to be unreasonably withheld or delayed), was not the diminution in the value of the land caused by the breach but the cost of restoring the premises to the condition in which they would have been in if the obligation had not been breached. The trial judge found there was a breach of covenant but awarded damages in the sum of \$34,820 being the difference between the value of the property with the old foyer and the value of the property with the new foyer as constructed by the tenant. On appeal the Full Federal Court increased the amount awarded to \$1.38m, made up of \$580,000 for the cost of restoring the foyer to its original condition and \$800,000 for loss of rent while the restoration work was being undertaken. The High Court upheld the Full Court's decision.
38. The High Court rejected "the doctrine of efficient breach" and the tenant's attempt to impose a form of economic rationalism on the unwilling landlord (at [13]). It applied the *Robinson v Harman* measure of damages for breach of contract as applied by Oliver J in *Radford v De Froberville* [1977] 1WLR 1262 at 1273 and the previous High Court case of *Bellgrove v Eldridge* (1954) 90 CLR 613. It was not necessary for the Court to consider damages under Lord Cairns' Act (at [22])(viz s. 38 *Supreme Court Act*). The tenant may have been entitled to a betterment discount if it had been argued (at [24]). Assessment of damages at the time of the trial was permissible in the circumstances (at [26]).
39. The Court pointed out (at [71]) that the question of whether or not the work is in fact undertaken is immaterial (relying upon *Bellgrove* at 620).

40. *Tabcorp* was applied by the Western Australia Court of Appeal recently in *Willshee v Westcourt Ltd* [2009] WASCA 87 (per Martin CJ with Buss JA and Newnes AHA agreeing) in a case where the builder had used inferior quality limestone in the external cladding of a house. The trial judge found in favour of the plaintiff but only awarded him the cost of cleaning and sealing the limestone and some repainting assessed at \$9,290. The Court of Appeal allowed the plaintiff's appeal and instead awarded him the much greater costs of, and associated with, replacement of the inferior limestone which the trial judge had assessed at \$257,977.91.
41. Generally a plaintiff can be adequately compensated by damages awarded on an expectation basis where a contract has been terminated for breach or repudiation (ibid at [110-11105]). Of course an award of expectation damages is not invariably made, and sometimes damages are awarded to protect a plaintiff's reliance or restitution interest.

Reliance damages

42. Reliance damages are recoverable in circumstances where a plaintiff spends money in the performance of a contract, but the defendant breaches the contract, with the result that the money is wasted (see *Principles of Remedies* at p. 107). The plaintiff may be able to recover what was lost by a damages claim, provided that the expenditure incurred was reasonable, within the contemplation of the other party and able to be proved, "including the displacement of any presumption in favour of an expectation award"(HLA at [110-11105]). Examples are *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; [1951] ALR 771; (1951) 25 ALJ 425 where the plaintiff, which was awarded a contract to salvage a tanker where no tanker existed, recovered damages for wasted expenditure; *Anglia Television Ltd v Reed* [1972] 1 QB 60; [1971] 3 All ER 690; [1971] 3 WLR 528 , CA in which case such an award was made where profit on television play was impossible to calculate; and *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; 104 ALR 1; 66 ALJR 123 where such damages were awarded where while it was impossible to prove profit as a matter of theory (cf *McRae*), but the difficulties were "legion" (at 89). Those difficulties included "the problems of assessing what were the prospects of early termination of the contract by the Commonwealth had the contract proceeded and, more importantly, the prospects of Amann securing a

renewal of the contract”, added to which “on any view, the most substantial part of Amann's damages flowing from the Commonwealth's breach of the original contract was represented by the wasted expenditure” (Amann at 89).

43. Traditionally, where the vendor breached the contract by failing to give a good title, the rule in *Bain v Fothergill* (1874) LR 7HL 158 confined the purchaser to recovery of the deposit and costs of investigation of title and precluded recovery of loss of bargain damages. It is unclear whether this rule survives in this State. It has been disapproved by the New South Wales Court of Appeal (*ibid*, *Holmark Construction Company Pty Ltd v Tsoukaris C/A Unrep.* 16.5.88; (1988) NSWConv R 55-397; BC8801975 at p. 3) as well as legislated against in some states. The rule would not preclude reliance damages (for wasted costs and expenses) which can be recovered if a purchaser has not suffered or cannot prove damages for loss of bargain (*Principles of Land Contracts and Options in Australia*, C Rossiter, Butterworths, 2003 at p. 296). It appears that this latter principle is of general application (*ibid*, *Amann* at 174 CLR 81-6, 99-108, 134-7, 154-7, 61-4).

Restitution damages

44. Restitution damages may be recovered where the performance of the contract by the plaintiff confers benefits on the defendant, but the plaintiff is unable to claim the contract price. In such circumstances the plaintiff may recover restitution damages measured by reference to the benefit obtained from the plaintiff's partial performance (HLA at [110-11110]). Examples of this form of damages are *Planché v Colburn* (1831) 8 Bing 14; [1824-34] All ER Rep 94; (1831) 131 ER 305 (sum recoverable for work done prior to the discharge of contract to prepare manuscript); and *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 451, 452 per Latham CJ (dissenting), at 461 per Starke J (dissenting), at 465 per Dixon J, at 476 per Williams J; [1946] ALR 390; (1946) 20 ALJ 189 (employer preventing employee from performing an employment contract). In some cases there may be very little difference between restitution and reliance damages (*ibid*)(see HLA *ibid* at [110-11110]).

Measure of Damages in Tort

45. In order to recover damages in tort the Court must be satisfied that:

- a. the plaintiff has a cause of action in tort against the defendant;
- b. the defendant's tort has in fact caused the plaintiff's loss;
- c. the plaintiff's loss is not too remote; and
- d. the plaintiff has not breached his or her duty to mitigate unnecessary loss.

(*ibid*, *Principles of Remedies* at p. 15). As with contract damages, the plaintiff bears the burden of proving the first three elements and the defendant the fourth element (*ibid*, *Principles of Remedies* at pp. 16-17). Often claims in contract and in tort will be pleaded together further, in the alternative.

46. "(I)n tort .. damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss)" (as was stated by the High Court in *Gates* by Mason CJ, Wilson and Dawson JJ, at 12).

The joint judgment in *Gates* explained damages in tort in the following manner:

Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation. This may well be so if the plaintiff can establish that he could and would have entered into the different contract and that it would have yielded the benefit claimed: cf. Esso Petroleum Co Ltd v Mardon (1976) QB 801, at pp 820-821, 828-829; Doyle v Olby (Ironmongers) Ltd. p 167. The lost benefit is referable to opportunities foregone by reason of reliance on the misrepresentation. In this respect the measure of damages in tort begins to resemble the expectation element in the measure of damages in contract save that it is for the plaintiff to establish that he could and would have entered into the different contract.

47. As in contract, causal connection is to be proved as a matter of practical common sense (*March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 518-19; 524). The 'but for' test is a helpful rule of thumb not meant to be applied rigidly (ibid, *Principles of Remedies*, at p. 19-20; *Alexander* at 368; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413). Matters of causation are not however a matter of "incommunicable judicial instinct" but it is necessary for a court to give reasons for his findings on causation (*Principles of Remedies*, at p. 20). The standard of proof is the balance of probabilities. The occurrence of the event is treated as certain if the probability of the event having occurred is greater than it not having occurred (*Malec* at 642-3).
48. As with contract, the damage must not be too remote and the damage must be reasonably foreseeable (*Principles of Remedies*, at p. 38). The test applies to claims in negligence, nuisance and trespass but the direct causation test applies to intentional torts of deceit and malicious falsehood (ibid at 40). In claims for damages for pure economic loss, the vulnerability of the plaintiff is now the added requirement (ibid, p 49; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [16], [80]).
49. If the defendant's tort deprives the plaintiff of a chance, or an opportunity, general damages for that loss may be available provided the chance was not negligible or speculative (*Principles of Remedies*, at pp. 64-65 referring to *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355 at 355)

Measure of damages for negligent misrepresentation

50. A common tortious action in a commercial context is that of negligent misrepresentation or misstatement (eg. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; L *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225; (1981) 36 ALR 385; (1981) 55 ALJR 713; [1981] HCA 59). The measure of damages for this cause of action is the amount necessary to restore the plaintiff to the position he or she was in before the representation, subject to the loss being reasonably foreseeable *Thomsons Laws of Australia* ("TLA") [33.10.1720].
51. Where the plaintiff has been induced to enter into a contract to purchase property by reason of the misrepresentation, the loss is often measured by the difference between

the price paid for the property and its true value. This measure is the same as for fraudulent misrepresentation. In *Gould v Vaggelas* (1984) 157 CLR 215, Gibbs CJ said (at 220): "It is well established that in an action of deceit where the plaintiff has been induced by the fraudulent misrepresentation of the defendant to enter into a contract of purchase, the measure of damages usually applicable is the difference between the real value of the property at the time of the purchase and what the plaintiff paid for it: *Holmes v Jones*, at pp. 1702-1703; *Potts v Miller*, at pp. 289, 297; *Toteff v Antonas*, at pp. 650-651; *Foster v Public Trustee*, at p. 28]; *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd*, at p. 31]. Events that happen after the time of the purchase may throw light on the real value of the property at that time: *Potts v Miller*, at pp. 289-290, 299. Referred to with apparent approval in *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, [2004] FCAFC 189 (FC) at [253].

Measure of damages recoverable for breach of s 52 Trade Practices Act

52. A plaintiff who pleads a case in negligent misrepresentation will often also plead a claim under s. 52 Trade Practices Act 1974 (Cth.) for misleading and deceptive conduct. It is clear that while the remedies available under the *Trade Practices* legislation are not to be "constrained by reference to the common law (*Marks v GIO Australia Holdings* (1998) 196 CLR 494), it is accepted that in the usual case of the purchase of property induced by a misleading or deceptive representation the tort measure of damage will be applied (*Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 per Gibbs CJ at 6-7, Mason, Wilson and Dawson JJ at 12-13; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 290-292; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 per Mason CJ, Dawson, Gaudron and McHugh JJ at 526-527; *Henville v Walker* (2001) 206 CLR 459 per Gleeson CJ at [18]-[31], McHugh J at [130]-[136]): *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, [2004] FCAFC 189 (FC) at [254]-[255].

53. In *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526, it was stated in the majority judgment that:

In a case such as the present, it may safely be assumed that the plaintiff is entitled to recover 'a sum representing the prejudice or disadvantage [the plaintiff] has suffered in consequence of his altering his position

under the inducement' (*Toteff v Antonas* (1952) 87 CLR 647, at p 650; see also *Potts v Miller* (1940) 64 CLR 282, at p 297; *Gould v Vaggelas* (1984) 157 CLR 215, at p 220; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, at p 12 (where that measure of damages was applied in an action for damages for contraventions of ss 52 and 53(g) of the Trade Practices Act 1974 (Cth)) of the misleading conduct or 'the actual damage directly flowing from' (*Clark v Urquhart* [1930] AC 28, at p 68; *State of South Australia v Johnson* (1982) 42 ALR 161, at p 170) that conduct, to take up and adapt well-known statements of the measure of damage applicable in an action of deceit.

54. While the principle was endorsed by the judgment of the court in *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at 407–408, holding that risk of loss was not a category of loss, a different measure was found to be appropriate on the facts. In that case, the applicants, who were induced to pay a capital sum to enter into a lease of a unit in a retirement village, did not seek damages based upon the difference between that sum and the real capital value of the leasehold. Because of the particular circumstances, including the nature of the misrepresentation and the nature of the transaction entered into, this meant that damages could be assessed upon another basis altogether (ibid *Expectation Pty Ltd* at [255]).

Causation: the common law test

55. In *Sali & Anor v Metzke & Allen* [2009] VSC 48 at [17]-[23] Whelan J helpfully summarised the common law principles in relation causation and remoteness. It is convenient to set this out to reinforce and reconfirm the discussion above:

17. In order to recover damages against an accountant who fails to exercise the requisite standards of care and skill, a plaintiff must prove that it suffered loss or damage; that there exists sufficient causal connection between the damage suffered and the want of reasonable care and skill; and, that the loss suffered was not too remote.
18. In contract law and in negligence, the question of whether a particular loss was caused by a particular breach is to be answered by reference to common

sense and experience. (*March v E & MH Stramare* [1991] HCA 12; (1991) 171 CLR 506, 522 (per Deane J). See also 515-6 (Mason CJ), 525 (per Gaudron J)). The 'but for' test is a useful aid (*ibid*, 522 (per Deane J). See also 515-6 (Mason CJ), 525 (per Gaudron J)) but it must be applied in a practical common sense way. (*ibid*, 532-4 (per McHugh J).

- 19 Where there are multiple causes of a loss, the want of reasonable care and skill need not be the only cause. It is sufficient that the failure materially contributed to the loss, even if other causes played a more significant role in producing it. (*Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at [60] and [106]).
- 20 In cases where there has been a failure to advise, the causation question becomes whether the plaintiff would have acted differently and avoided the loss if properly advised or warned. (*Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 at [24] – [25] and [87])
- 21 The plaintiff must then identify the kind of warning or information which the circumstances called for and prove that, if the warning had been given, the loss or injury alleged would not have been suffered. (*Qantas Airways Ltd v Cameron* (1996) 66 FCR 246, 293).
- 22 Causation will not be established unless the plaintiff can persuade the court on the balance of probabilities that, if the advice or warning had been given, the plaintiff would have acted differently and avoided the loss. McHugh J in *Chappel v Hart* said:
- “... a causal connection will exist between the failure [to warn of risk or injury] and the injury if it is probable that the plaintiff would have acted on the warning and desisted from pursuing the type of activity or course of conduct involved; (2) no causal connection will exist if the plaintiff would have persisted with the same course of conduct in comparable circumstances even if a warning had been given.” ([1998] HCA 55; (1998) 195 CLR 232 at [34]).*
- 23 Given the effects of hindsight, Courts should be cautious when evaluating a plaintiff's retrospective evidence that he or she would have acted to avoid a loss. (*Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 at [89]–[91]; *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232, 246) When evaluating

such evidence, Gummow and Kirby JJ have suggested that Courts should give particular weight to objective factors or to an objective standard. (Rosenberg v Percival [2001] HCA 18; (2001) 205 CLR 434 at [89]–[91]. See also per Kirby J at [155]–[158]; see also Chappel v Hart [1998] HCA 55; (1998) 195 CLR 232, 246 – footnote (64).

Assessment of equitable compensation for breach of fiduciary duty and other claims

56. While business people are expected to be motivated by self-interest, this is certainly not the case with trustees and other who stand in a fiduciary position. McLachlin J in *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 543 developed this idea as the basis for the difference in awards of damages in contract and in negligence as compared with compensation for breach of fiduciary duty or breach of trust:

“In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged”.

(This dicta was referred to with apparent approval in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [40] and clarified in *Norberg v Wynrib* [1992] 2 SCR 226 at 312 and approved in *Maguire v Makaronis* (1997) 188 CLR 449 at 474; *Breen v Williams* (1996) 186 CLR 71 at 110 and *Pilmer v Duke Group* (2001) 207 CLR 165 at [71]).

57. Equity provides a range of remedies for breach of an express, resulting, implied and constructive trust and apprehended and repeated breach (*Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 at [36]. These remedies may be able to be

pleaded as an alternative to a claim for damages for breach of contract, or for commission of some tort.

58. "Compensation in equity" aims to restore an injured party to the position which existed before a wrong and to uphold an obligation that has been breached. (TLA [15.9.200] citing *Target Holdings Ltd v Redfern* [1996] 1 AC 421; [1995] 3 WLR 352, Lord Browne-Wilkinson at 432 (AC); *Nocton v Lord Ashburton* [1914] AC 932, Viscount Haldane LC at 952; *Hill v Rose* [1990] VR 129, Tadgell J at 143–144; and see *Youyang*).

Account of profits, an alternative remedy to damages or equitable compensation

59. Damages or equitable compensation, on the one hand, and an account of profits, on the other, are alternative and inconsistent remedies between which the plaintiff must elect (*Principles of Remedies* at p. 208). The latter aims to prevent the defendant's unjust enrichment (*Dart Industries v Decor Corp* (1993) 179 CLR 101 at 114) and may be awarded in the exclusive jurisdiction of equity for breach of trust and fiduciary duty and breach of confidence (eg. *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557), and in the auxiliary jurisdiction of equity against the infringer of intellectual property rights (*Principles of Remedies* at p. 211). Exceptionally an account of profits can be awarded for breach of contract (*Principles of Remedies* at p. 217).

60. The trustee or fiduciary must account for the *entire profit* made by reason of the breach of trust or duty (*Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 393 per Gibbs J cited in *Principles of Remedies* at p. 219). An account of profits in intellectual property cases is 'notoriously difficult' and 'mathematical exactitude is generally impossible', but this is no reason on its own for refusing the remedy. Profit is the price received by the defendant attributable to infringement less the cost of manufacture and sale (ibid *Principles of Remedies* at 220ff).

Compensation for breach of trust and for breach of fiduciary duty

61. Where compensation is consequent on a breach of a "traditional trust", the object is that of making "restitution" to the trust estate: see TLA [15.9.10]. In *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* (1966) 84 WN (Pt 1) (NSW) 399; [1966] 2 NSW 211, Street J said that the "obligation of a defaulting trustee is essentially one of effecting a restitution to the estate". However, it should be noted that "restitution" is used here in the sense of "restoration", not in the sense in which that word is commonly used (see TLA [15.9.20]). It is clear that in cases where compensation is the remedial response to a breach of a "traditional trust", the object remains that of putting the beneficiary in, or restoring him or her to, the position which existed before the breach of trust (*ibid*).
62. Equitable compensation for breach of fiduciary duty may be awarded in lieu of rescission or specific restitution (*Bristol and West Building Society v Mothew* [1998] Ch 1 at 17 approved in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 681 (C/A) and in addition to, or lieu of, specific performance or an injunction, under s. 38 *Supreme Court Act* 1986 (the legislative progenitor of which was *Lord Cairns' Act*).

Contributory negligence

63. It is important when pleading a defence to claims in tort and certain types of contractual claims to plead *contributory negligence*.
64. The apportionment legislation allows the court to reduce the damages recovered where a person suffers damage partly as a result of his own fault and partly of the fault of another, to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage. The claim is not defeated (*Wrongs Act* 1958 (Vic), s. 26(1)). Where the damage is caused by more than one defendant, rather than each defendant being liable for the whole loss, the amount of defendant's contribution is that which is found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage (Part IV *Wrongs Act*). Concurrent tortfeasors are only now liable proportionally for the plaintiff's loss (Part IVA *Wrongs Act*) with a particular defendant's liability being limited to the amount which reflects the proportion of the damage or loss which the court considers is just having

regard to the respective responsibility of the defendants (*Principles of Remedies*, pp. 32-35; *Civil Procedure Victoria*, Lexis Nexis, Vol 3 at para [7690.0] ff).

65. It should be noted that with claims for *misleading or deceptive conduct* no defence of contributory negligence is available (*Antoniou v Karedis Enterprises Pty Ltd* (1995) ATPR ¶41-400; *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52); however, since recent amendments to the *Trade Practices Act 1974* (Cth.), there may now be apportionment of damages having regard to the extent to which the claimant is responsible for loss and damage (s. 82(1B) and Part VIA (ss 87CB-87CI) TPA. For equivalent state legislation, see the *Civil Liability Act 2002* (NSW) ss 34-39 and *Wrongs Act 1958* (Vic) [HLA at para 65-365].

Burden of proof/causation and remoteness

66. The relevant principles in relation to discharging the burden of proof in civil cases were recently and helpfully summarised by the New South Wales Court of Appeal in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [55] as follows:

- (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
- (2) where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
- (3) where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or inconsistent with its existence, be excluded before the fact can be found; and
- (4) a rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue.

Remedies for delay in the payment of money

67. Traditionally the common law has denied damages for a mere failure to pay money in a time fashion [HLA 110-11335]. Express contractual terms may allow for payment of interest and also statutory provisions allow the recovery of interest (eg. ss. 58 and 60 *Supreme Court Act 1986*)(referred to below) and damages for delay in the payment of money may in some cases be recovered under general principles as outlined in *Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; 63 ALJR 210 (claim for damages for the loss of use of money where the primary cause of action arose in contract or tort)(HLA 110-11335).
68. As noted in cases where a claim for interest satisfies ordinary contractual principles compensation may be recoverable. In these circumstances damages may be recovered by a plaintiff who suffers loss by reason of having been deprived of the use of the money and the opportunity to invest (*Hungerfords v Walker* (1989) 171 CLR 125; 84 ALR 119; 63 ALJR 210 (accountants' negligence resulted in the overpayment of tax), or by incurring a borrowing cost (HLA 110-11335). The quantification of any such claim, will depend on the circumstances, there being no automatic allowance of damages in the form of interest where money is withheld and no automatic assessment of current market rates of interest (HLA 110-11335 referring to *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358 at 364 per Giles J (entitlement of insured following claim under insurance policy); *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd* (1991) 58 SASR 184 at 196 per King CJ, at 212 per Zelling AJ (Mohr J agreeing), SC(SA), Full Court (entitlement of vendor under contract for the sale of land)).

Interest pursuant to statute

69. The Supreme Court and the County Court may award interest pursuant to statute under ss. 58 and 60 *Supreme Court Act 1986* (see, *Civil Procedure Victoria*, Vol. 2 at para 670; 690). The “beneficial purpose” of an award of interest is to compensate parties who have been obliged to take “proceedings” to recover a money sum and who in the meantime have been kept out of moneys which they could otherwise have used or upon which they could otherwise have earned interest”: *Victorian WorkCover Authority v Esso Australia Limited* (2001) 207 CLR 520; [2001] HCA 53 per Kirby P at 546.

70. Under both sections the award of interest is a matter of discretion, and the court may refuse to give interest if in the terms of the legislation good cause is shown to the contrary. The rate of interest which may be awarded is not to exceed the rate for the time being fixed under s. 2 *Penalty Interest Rates Act* 1983 (except under s. 58 in respect of any bill of exchange or promissory note where the rate is 2% higher than the ordinary rate).
71. Even apart from statute, equitable principles will permit the award of interest on an award of equitable compensation when the interests of justice so demand, including where money has been withheld or misappropriated by a fiduciary: *Talacko v Talacko* [2009] VSC 579.

Liquidated damages and penalties

72. A topic worthy of reference in any discussion about the law of damages is the distinction between liquidated damages and penalties. The issue will arise in practice particularly in relation to building and construction contracts. Liquidated damages for late completion “are damages which can be determined in advance by calculation with reference to the period of overrun. They are normally fixed as a stipulated sum for every calendar day from the date for practical completion to the date on which practical completion is achieved, that is, the actual date of practical completion”. (HLA [65-1010]; [110-11465]-[110-11515]).
73. If a term of a contract operates to impose a *penalty* on the party in breach it will not be enforced (HLA [65-1015]. In order to be enforceable the sum must be “a genuine and reasonable pre-estimate of the losses which the proprietor was likely to incur by reason of the contractor’s failure to complete by the due date” (ibid, HLA; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79; [1914-15] All ER Rep 739). The question whether an amount is payable by way of liquidated damages or a penalty “is a question of law to be determined from a construction of the contract and in the light of circumstances present and foreseeable at the date of contract” (*Dunlop* [1915] AC 79 at 86-7 per Lord Dunedin).

Proof of damages in different contexts

74. The ways of proving damages are myriad and will depend upon the particular cause of action alleged and the circumstances of the case.
75. Proof of damages may involve adducing accounts and financial documents to prove loss of profits. Recoverable lost profits are the *net* profits, that is the gross receipts, less the expenses justifiably incurred in discharge of the contractual obligations concerned (*Amann* at 81 per Mason CJ and Dawson J).
76. In determining loss of profits, as well as other damages, one would ordinarily compare a *hypothetical* state of affairs, with the *actual* state of affairs: what represents the position in which the plaintiff would have been *if* the wrongful act (ie the repudiation or breach of contract or the tort) had not occurred, *and* what represents the position in which the plaintiff is, or will be, after the occurrence of the wrongful act (see, para above). This approach was adopted in *Griffiths & Beerens Pty Ltd v Duggan* [2008] VSC 201 at [171] per Pagone J; *National Foods* at para [22] – [25].
77. In *Griffiths & Beerens*, which was a claim for breach of a restraint of trade covenant, improper use of position and information by a director ss 182-183 Corporations Act 2001), breach of confidence and breach of fiduciary duty, Pagone J assessed the plaintiff's loss by making an assumption as to the amount of sales lost by the plaintiffs during the relevant period as a result of the breach and calculating the likely net profit which the plaintiffs would have made on that amount of sales. A discount was then applied because of such matters as drought conditions in Australia and the change of a major supplier's practice of selling its product into Australia. It was assumed that the plaintiffs would only have retained approximately 45% of the sales which were in fact made by the defendants. An assessment of the likely net profit on sales of this amount was then calculated and damages awarded (see *National Foods* at [24]).
78. *National Foods* was a claim for breach of non-competition provisions of a licensed distributor agreement and intentional interference with contractual relations. Hargrave J awarded the plaintiff loss of profit of \$238,796 and damages for "mitigation expenses" of \$154,000. The loss of profit claim was "based upon the profit which National Foods alleges it would have made on sales of milk and milk products by McMahon's Dairy Products in the McMahon territories during the six month period following termination of the licensed distributor agreements" (at [30]). The mitigation expenses claim was the costs National Foods incurred in endeavouring to retain customers for its milk and milk

products during the 6 month period (at [31]). National Foods calculated the volume of milk and products sold by McMahon's during the 6 month period equivalent to National Foods products. It then calculated its lost profit by determining the wholesale price for which it would have sold that volume and deducting an amount for cost of goods sold, discounts provided to customers, and freight costs.

79. Expert evidence is commonly utilized to prove loss and damage, as well as causation and other matters requiring proof eg. a property and construction consultant might give expert evidence supporting the estimated cost of reinstatement of premises being claimed by the plaintiff, or a valuer may give evidence as to the market rental value of property.

Conclusion

80. Whether to pursue a claim for damages in contract, tort, equity, under some statutory cause of action, or a combination thereof will depend on whether the basal facts exist to establish one cause of action or another. The particular facts will dictate the requisite causes of action and available remedies, and if damages are claimed, how the particular damages claim is to be framed and proven. When more than one cause of action is available, the respective limitation periods may be decisive in deciding how to plead the case as although the limitation periods for contract and tort are identical, the causes of action may accrue at different times, and a claim in contract may become statute barred before the claim in tort is barred (see HLA at [110-11070]).
81. The choice of cause of action may also be influenced by the measure of damages, and the likely quantum, if the cause of action is established.
82. Arguably the principal lesson is that while the object of an award of damages is compensatory, it is not subject to hard and fast rules. Sometimes there will be considerable difficulty in determining the precise amount of loss suffered and some estimation and even impression must suffice. Indeed rigid rules must give way to solutions which give an injured plaintiff the quantum of damages which most fairly compensates for the loss suffered.

Dated: June, 2010

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