Contract – Remedies, Breach and Misrepresentations

General Notes - Exam

Still Closed Book

Comprised of Short Answer Questions; all 4 marks – 15 odd questions.

Essentially – last two weeks will be Misrepresentation

General Terminology

Breach of Contract – BK.

Equity/ Equitable – EQ

Common Law – CL.

Distraint; seizure of someone else's property in order to obtain payment of money owed,

Consideration; is the acceptance of an obligation to be bound at law.

Nominal Consideration: something sufficient but utterly inadequate – a peppercorn.

Synallagmatic Contract; in common law jurisdictions is roughly the same as a bilateral K.

Bilateral Contract – K in which *both Parties are promisee and promissor*.

Promisee will be trying to enforce the contract.

Gratuitous Promise (noun; gratuity); a purely gratuitous promise where there is no consideration provided in *return* – these do not give rise to a contract – UNLESS; estoppel example.

Negotiable instrument; Cheque or Bills of Payment – essentially a document to enforce payment.

Agent; An agent is a person who has authority to act on the behalf of another (the Principal). If an agent acts within the scope of their authority, they will conclude a K between the 3rd Party and the Principal: 2 kinds of authority

where there is **actual authority** of an agent to enter into a transaction

ostensible authority or **apparent authority** – where an agent is held out as having authority to do things, but does not actually have it.

- Requires a representation by the Principal that the agent has the authority

Classic example of Real Estate Agent – although not *actual* authority; they do have *ostensible* authority to do things.

Don't usually have authority to conclude K on principal (vendor's) behalf; role is to introduce buyers

Sometimes they do have full authority to be a full agent

Ostensible authority to make representations about the property; sometimes they exceed that authority and make statements and decisions about the property that the vendor is not aware they are making

Vendor may be bound and forced to pay damages for mistakes made by agents

Liability

Joint: Each of the partners were liable for the *full sum* vs. **Several**: Only liable for proportion due

Trust; developed by courts of equity; essentially an equitable obligation to hold property on the behalf of another; Even possible to have a trust in a promise – contractual right

Repudiation/ Anticipatory Repudiation; act or communication that a party will breach a K / refusal to perform.

Diminution of value; Either (1): difference between value and price paid, or (2) an alternative measure of damages. IF court says that damages is a "diminution of value" its between promised and actual value – or alternatively, the cost of reinstatement.

- "diminution in value"; there will usually be a close relation between a diminution in value and the cost of repairs – BUT not always; the cost of putting the promise right might be far greater than the promised and actual value. In some, so great that the court will not grant it.
    - in *Ruxley* D built a swimming pool 6-9 inches too shallow at the deep end – described as a "beautiful pool" BUT no *actual* distinction between the value gained…
- Essentially won't get *repair costs* when so much greater than diminution.

Reliance Damages;

History of Equity

Development and Influence of Equity

- Intro; essentially post 1066 Norman invasion the establishment of Feudal Courts replaced the County courts. These still applied predominantly local customary law.
- King would exercise "high justice" – preside over cases of exceptional interest via Curia Regis (Court of the King); power was later delegated to his officials.
    - Court of Exchequer (Finances)
    - Court of Common Pleas (ownership/ possession of land)
    - Court of King's Bench (Serious Criminal matters).
- Pressure to extend the King's courts; more efficient and rational procedures (I.e. Juries to resolve facts issues, evidence on oath) vs. trial by battle or ordeal.
    - Judges would increase fees (wanted more cases) BUT Barons would lose out.
    - Created a transparent fiction; i.e. Approach Exchequer so the King would "not miss out"
- Writ system was created – Royal courts were limited to current expansion, remedies were turned into writ. Barons thus prevented what they saw as further expansion of Royal Court.
- BUT people still preferred royal courts; so had to fit cases into already existing old forms
    - Proceduralism dominated until 19th C

Development of Equity; a supplementary to the common law – to alleviate harshness.

- Created a situation where some appellants were unable to find a remedy; solution? Appeal to the King's conscience. Eventually this 'fairness' was delegated to Lord Chancellor "Keeper of the King's conscience"
    - Gradually, would give a remedy whenever Common law procedures were unsatisfactory
    - Decision on the 'equity of the case'; no rules – only "good conscience"
    - Rather than administering a separate set of rules, was viewed as fine tuning the administration of the King's justice [Berryman, 1988]
- This became increasingly popular, then (like Kings Court) compromised; no more expansion
    - Maintenance of the status quo,
- Initially had no rules; applied moral/natural justice.
    - Based on the "Aristotelian notion that equitable justice is a necessary correction of the defects of legal justice." [Berryman, 1988]
- Equity has two Jurisdictions; Exclusive jurisdiction (trust – mechanism whereby property owned by Party A is held in Equity for Party B) and auxiliary jurisdiction (contract law – supplements CL; auxiliary to CL.)
    - Broadly speaking, the only Remedy that could be provided for a Breach of K, was award damages in any circumstance. Equity thus developed its own remedies
        - (1) Specific Performance
        - (2)
        - (3) Rescission; if SP rips WP off – WP might get damages, OR could use rescission, which means K is set aside and both SP and WP are returned to their "status quo anti"
        - (4) Count of Profits; parties wrongdoing might allow them to profit, and courts will force the party to disgorge the profits and give them to the innocent party.

- Jimi Hendrix's estate sought a Count of Profits after a 3rd party made an unlicensed album of H's music.
  - Equity in it's auxiliary function was thus doing something different to CL – provided P with more potential remedies.
- Eventually post 16th/17thC had to follow precedent; "equity developed from being a general concept of natural justice or moral sense into a series of judge made rules based on decided cases."
  - Followed on from a 1616 clash between Chancellor Lord Ellesmere and CJ of King's Bench, Sir Edward Coke. [Berryman, 1988]
  - These were a set of 12 Aphorisms that dictated the equitable responses
    - 1. Equity will not suffer a wrong without a remedy.
    - 2. Equity Follows the law
    - 3. Where there is equal equity, the law shall prevail
    - 4. Where the equities are equal, the first in time shall prevail
    - 5. He who seeks equity must do equity
    - **6. He who comes into equity must come with clean hands (important).**
      - i.e. must be equitable in your own dealings.
    - **7. Delay Defeats equity – "equity favours the diligent not the tardy" (important).**
      - if you hesitate, the other party might change their position - will prevent the party gaining restitution as it then might be inequitable
      - Essentially need to act *quickly*.
      - In problem answer; "there has not been a delay of sufficient length to make it inequitable to grant restitution to the plaintiff"
    - 8. Equality is equity
    - 9. Equity looks to the intent rather than the form.
    - 10. Equity looks on that as done which ought to be done.
    - 11. Equity imputes an intention to fulfil an obligation
    - 12. Equity acts *in personam*.
- Equity will deal with new problems based on development of established principles rather than wholesale revision

Fusion of Common Law and Equity – note; known as a "merger" in the USA.

- Initially, there were separate courts which administered Equity and Common law.
  - Common; exchequer, common pleas, Kings (Queens Bench)
  - Equity; Court of Chancery.
- By early 19thC Chancery was unworkable; reform in mid 19thC streamlined.
- *Lord Cairns' Act (Chancery Amendment Act) 1858* allowed Chancery to award damages.
  - Paved the way for increasing similarity; lead to fusion.
- 19thC Judicature Acts – fused the two systems; all courts can apply equity and common law.
  - 1873 Supreme Court of Judicature Act – created the Supreme Court of Judicature.
    - All the (above) courts, became subsidiary courts.
    - All divisional courts could grant whatever remedies they wished.
  - 1875 Judicature Act
  - Similar law passed in NZ
- Freed from proceduralism; courts concentrate on substantive law; right vs. wrong.
  - NB; aided by systematic law reports – easy tracking of precedent.
- By late 19th/20thC Parliament is ready to pass legislation which altered unsatisfactory law.

Meaning of Fusion – was there now one body of law…

- View (1) No 'Fusion' "…vesting in one tribunal of the administration of Law and Equity…" [*Salt v Cooper* (1880)]; I.e. fusion of administration rather than principles;
    - Apparently this was essentially "procedural".
    - Professor. Ashburner; "though they run in the same channel, run side by side and do not mingle their waters." (*Principles of Equity,* 1902)
- View (2); this view is "*both mischievous and deceptive… the waters of the confluent streams of law and equity have surely mingled now*" (Lord Diplock [*United Scientific Holdings Ltd v Burnley Borough Council*] 1978)
    - According to P Scott, this is wrong; Critiqued heavily.
    - Lord Cooke quotes this in 1987; *Day v Mead*
        - Prof. MacLaughlan says that the Court of Appeals pronouncement is largely unreasoned.
        - "exposes the fragility of contemporary legal systems"
        - Apparently, Lord Cooke's reputation is not as sacrosanct…
            - P Scott is Salty AF.
- Ultimately it is a disputable territory.
- **But we will be learning about an Equitable Defence to an Equitable Remedy; maxim of Equity – that "equity favours the diligent not the tardy" – if you make it inequitable to grant a remedy through delaying (and hence allowing D to rely on it) you invoke the *doctrine of Laches***.
    - An example.

Critiques of fusion;

- Regularization of the law resulted in the ossification that equity was initially going to combat [Berryman]

Remedies – in General

Equity vs. Common Law

In NZ the HC has always possessed both EQ and CL remedies – in UK only since Judicature Acts of 1973, 1975 have the HC had the same powers.

Note that initially specific performance was only granted where damages where considered *inadequate*; CL courts would not order K to be specifically performed due to CL judgement's being enforced on distraint of D's goods – always created monetary sum.

Introduction

Both *Misrepresentation* (BFT c11) and *failure to perform – "breach" of contract* (BFT c 18) may entitle one party to withhold performance or cancel the contract. This is simultaneously a *right* and also an effective remedy – in the sense it prevents a loss.

Common Law

- "Enforce K" – only where D is obligated to pay a fixed sum
    - **Right to "Enforce a K";** description of innocent party right following BK – in reality in NZ no right to enforce in the sense of compelling execution; needs a structured remedy.
- Damages to compensate for BK

Equity

- **Specific Performance**; typically given in Contract for the sale of land where the ***vendor*** repudiates.
    - In the same context, might go for damages between initial Cost of House, and *higher* cost of an alternative but equivalent house.
    - Essentially this reflects that *historically* land was viewed as unique – consider the disparity between this view and today, where it was commoditized.
- **Injunction**; another form of specific action – usually related to **negative covenants**
    - Example: **Lessee** and **Lessor** of stadium; contractual limitations on number of contracts that are held. Lessee decides to breach (NB this could be a commercial decision, or a mistake). Lessor could theoretically extort the lessee in order to gain some of the profits…
- **Cancellation**; where one party commits a serious breach/ breach of a concrete term. Under common law and Contractual Remedies Act, the other party can relieve themselves of the obligation to perform
    - Usually combined with an action for damages – acts as a prelude. One party repudiates, the other *cancels* then seeks damages.
- (Exceptionally) **account of Profits** even where there is no loss to Plaintiff.

Damages

Introduction - *Whether P can recover, raises two issues*

Subject to remoteness, damages should "***restitutio in integrum***". Another principle is the *Robinson v Harman* principle – that P can seek to recover *expectation interests*. It's difficult to see how any other damages would work.

- **Principle**: "*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*."
- When a BK; compensatory damages must automatically provide a monetary substitute to place the P in the previously occupied state.

- Implementation of damages can provoke judicial difficulty:
  - ***Fulton Shipping v Globalia Business Travel (The New Flamenco)* [2016]** is an example; charterers repudiate K with 2 years remaining; owners faced with this, accepted the repudiation (cancelled the K): couldn't get an exact substitute to the 2 year charter – "no available market". Decide to sell the ship. Get some US $24m. Still attempt to sue charterers for damages; claim 7.5mEuros. Charterers argued that the *value of the ship when the charter was due to end would have been only US $7m*; essentially, the company profited enormously and to provide damages and would put them in an even better position.
  - Arbitrator said that sale should be taken into account – no restitution – so owner appeals; Poppelwell J. Poppelwell J – makes the call that the two instances were separate; appealed by Charterer's – CA upheld arbitrator.
  - DMAC has written a paper about it – thinks that UKSC might allow appeal.

Quantification or ***measure of damage*** in monetary terms. Essential principle of ***"restitutio in integrum"*** – that as far as money can do it P must be restored to their *status quo ante* position (initial case was *Robinson v Harman* [1948] Exch 850) had the BK not occurred;

- Loss to Plaintiff
  - *Fuller and Purdue* (1936) *Classifications – essentially defunct but still used!*
    - ***Restitution interest*** – namely the right to restoration of a valuable benefit conferred on the other party; *prevents unjust enrichment*.
    - ***Reliance Interest*** – namely the right to compensation for ***loss due to steps taken by the innocent party in reliance upon the existence of the contract***, the object being to *restore the innocent party to the position he or she would have occupied* ***had the contract not been made***; and/ or
      - *"interest of the plaintiff in being reimbursed for the wasted expenditure incurred in reliance on the D's promise."*
      - No different principle applies where P seeks to recover for wasted expenditure rather than lost profit.
        - Reliance damages; expenditure in reliance of D – in the **<u>usual case</u>**, P's will argue that they were *induced* by the outcome of D's negligence, and should consequently pay damages for expenditure consequently incurred (in ***Watts*** it would be distinction between promise and actual value – 15 000pounds).

- However, the award – NB referenced in *Omak* – this is consistent with *Robinson* principle – strictly un-necessary to attach the label.
- Example: professional negligence situation fits in this.
- There is no actual reliance interest; this term is a synonym for "damages for wasted expenditure" (*Amann*).

- ***Expectation interest*** – ***namely the right to compensation for the loss of the bargain***, the object being to financially *restore the innocent party to the position which he or she would have occupied* ***had the contract been performed***.
- ***Restitution Interest***; *the plaintiffs interest in having restored to them any benefits conferred upon D pursuant to the K.*

- Rules regarding application
  - In principle, P should have free choice as to basis for quantifying loss suffered – this is law in England, apparently not in Australia.
  - **There is no objection to combining these interests subject to overriding rule that P cannot recover more than once for the same loss; *Depending on the facts all 4 interests may need to be recognized to restore P to pre-K Position***.
    - Example P cannot claim ***reliance*** and ***expectation*** where necessary to expend reliance on a K in order to earn profit – common – because then P would be *overcompensated*
    - Example P cannot claim *reliance* and *expectation* where reliance is expenditure to purchase a business and expectation is profits lost after lawfully cancelling the sale of a business.

- Separate "consequential loss"; where BK causes loss of property, or injury is caused – either physical or psychiatric. These are always recoverable subject to *remoteness*.

- Need to determine the precise loss – otherwise cannot restore.
  - Distinction between an **absolute contractual undertaking/ warranty** (*promise of a specific result*) and on the other a **promise to take reasonable care**.
  - i.e. **reasonable care**; think about the "promise" made by *service people* – who are implicitly under a K to take reasonable care.
  - The most prominent rules around these are from cases concerning Lawyers, Building Inspectors, and accountants

- *Ford v White & Co* (1964)
  - **Facts**: P bought land upon negligent advice from solicitors that the land was not subject to building restrictions. Sought difference between (i) the value of the land *without* the restrictions and (ii) the value of the land *as is*.
  - **Held**: Court denied the claim – the **measure is between the price paid and the actual value** – on the facts this was nominal! P had made a good bargain despite not getting what they initially expected.
  - **Explanation**: the **duty of Solicitors was to exercise *reasonable care*. P was only entitled to be restored to the position if reasonable care was taken. Here P wasn't *harmed* as a result of the want of reasonable care**.

        - Court said the claim could only be sustained ***if there had been a warranty***; if the Solicitors were in effect promising that the land didn't have a building restriction.
        - Tantamount to making D liable for warranting their view was correct.
        - If they had so warranted, then P would be entitled to a restriction free price of land – would find the difference sought above.
    - **Example to illustrate**: A sees picture for 100pounds. Consults expert. Expert states it is by an old master (negligent). A buys the picture but cannot find a subsequent purchaser who will pay more than 5pounds.
        - **Thus** is the measure of damages 95pounds of 49 995pounds?
        - The former; absence of a promise. Were there an ***absolute*** promise, would be the latter.

- Sometimes it will be too complicated to calculate damages from loss of bargain – the K might have been too complicated or speculative. In such situations, the best that can be recovered is expenditure incurred in reliance on or preparation for the K; expenditure that is wasted.
    - *McRae v Commonwealth Disposals Commission* (1951) HCA.

Remoteness of damage – whether the damage is something D should be liable for; the law draws a line that certain types of damage, albeit attributable to D, will not be compensated for – defines what is appropriate damage for recovery. Initial distinction was drawn in *Hadley v Baxendale* (1854).

- *Hadley v Baxendale* (1854)
    - **Facts**: Hadley owned a flour mill – crankshaft breaks. Takes the crank to a carrier, who delayed in transporting it to the manufacturer. As a result, there was a greater delay in the mill's operating – and as a further result a greater loss of profits.
    - **Held**: too remote. Carriers were unaware of this etc. Courts were never going to enforce the damages.
- **Traditional Rule**: if the loss was within the reasonable contemplation of D – the *kind of loss* – thought of as a likely or unlikely outcome of a breach. However, recent HL decision;
- *The Achilleas* (2009) 1 AC 61:
    - Under this a loss may be considered too remote even if it was of the kind considered by the parties. Stressed that the "reasonable contemplation" test will **usually** be satisfied but not always. ***D will not be liable if they haven't assumed or taken responsibility for the loss***.
    - This position was probably the traditional view; however in DMAC's view was buried below turgid judicial thinking. Example: No Court would hold a taxi-cab driver liable for damages after an unreasonable delay in transporting a passenger to a valuable meeting and caused the passenger an enormous commercial loss. Even though it was the *kind of loss* that could be contemplated, court would not order liability.

***Mitigation of Damage*;** general rule is that the P must take reasonable steps to diminish the loss. If they do so, then they can only recover the (*difference between the mitigated loss and the full loss*)

- Example: P is buying 1m shares at $1 000 000; market goes up – value increases to $1 200 000. Seller repudiates to avoid loss of $200 000. P waits 2 weeks – value increases to $1 500 000 – then sues! Court would find that full claim could not succeed as buyer is expected to take reasonable steps to mitigate the loss as soon as practically possible after the breach. Court would not allow full $500 000 – would only allow $200 000 as damages. Even if the shares had fallen back.
- **Damages will *crystallise* at the point that reasonable steps were taken to mitigate the loss.**

Watts v Morrow (1991) CA.

Facts: P's bought a house for 15 000 pounds more than its value – did so on the basis of a negligent building surveyor. Sought (amongst other things) the *cost of rectifying the defects that went undisclosed*.

Held; the proper measure of damages was not the cost of repairs, but the amount by which the *actual value of the house was lesser than the price*. **Price paid – Value**. Court said that the award of the cost of repairs would essentially give P's damages for breach of a warranty.

Reliance: If D's did job with due care P's wouldn't have purchased the house. Reliance damages; expenditure in reliance of D – in the usual case, P's will argue that they were *induced* by the outcome of D's negligence, and should consequently pay damages for expenditure consequently incurred (in *Watts* it would be distinction between promise and actual value – 15 000pounds). However, the award – NB referenced in *Omak* – this is consistent with *Robinson* principle – strictly un-necessary to attach the label. Because P's wouldn't have bought the house, *prima facie* the only damages available were those for wasted expenditure.

Usually the position will be that the P's wouldn't have entered the K. If P can show with evidence that they would have entered a *different* K with more favourable terms, then they argue for *loss of chance* – essentially, the distinction between the *price paid* and the *price they would have paid*.

- Such compensation might appear to be compensation for the deprivation of a full loss of bargain – "expectory" damages.
- In *Watts* if there was clear evidence that the P's would have got the house for 25 000 less than the price paid because of the valuation, they would have got that rather than price paid minus value (which conceivably could be nothing – could have paid less than market value despite the defects).
    - Compare this to a situation where D warrants that their advice is correct…

Example – based on *Watts*

Price paid; 500 000
Representative value; 535 000 (value if the representation had been true!)
Actual Value; 485 000
Price Would have been Paid (without promise); 475 000 – ***NB: would need facts to support.***

Hypothetical 1: P is able to establish there was a warranty to support the claim by the D; to put P in the position they would be in if the promise was true? Position they would have been in would be RV. Compare to what they *actually* have – AV; **therefore, damages should be 50 000**.

- NB: what about mitigation? If P had tried to rectify the problems? But repairs cost 60 000?

Hypothetical 2: No contractors warranty – simply the normal presumption of reasonable use of care. In this case, would be the **PP-AV; 15 000** – this is the actual award from *Watts*. Putting them in the position if the K had been performed would be averse to the presumption that they wouldn't have purchased.

Hypothetical 3: P's are able to establish they could have achieved the lower price (475 000); difference between PP - PWP; 25 000 would be the damages. Notice that proving loss of opportunity is still half of loss from damages.

Price paid; 500 000
Representative value; 535 000 (value if the representation had been true!)
Actual Value; 505 000
Price Would have been Paid (without promise); 475 000 – ***NB: would need facts to support.***

Hypothetical 4: P is able to establish there was a warranty to support the claim by the D; to put P in the position they would be in if the promise was true? RV – AV; 535 000 – 505 000 = 30 000pounds.

- Note; can claim *diminution in value* and *cost of repairs* as alternatives.

Hypothetical 5: No contractors warranty – simply the normal presumption of reasonable use of care. In this case, would be the **PP-AV;** 500 0000 – 505 000 = -5000. No damages following *Ford v White & CO;* **Explanation**: the duty of was to exercise *reasonable care*. P was only entitled to be restored to the position if reasonable care was taken.

- **Possible nominal damages** as punishment for the breach of duty to take care
- **Because AV exceeds PP** they haven't been harmed. as a result of the want of reasonable care.

Hypothetical 6: P's are able to establish they could have achieved the lower price (475 000); difference between PP - PWP; 500 000 – 475 000 results in **25 000 damages**. *But* this is increasingly improbable – not impossible but would be an extraordinarily good bargain.

- **Damages for the lost opportunity to get a better bargain**
- We can say that on the surface although the purchaser looked better off – that realistically he is also worse off in the sense he missed out on a better bargain; it ignores the "opportunity" cost

Warranty claim seeks restoration to the position if the claim was *true* where the BK claim seeks restoration to position.

Damages Calculation

<u>Long way;</u> calculate **Promised Position – Actual Position; PP – AP**
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*

<u>Short ways; $B = $X + $Y +/- $ Z</u>
B = total benefits of the K for P
X = Prior expenditure to repudiation/ issue point.
Y = Future expenditure to achieve the K
Z = the amount of expected **profit** (**if +**) or **loss** (**if -**)

Method 1: B – Y

Method 2: X +/- Z
Z = (B – X – Y)

Either Method;
Deduct off-setting gains (Mitigation)
Deduct value of any part performance by the Defendant
Addition of costs caused by BK – legal costs etc.

McRae v Commonwealth Disposals Commission (1951) HCA.

Facts: McRae bought a wrecked oil tanker (CDC were involved in selling salvage etc. post WW2) for 285pounds. CDC had taken the position the tanker was lying on a named reef, and that it actually *had* oil left in it. Spent some 3000pounds trying to reach and salvage it. Neither the reef nor the tanker existed!

Issue: McRae couldn't calculate the *actual* value to him – too speculative. Impossible to prove loss of profits, so the plaintiff was restricted to recovering the expenditure wasted.

- He had suggested 300 000 pounds… was restricted to 3285 pounds!

Often cited as a case in favor of *reliance* damages: thought to be an example of the plaintiff being restored to his pre-K position. Instead, it can be accounted for as BK damages.

Principles:

- Where the benefit of the bargain is too speculative/ uncertain, you can claim damages for wasted expenditure.
- In calculating that, a number of other principles are recognized:
    - Expenditure must be that within the reasonable contemplation of the parties as likely to be wasted in the course of the defendant's breach.
- Although in a case like this, restitution will often have the effect of restoring the Plaintiff to his pre-K position, this is a *coincidence not the object of the award!*.
- Essentially there is no alternative measure
    - Damages for lost profits vs damages for wasted expenditure are simply two manifestations of the *Robinson* principle.
    - Justified on the basis that the law *assumes* that P would have *at least* recouped their lost expenditure.
    - That expenditure costs and potential profits are the closest approximation.
- Where, it can be proved that the plaintiffs made a *bad bargain* – that they would have made a net loss, they can only recover to the extent that the expenditure exceeds the loss. If there is no such loss, then only receive nominal damages.
    - The onus of proving that plaintiff's made a *bad bargain* lies on the defendant (either at all, or in part at least not recovered) – critical in the *Amann* case.
        - Majority favor this point; supported by the English Cases.
        - Some have argued it's not a strict onus, rather an evidential onus.
- An award for wasted expenditure, may include wasted expenditure *prior to the K – i.e. the Anticipation of the K* subject to the proviso that such expenditure would have been likely to have been incurred and wasted as a result of the breach.
    - Look at *Anglia Television Ltd*.

Anglia Television Ltd v Reed (1972) QB.

- **Facts**: P's made arrangements in advance of K; much expense. All of which was done before getting a leading man – Actor in TV play.. Found him; Mr Robert Reed (Brady Bunch). Agreed by Mr Reed via agent he would come to UK and do the shoot – availability for a month. Pulls out at the last moment (muddled bookings) and Anglia claimed for wasted expenditure after repudiation – couldn't find a replacement.
- **Claimed damages for wasted expenditure** – 2700pounds some 1900pounds of which was incurred prior to engaging the defendant.

- **Didn't claim lost profits**; perhaps too speculative/ uncertain.
    - Plaintiff may have too readily conceded that they couldn't substantiate a claim for lost profits – difficult to quantify lost profits from a play never produced. However well settled that, difficulty in calculating damages is not in itself a "bar" to claiming lost profits – the court ought to do the best it can(*Amann*). Previous *comparable* TV plays could probably have been used to *infer* profit in this instance.
- Whether the court would have *allowed* damages for lost profits when they would have been totally out of proportion to the gain that D stood to make is another question
    - "*court would lay at the door of the defendant*"
    - Can argue that the difficulty in calculating damages re. lost profits, and subsequent refusal masks a policy decision that Defendants ought not be saddled with massive costs ought of proportion with D's prospective gain.
- If the Plaintiffs *had* pursued lost profits, the court might have more closely scrutinized
    - Ps contention they were incapable of finding a replacement actor
    - Whether within reasonable contemplation of D that P would have to abandon the entire production upon repudiation…

- **CA** was happy to award damages for prior incurred expenses.
- **Judgment (Lord Denning): (page 5 B Onward);** "*If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken. Applying that principle here, it is plain that, when Mr. Reed entered into this contract, he must have known perfectly well that much expenditure had already been incurred on director's fees and the like. He must have contemplated – or, at any rate it is reasonably to be imputed to him – that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract. He must pay damages for all the expenditure so wasted and thrown away.*"

- **Criticism from Academics:** awarding damages for prior expenditure is not consistent with either reliance or expectation interests; doesn't put the P in the position they would have been if the K had been made because obviously the expenses were already incurred –
    - (i) would have spent it in order to achieve profit,
    - (ii) not incurred in *reliance* on D, incurred in *hope* that D would contract!
    - Thus it is argued that there is no connection between either
        - (i) the formation of the contract or
        - (ii) its breach.
- DMAC thinks this criticism is incorrect.

- Employs the jargon of reliance and expectation damages rather than addressing it from first principles of damages law; where the real issue is quite straightforward – whether a plaintiff is entitled to recover for losses caused from the breach that are not too remote (at the time of the contract).
  - **Lord Denning**: D knew that pre-K expenditure would be wasted.
- Even if the loss is reasonably foreseeable (not too remote), it wasn't caused by the breach.
- Boils down to causation issue.
  - P's take a risk of expenditure occurred in expectation – especially if the expenditure cannot be recouped if the K doesn't materialize! It is *essentially* an investment.
    - They expect that
      - (i) K will be formed,
      - (ii) K will be performed,
      - (iii) that expenditure will be recouped.
  - Certainly not simply throwing money away… it is only *potential loss* in other words the P might be able to reimburse themselves. The risk was then removed once Mr Reed signed the K, and P's would have recouped.
    - The loss only arises once
      - (i) K is formed,
      - (ii) the K isn't duly performed…

- In essence, we are trying to say that in this case (and in others like it), the expenditure wasn't caused by the formation of K or its breach, that ***this is beside the point: the real question is whether the loss was caused by the breach***.
  - Clearly it was – the P's lost the ability to recoup expenditure *due to D's repudiation!* Especially considering this was within his reasonable contemplation there should be no issue on principle

CCC Films (London) Ltd v Impact Quadrant Films Ltd (1985) QB.

Case is best known for the authority that the onus is on the D to prove on the balance of probabilities that the wasted expenditure wouldn't have been recovered if the K HAD Been properly performed.

Facts: Ps purchased license to exploit and distribute 3 motion pictures; paid $12 000 USD. Recordings were delivered to the plaintiffs and the price was paid. HOWEVER, the tapes were immediately returned to D's who agreed to arrange insurance and deliver to another address. Ds breached K, tapes were lost. D's breached 2 subsequent agreements to deliver replacement tapes. P's claimed damages for BK.

- Damages; 12k expenditure. Claim upheld.
- Note; that this was essentially pre-K expenditure; initial expense of 12k was before the subsequent K to arrange insurance and deliver to munich.

Neither party had adduced evidence as to whether the expenditure would have been recovered let alone profits made!

Critical Issue: Who bore onus of proof? **Judge found (following Canadian and American Authorities) that it was fair to put the onus of proving the bargain was a losing one *on the defendant***. Included cases where:

- expenditure was in preparing to perform obligations (*The Mamola Challenger, Amann*), but also
- (ii) where Ds breach had *prevented* the Ps exploiting the right contracted for (*here*).

1. Foreseeable result of BK that expenditure incurred in acquiring license would be wasted.
2. This expenditure was in fact wasted – can't exploit films if you don't have them.
3. Furthermore, onus of proving that the Ps wouldn't have recouped expenditure was *on the Ds* and hadn' been discharged!

Outcome: Ps got judgment for 12k.

***The Mamola Challenger* (2011) QBD**. judgment by **Teare J**.
Omak Maritime v Mamola Challenger Shipping (2011) Bus LR 212

Facts: Omak agreed to charter Mamola's vessel for 5-years; never did. Instead *repudiation*; refusal to perform. Mamola *accepted* this and it allowed owners to charter elsewhere at higher rates

- **Repudiation described as "unusual" by Teare J**: usually one would expect the charterers to wish to retain the benefit of the charter-party (*as opposed to market falling and charterer's abort*) …

- **Daily rate under initial charterparty was US$13 700; market rate at point of termination was $21 347**. Essentially meant that **Mamola were able to earn more than $7.5k per day then otherwise would have earned**.

*Mamola still claimed **reliance** damages having **abandoned expectancy damages*** – wasted expenditure incurred in carrying out modifications to vessel required by the terms of the charter-party, no apparent residual value. *The gain resulting from the repudiation exceeded the amount wasted by the owners in fitting out the vessel for the initial charter*.

London Maritime Arbitrators Tribunal *upheld the claim*; awarded $86 534; notwithstanding owners' profit – expenditure would have been recouped after 12 days of hire…

- **Omak appealed**; grounds that no account was taken of the owner's *profit* and recovery of expenses – needed to do so when assessing damages.
- **Mamola cross appealed** – but *only on the basis that the first decision was correct – thus not addressed.*

Teare J *allows* the Appeal; ***owners had suffered no loss*** – confined to nominal damages

Scenario of this case is most relevant where P is claiming damages for BK for wasted expenditure (in reliance of K) where (i) prima facie the K was a losing one, or (ii) too difficult to determine the profits that were potentially going to be made. In The Mamola Challenger it was clear that the Owners were in a far better position than if the K was performed – the expenditure was recouped many times over.

Question really was whether *Robinson v Harman* applied!

Owners' arguments

- *Robinson* doesn't apply in a case where you are claiming wasted expenditure; that there are two different basis for damages.
    - (i) reliance interest; things you lost rather than were set to gain;
        - want to be put in the position they were in within
    - (ii) expectation interest; the money you were expecting to make had K been honoured.
- That because the owners would not have incurred this expenditure without the K, not only would they have been able to have (i) entered a more lucrative K, (ii) not spent some $86k outfitting the ship, (iii) not lost income while the boat was being outfitted.
    - This is totally untrue – essentially wants to be returned to pre K position.
    - Also thinks that there is a distinction between expectation and reliance damages.

Law
***Robinson v Harman* (1848)**; **Parke B**;

- **Facts**; P sought damages for BK to grant a lease; premises were worth more than agreed rent and P sought both expenses incurred and damages for his loss of bargain.
- **Principle**: "*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*."
- **Corollary**: "*an award of damages for breach of contract should not put the claimant in a better position than he would have been in had the contract been performed*."

***British Westinghouse* (1912)**; **Viscount Heldane**;

- **Facts**; Appellants supplied defective turbines to respondents; respondents then purchased superior turbines that mitigated or prevented the *initial* loss AND enabled them to save expenses later. Resulting **Issue**: whether that benefit should be brought into account when assessing damages.
- Adopted ***Robinson* principle** (above), **AND**; **Principle** there is a "duty of taking all reasonable steps to mitigate the loss consequent on the breach… [if this] action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act." This principle is pursuant to **principle one**.
    - HL held benefit represented by the expenses which would have been incurred had the turbines been better but which were saved by the better purchase should be brought into account when assessing damages.

***L Albert & Son v Armstrong Rubber Co* (1949) USA CA 2nd Circuit**; **Chief Judge Learned Hand**;

- **Facts**; purchaser sought damages for BK – for the cost of the foundation to put the machines on. Purchaser didn't prove earnings he was expecting, nor did D prove that P wouldn't have recovered this expenditure had K been performed; swung neither way.
- **Solution**; "On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract had been performed."
- **Consistent** with ***Robinson*** **principle.**

***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) HCA**; **Mason and Dawson CJJ**;

- Onus of proving damages is on the plaintiff – amount awarded is objective not subjective.
- "the expressions 'expectation damages', 'damage for loss of profits', 'reliance damages' and 'damages for wasted expenditure' 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."

Outcome

Teare J allows the Appeal; ***owners had suffered no loss*** – confined to nominal damages.

- **Tribunal Errors:**
    - Regarded (i) wasted expenses and (ii) claim for loss of profits, as independent claims which couldn't be mixed.
    - Actually, both claims are illustrations of *Robinson* Principle.
- **Solution**: In this instance reliance damages were contrary to ***Robinson v Harman*** in that they *put the owners in a* ***better position than they would have occupied had the Contract been performed.*** **This correct approach** requires *factual comparison* between
    (i) P's actual position after breach, and

(ii) P's position if the contract had been performed
AND
(iii) Where steps have been taken to mitigate the loss following BK requires benefits obtained by mitigation to be set against the loss which otherwise would have been sustained.

to ignore "offsetting gains" understates the actual position, and results in overcompensation.

- This is due to Mitigation law – i.e. need to take reasonable steps.

Hypothetical: If Owner's *didn't* charter the boat out, and instead took the ship to the Mediterranean for a laugh, might be reasonable to …?

- ***No different principle to Robinson v Harman applies where P seeks to recover for wasted expenditure rather than lost profit***; endorsed [**at 34 and 53**] ***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991)** view of damages for lost profits (***expectation***) and awards for wasted expenditure (***reliance***) as "*simply two manifestations of the general principle in Robinson v Harman*" [**at 86**] rather than discrete or alternative measures of damages that P may choose between [**at 82**].
  - Counsel for Owners thought terminology of 'election' highlights fundamental differences between the two claims.
    - **Doctrine of Election**; election is essentially that when faced with two different courses of action, must decide between the two. Where a party breaches, need to decide between the inconsistent rights of (i) accepting BK as repudiation or (ii) affirming the contract regardless.
    - Quite simply, have a ***right to choose***.
  - **Disagree with choosing interests;** "the language of election" and "the notion that *alternative* ways are open to a plaintiff in which to frame a claim for relief" are inappropriate.
- **Instead (as in HCA) presumes *recoupment* of "reliance interests" in expenditure reasonably incurred by P in performing or preparing to perform its obligations** – i.e. where it is too difficult to calculate profits**. Teare J thus concludes that *one overriding principle supplemented by a presumption of recoupment*.**
    - In substance this is the same as Treitel's crucial rule – delimiting the alternative of reliance recovery.

- **Re. Damages**; expectation and reliance losses are not separate; their award doesn't reflect distinct rights, only the actualisation of the principles from ***Robinson v Harman***; Contract Damages exist to replicate P's position had the contract been kept. Neither allow P to recover more than he had actually lost.

- Expectation and reliance are neither "fundamentally different" nor from different judicial basis' of claim; reliance is essentially a facet of expectation.
  - **Wasted Expenditure cases:** "… expectation loss analysis does provide a rational and sensible explanation for the award of damages in wasted expenditure cases. The expenditure which is sought to be recovered is incurred in expectation that the contract will be performed. It therefore appears… rational to have regard to that position that the claimant would have been in had the contract been performed."
  - **Where Parties didn't enter K for profit (i.e. charity or for pleasure)**; "… the defendant will usually be unable to show that the expenses exceeded the benefit expected to be obtained from the contract and thus the expense will be recoverable as damages.

Critique and Questions from *The Mamola Challenger*.

Re. Mamola Challenger solicitors; why did they bring this case after their offsetting gains essentially put them in a better position….?

- **Terminology of "reliance" etc.** is "*unhelpful and misleading. Indeed, they may well have been the source of the decision by the owners' legal advisers in The Mamola Challenger to make what, in my view was an unsustainable claim*." (From DMAC)
- **Gauldron J** in *Amann*; "reliance damages" "*may suggest that compensation is to be awarded on the basis that he plaintiff is to be put in the position in which he or she would have been if the contract had not been made*." Where in reality, victim of BK has no entitlement to be restored to pre-K position; thus no *reliance interest*.
- ***The Mamola Challenger*** had factual offsetting gains, where the actual loss from wasted expenditure was wholly expunged.
- Reflects that **modern reliance analysis not only yields the same recovery as the expectation measure, but because its focus is loss caused by the breach, it *is* the expectation measure**: "*The reliance interest cannot assimilate the expectation view of causation without becoming the expectation interest*." (Michael B. Kelly)

Appears to have been assumed that if Owners had a true reliance interest and therefore could claim damages to restore them to the position they would have occupied had the contract not been made, they were entitled to recover re. wasted expenditure.

- There are not enough facts to make an informed comment on this assumption
- Scenario 1: if they had not entered into K (charter at $13 700) they would have entered into an alternative K at a similar rate.
    - If that were the case then since the *actual position* after repudiation was that they rechartered the vessel at the much higher daily rate of $21 347, they are in a better position than if the K had not been made and hence an awared in respect of the wasted expenditure would overcompensate them.
- Scenario 2: if the hire rate in K, was lower than the market rate at the time and, if that K had not been entered into, the alternative fixture would have been at the higher rate eventually obtained, awarding the wasted expenditure would *not put them in a better position*.

Professor Treital was one of Teare J's lecturer's at Oxford; Teare J came to a conclusion contrary to Treital's view – despite his "unfeigned respect".

- ***No different principle applies where P seeks to recover for wasted expenditure rather than lost profit***; endorsed [**at 34 and 53**] ***Commonwealth of Australia v Amann Aviation Pty Ltd* (1991)** view of damages for lost profits (***expectation***) and awards for wasted expenditure (***reliance***) as "*simply two manifestations of the general principle in Robinson v Harman*" [**at 86**] rather than discrete or alternative measures of damages that P may choose between [**at 82**].
    - **Disagree with choosing interests;** "the language of election" and "the notion that *alternative* ways are open to a plaintiff in which to frame a claim for relief" are inappropriate [**at 85**] **Instead HCA presumes *recoupment* of "reliance interests" in expenditure reasonably incurred by P in performing or preparing to perform its obligations. Teare J thus concludes that one overriding principle supplemented by a presumption of recoupment – from *Amann***

- Treitel thinks that welding "two principles into one" with a presumption doesn't conceal the different interests. In substance, Teare J's principle from *Amann* is the same as Treitel's crucial rule – limiting the alternative of reliance recovery. Essentially Treitel is guilty of verbal trickery;
    - Because how can we sensibly say that there are two basis of recovery, BUT deny reliance when it would exceed expectation? Essentially say the same thing. You can claim reliance damages subject to expectation damages.

At paragraph 19; "the law permits…"; essentially continues to refer to "reliance damages" – which is misleading; Look to Gaudron J ruling at page 90

- We should thus consider *not* using reliance damages as terminology. Would be fine if we used it to mean *"interest of the plaintiff in being reimbursed for the wasted expenditure incurred in reliance on the D's promise."*
- But reliance interest is *redundant*; with clear losing K's is limited by expectation cap. So essentially this reliance analysis not only yields the same recovery as the expectation measure when you take the presumption into account, BUT because its focus is the loss caused by the Breach it *is the reliance interest*
- "*The reliance interest cannot assimilate the expectation view of causation without becoming the expectation interest*"

Note: it is stated that Omak committed a "**repudiatory breach**"; essentially a shorthand term. But it invites confusion between conceptually distinct grounds that allow an innocent party to discharge.

- Repudiatory breach means either:
- In Common Law could cancel K in 3 situations (codified in **NZ Contractual Remedies Act s7(2-4)**)
    - (i) Where one party **repudiates** – via words/ conduct indicates an intention to not perform or stop performing. For conduct to indicate, requires conduct that implies a lack of intention to perform.
    - (ii) Breach of an **Essential Term** – a term "expressly" agreed to demand exact performance every breach of that will be a ground to cancel the K.
    - (iii) (*although without repudiation or breach of essential term*) Serious breach; a **breach has occurred that substantially effects the K** – i.e. the benefit has been substantially lessened or the burden on the party has substantially increased.
- Essentially explains why its confusing; in *The Mamola Challenger*, it would have been sufficient to just say "there was a repudiation".

Paragraph 15; quantification of damages – "*Equally, if those expenses had already been incurred at the date on which the K was repudiated, to award those expenses in addition to damages for loss of bargain would put the claimant in a better position than he would have been in had the contract been performed."*

- Issue here is that earlier he said; Benefit expected to earn from performance of K less costs required to earn that B.
- Unless the expenses previously incurred have previously been deducted from the future necessary expenses to achieve the benefit, P will be undercompensated.
- If B – Y, then that's fine – as do not need to worry about already accrued damages.
    - ***Not the terminology*** that he uses.
- ***So*** he is correct *if the expenses previously occurred are deducted from those that have to be incurred*; i.e. B – Y; ignores X.

Commonwealth of Australia v Amann Aviation Pty Ltd (1991) HCA.

Facts: K entered into 1987; Amann to provide aerial surveillance services for 3 years to Commonwealth commencing 12 September 1987 *Amann only has 6 months to prepare...*

- Amann were awarded this K ahead of Skywest who were currently providing the service – were furious that they did not get re-employed.
- As Amann prepared – and imminently were going to deliver late – it seems that Skywest pressured the Government; threatened to sell planes, Government would be dependent on Amann.

Commonwealth repudiates K *first day of operations*;

- ***NB seems incompetent here – shouldn't terminate for performance of K. Cannot terminate for mere breaches; would need to show Amann repudiated themselves, OR even though they wanted to perform that Amann's BK were so serious that they deprived the innocent party of the whole substantial benefit. <u>How can this be established on the first day</u>***.
- Made clear that although Amann have breached, repudiation was premature.
- Breaches
    - Whilst there were breaches, there were only going to be some 2months were Amann weren't supplying perfectly… (of 36 months…) *so clearly not going to deprive the innocent party of the substantial benefits.*

Amann accepts and sues for damages.

- Merely the legal term for accepting the right to cancel the K. Accept the repudiation. Treat itself as discharged (with neither party being obliged or even entitled to perform it later).
    - "rescinding" is a *synonym* for cancellation. *Note that Rescinding a K means it is deemed to never have existed…*

BUT two obstacles to recovering damages:

- Chance (perhaps considerable – DMAC) that K would have been validly terminated inevitably; clause 2.24 allowed Secretary of Transport to cancel K if Amann failed after due notice to show why it shouldn't – Amann was in serious breach at the time!
- K contained no "**right of renewal**"; AND on the surface was a losing one!
    - Amann had just spend $5 281 521 (through an associated company) on Aircraft with a remaining value of only $917 329 – when it was no longer needed for coastal surveillance. Pre operational expenditure of $854 943 brought **net wasted expenditure to $5 219 135**
    - Security deposit of $113 000 and after cancellation of K would need to make termination payments totalling $143 039.
    - Total receipts from *performing K* would have been $17 107 462; to earn this would have required further expenditure of $15 801 899.
        - Thus total expenditure to earn $17 107 462 would equal $21 021 034; **net loss** of $3 913 572.
        - Prima facie this contract was a losing one!

- B = $17 107 462, X = **$5 219 135,** Y = $15 801 899, Z = $3 913 572
    - Additional costs incurred in preparation/ because of BK; return forfeited security deposit + termination payments = (113 000) + (143 039)

Thus, ignoring the contingent possibility that Amann lost the K, sum required to return Amann to starting position

- $1 561 612: *net wasted expenditure – expenditure that would not have been recouped if K had gone through (- a loss) + return of forfeited security deposit + termination payments*
- (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**
    - This is the ordinary amount of damages that would have been recoverable – assuming no contingencies.

An issue here

- reference to $Y – further expenditure required doesn't marry up with the figures set out on page 6 by **Mason CJ** and **Dawson J** – the figures set out by the trial judge.
    - **Brennan J** sets out Y = $15 801 899
    - Trial J sets out Y = $15 433 420
    - **Difference of $368 479;** "if the contract had continued, Amann would have been liable t pay another $368 479 in respect of the acquisition of aircraft."
- This difference is explained on [**(100) page 74 at line 30**];

However; **HCA majority (4:3) upheld Federal Court decision; paid out**

- *net wasted expenditure + security deposit + termination payments*
- 5 219 135 + 113 000 + 143 900 = $**5 475 184 (+interest) – in the full court brought damages to $6.6m and by the time of HCA, would be approaching $7m.**

Judgment of Beaumont J: look at the table on [**(32) page 6**]

- thought that Net profits (lost profits…) would be $820 000 – divided this in half and awards $410 000 because he thought there was a 50% chance COA would repudiate legally via CL 2.2.4
- Why did he think that they would make a net profit?
    - Q: why would Amann be undercompensated?
    - A: **Beaumont J** did not treat the acquisition of the aircraft and the associated costs of fitting those aircraft as pre-operational expenditure incurred by Amann. This was because of the close relationship between the companies of Amann and CVC.
        - The reason this was done, was to enable Amann to get its finance in order – then once the deal came through Amann were going to purchase the debt; Amann were also obliged to indemnify CVC *hence why the other Judges treat the capital expenditure on the Airplanes as Amann's*.
            - Amann were liable for expenditure and had in effect incurred it.
        - if you add the $5 281 521 expended on the planes, to his figures, essentially get the same figures.
    - If you do this via. B – Y would come to a whole new figure;
        - Net profit + pre K expenditure; would put it in position if K was performed.
- Was he correct to divide the Award in half?

Judgment of Full Federal Court:

- Amann appeal – received full compensation for previous expenditure.
    - *net wasted expenditure + security deposit + termination payments*
    - 5 219 135 + 113 000 + 143 900 = $**5 475 184 (+interest) – in the full court brought damages to $6.6m and by the time of HCA, would be approaching $7m.**
- Full Court said that Amann can pursue ***reliance damages*** – BUT that such a loss couldn't be claimed if the K was a losing one.

    - however, they said (consistent with HCA) that the onus of establishing a loss was on the COA and this onus had not been discharged. The value of the prospect of K renewal had to be taken into account – this was not quantifiable, so virtually impossible for the commonwealth to rebut the onus.
    - Virtually impossible to say that the receipts of the intangible benefits were less than the expenditure incurred.
- **Majority** also addressed Clause 2.24; thought it was possible rather than probable that the K would be terminated. Trial Judges estimate of 50% was excessive. This was because; Trial J didn't take into account the term of 2.24 which obliged the Secretary of Transport to give due notice and pay attention to the interests of both parties.
    - came to a 20% chance of termination; too unlikely to justify reduction of damages.
- **Shepard J dissented;** [**(35) page 9 line 15**]

Majority; Mason CJ, Dawson, Brennan, Gaudron JJ.
Dissenting; Deane, Toohey and McHugh JJ; not only dissented from Majority but within themselves.
DMAC thinks that Deane J provided the best Judgment; holistically outcome might be wrong apparently.

Awards
410k Trial J
2.7m Toohey J (dissenting in HCA), Shepard J in Federal
3.9m McHugh J (HCA)
4.4m Deane J
5.5m Majority award; favoured by 5 judges.

COA Appeal;

- starting point was that Amann couldn't recover at all; such an award is only justified where the nature of the BK is to render proof of the loss as impossible.
- **Relied on the non-existent Tanker case** – *McRae v Commonwealth Disposals Commission*.
- Went on to say, if severe difficulty of calculation suffices (case like this) then actually there is no difficulty, as per these figures there was a clear losing bargain. In this case it was not possible to attach value to chance of renewal – Amann had no right of renewal; so award loss of bargain damages – which is $1 561 612.
- They should really get nothing because the Commonwealth would have cancelled within a short time and cancelled validly – Amann would get nothing (nominal damages).

Judgments at the HCA:
Mason CJ and Dawson J (Joint):

- Amann was entitled to damages for BK re. reasonable expenses incurred in reasonable reliance – "**wasted expenditure**"; such recovery is consistent with *Robinson* as law ***presumes*** Amann would *at least* recover expenditure if K was performed.
- **Burden to displace presumption on D**: needed to establish that expenditure would have been wasted regardless
- Burden was not discharged – despite difference in receipts and net loss of $3.9m – due to "strong" prospect of renewal, loss of which was within parties contemplation as probable consequence of BK… couldn't show that ***renewal + $17.1m < expenses incurred ($21m)*****.**
    - **NB didn't use term of impossibility.**

- No discount to damages due to issue 1 above; full court assessed the **probability of cancellation at only 20% - statistically improbable, so why impugn damages**.
- ***Further summary***
    - award of the claimed wasted expenditure was consistent with *Robinson* because the law presumes P would recover expenditure. Burden to displace hadn't been discharged; due to strong prosect of renewal. Damages shouldn't be impugned on statistically improbable chance of valid cancellation.
- Page 10, line 9; Damages recoverable as lost profits (expectation) are constituted by the combination of expenses reasonably incurred + net profit.
    - Damages are awarded for loss of chance = **X+Z**;
    - **inconsistent with Para 15 in *The Mamola Challenger*; if expenses had already been incurred, to award those damages as well as loss of bargain would put P in a better position than he would have been**.
        - this is fine if he is referring to B-Y.
        - However, if some other costs have *already* been incurred then it would undercompensate P to *not* award "X" damages.
    - watch out for Y dollars;

Question: are there any exceptions to the presumption of recoupment?

- "Aleatory" contract; "*it would not be appropriate to apply the presumption for the reason that inherent to the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit*."
    - "In the case of aleatory contracts, damages are awarded for loss of a chance and the burden of establishing the existence and loss of this chance as a result of a defendant's breach lies on a plaintiff although, as has already been observed, mere difficulty of estimation does not relieve a court or jury, in appropriate cases, of the task and responsibility of placing a value on the chance loss."
- *Aldwell v Bundey*
- *Chaplin v Hicks*;
    - **Facts**: Advert for a competition to find actresses – Chaplin submits a photo; gets through to the top 50 (first cull) then *denied* the chance to interview to go through to the top 12 (final cull).
    - **Sued for loss of a chance**; received a serious award.
- Prior Year
    - DMAC: Triathlete is disqualified in the final stretch – in the top 3; he had spent some $5000 on training – the award was some $20 000. Aleatory contract. He can recover through *loss of a chance* – more than the money expended through not working etc.
- BUT if recoupment doesn't apply to "gamble", then what is different with this scenario and McRae v Commonwealth Disposal Committee;
    - Tanker wasn't sold with a guarantee – no promise it contained value, merely "its been said there is some oil"
    - P would have had no complaint if the Tanker *was there* on the reef but had rusted away and there was no oil.
    - P had essentially taken a gamble.
    - Essentially because there was a promise there *was* a tanker.
- ***QUESTION: McHugh J thinks that the principle is crap – contrary to empirical evidence etc. people make bad bargains etc. Thinks its alien to evidence rules?***

Question; reason as to why it might be unfair not to discount damages awarded for chance of cancellation under cl 2.24.

- Judges basically justified the award of the full amount instead of $1.5m, because there was a chance of renewable – a valuable commercial bargain. IF they had received the full K this would have been a lot more valuable. Judges took into account the chance of renewal to augment the damages but ignored the 20% chance that there would have been no damages at all.
    - This is the point made by **Brennan**; "substantial" but "unquantifiable"
    - Could argue that Amann were thus overcompensated.
    - Seems that **Deane J** took this into account in reducing damages by 20%.
- Relied on *Hadley v Baxendale* when taking chance of renewal into account
    - [**Page 44 (18/4)**]; Essentially there is only one principle here;
    - if more loss is known to D, then D will be liable for more damages.
    - "Problem" here (critics): *Hadley* is usually used to *limit* the scope of damages rather than extend it; here it is used as a method of including some damages.
        - Brennan J doesn't rely on *Hadley*.
        - DMac doesn't think there is a problem; the profit from a renewal, where much of the expenses were already incurred, was a Benefit that performance of the K would have provided to Amann.
        - DMAC suggestion: the judges could have made the point that the benefit was plainly not too remote – that it was something that both parties would have contemplated.

Brennan J (**majority**): *NB, DMAC thinks this judgment is more sophisticated than CJ+J above.*

- Essentially treats in the same manner as **Mason CJ** and **Dawson J** (Joint) but reasoned that prospect of renewal of K was an "**implicit benefit**" that was "**substantial**" but **unquantifiable**.
    - Unquantifiable; "*It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain*."
        - from *McRae's* case.
    - This is the same at [**(59) 33/45**] and [**(60) 34/11**]
- Meant that D was unable to discharge onus of proving ***renewal + $17.1m < expenses incurred ($21m).***
    - It's not clear whether Brennan J intended his impossibility train of thought – might have been looking at practical difficulty…. Holistically it doesn't matter really concerning the situations in which the principle of Recoupment existed.
    - BUT it's unlikely that Mason and Dawson would agree…
- Treated 20% chance of cancellation as relevant to value of *Amann's* contractual benefits; but that didn't enable Commonwealth to discharge onus – unable to establish that even 80% of net benefits was less than the expenditure incurred by Amann.
    - "*Even if the Commonwealth be held to have proved that there was a 20% possibility that the contract would have been terminated under cl 2.24, that finding does not enable the Commonwealth to discharge its onus.* ***The Commonwealth remains unable to prove either that $B - $Y is less than $X or that 80% of ($B - $Y) is less than $X***."
    - treating the 20% chance of valid termination as relevant to value of Amann's contractual benefits.

- Doesn't seem right to DMAC
  - wasn't just relevant to benefits Amann would receive; if that risk materialised Amann would not have got any damages at all.
  - thinks Brennan J should have calculated the prima facie damages then deducted the 1/5 chance that nothing be reflected
  - **Q: what if the damages would have been something... I.e. valid cancellation with a clause stating that Amann would have received 500k in good faith…**

- Because the prospect of renewal was an ***implicit benefit*** the Commonwealth had impliedly promised that there was a chance of renewal.
  - Example: Hairdresser who is dismissed.
  - However, it's not that there is a promise, it's an inherent benefit to the awarded K; a consequence of the bargain…
  - ***Dmac Question***: why did he need to treat it as an implicit benefit before it could be brought into account?
    - because he used $B as representative of what P *would have been entitled to*
    - Compared to Deane J;
      - Amann had *either* the prospect of (1) renewal, or (2) of re-selling the planes – written down book value of less than $1m (despite spending almost $5m on them) – at a *much higher value*.
      - loss of those two alternatives were *consequential* loss
      - in the context of Amann's claim for wasted expenditure, he viewed renewal as a consequential benefit that needed to be brought into account to whether Crown had Rebutted the principle of recoupment.
    - Different to the "implied term"
    - Look at example (pages 25 and 26); hairdresser who is deprived of both wages and the tips from customers.
      - can say that tips were implied benefit; DMAC doesn't think it is necessary – it's merely a benefit of the K that should be allowed for when compensating via damages.
- Interesting that Brennan at page 32; paragraph below line 15; DID Refer to the prospect of the *value of the planes themselves being enhanced*; he was only doing it in the context of a summary of Amann's argument: Not unequivocal agreement (***note that he did agree with the rest of what Amann said***).
  - Gaudron and Deane JJ took this as an *alternative formulation* of benefit.
  - it would be highly artificial to argue that the enhanced value of the planes (either to Amann or a new supplier) would be an implied benefit.
  - Arguably unnecessary to talk about implied promise.
    - Interesting that Deane J's judgment contained no reference to that requirement.

- **Question; what if it was impermissible to take into account the prospect of renewal?**
  - $B would only include remuneration payable by the commonwealth; further consequence that Amann could only claim for damages for wasted expenditure rather than loss of profit; there would have been no principle of recoupment at all.
    - P would have needed to establish how much better off Amann would have been; $1 561 612.
    - would this be discounted
  - No longer impossible to undertake an assessment of damages

- "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the full court, would have reduced those damages*."

Deane J (**dissenting in the result**): *Dmac thinks this dissent is Correct.*

- Didn't regard chance of valid cancellation as solely relevant to determination of net valuation of benefits; **in his view presumption of recoupment (of expenditure if K was performed) and risk of cancellation was essentially an 80% chance of recovering wasted expenditure when combined**. This is explained at [**(73) 47/46**];
- **Thus reduced recovery by 20% - to approx. $4.4m (+ interest)**; thinks Amann would have been overcompensated;
- **Core argument begins at**: [(72) 46/ second paragraph]
  - Problem 1: if Commonwealth had used cl 2.24 – Amann would have got nothing
  - Problem 2: if the K was not renewed AND the planes couldn't be sold at above book value, the K would have been unprofitable; Deane J goes on to point out that Amann didn't regard the K as a one-off; agrees with other judges that if K had continued Amann would have been in a favourable position to receive another K. ***Issue*** was putting a monetary value on that!
    - Re-Emphasises the importance on the principle of recoupment; if Amann bore the onus of proof there would have been a cap to the damages they could receive. Since they had the benefit of the presumption it *became* the commonwealth's problem.

Toohey J (**dissenting in the result**):

- **Disagreed in holding commonwealth was under burden to prove K was losing one** instead found a ***mere evidentiary onus*** (simply means that they need to point to evidence that *prima facie* leads to conclusion they are arguing for – here need to show losing bargain) onus that was clearly satisfied considering *prima facie* loss of $3.9m.
  - **disagrees with the presumption of recoupment** – which effectively puts strict onus on D to prove K was a losing one.
  - Compare to; of the ***strict legal onus*** was on Amann would need to show that B – Y at least met expenditure that would be incurred and would need to show a value attributable to prospect of renewal or value of the planes over their written down book value.
- Thought that **fair compensation (in his view this was the task of the court)** considering the various **contingencies** (chance termination + chance renewal) was **damages awarded by full court should be halved**; **$2 737 539 (+interest)**; very similar to Shepard J in Full Court

Gaudron J (**majority**):

- Actually agrees with Toohey J that there was **only mere evidentiary onus on D**; didn't lead her down the same path of balancing contingencies.
- Thought it **impossible to say K would be unprofitable**; ***principally***: aeroplanes would have been worth much more than their written-down book value at end of K.
  - Given that at the end of 3years, the planes might be worth more than they were bought for the expenditure might well have been recouped.
- **Dismissed the prospect of valid termination pursuant to Cl. 2.24 as unlikely – agreed with Mason CJ and Dawson J.**

McHugh J (**dissenting in result**): *DMAC thinks this is the most "interesting" judgment*.

- Arrived at $3 989 899 (+interest), which is close to **Deane J** finding $4.4m (+ interest).
  - Awarded ***expectation*** damages…
- **Rejected *presumption of recoupment* that Amann would *at least* recover expenditure** if K was performed
  - **Contrary to commerce**; business people frequently make bad bargains
  - **Contrary to history of law of evidence**, seen an increasing **rejection** of these presumptions and "**artificial forms of reasoning**"
    - "*… the history of the law of evidence has seen an increasing rejection of presumptions and other artificial forms of reasoning in favour of allowing tribunals of fact to give such probative force to evidentiary materials as they think fit having regard to all the circumstances of the case*."
    - **BUT** the **presumption of recoupment** is pretty well entrenched – certainly applies in cases like *Amann* or *CCC Films*; we will examine some situations where it doesn't."
- ***Reliance damages could only be justified if D's breach made it too uncertain to ascertain whether P would have made net profit etc***.
  - Not satisfied; no express promise that if Amann performed K it would obtain a commercial advantage to enable it to earn profits in a later K (1990)

- **Amann's damages were therefore assessed through orthodox loss of bargain approach by comparing**
  - *Actual position vs. position if K was performed*
  - **Maximum prima facie of $1 305 563**
    - Net wasted expenditure vs. loss on full performance
    - **5 219 135 – 3 912 572 = $1 305 563**
  - **BUT** arrives at **$4 695 563**; treated Amann's borrowing costs of **$3 390 000** as a **pre-acquired expense**. Deducted this sum from amount of future required expenses
    - **1 305 563** + **3 390 000** + **Breach related costs** [**113 000** + **143 049**] = **$4 951 612**

- Then **consistently with Deane J**, held that there must be **deduction for the 20% chance** of cancellation. Note his only inconsistency was disagreement with presumption of recoupment.
  - **Issue**: thought that termination payments were immune from the discount? Why?
    - Answer: **Presumably because they were a *consequential loss* caused by BK**
    - Issue: but if valid termination pursuant to cl 2.24, the full termination payments would have to have been covered by Amann.
  - Instead of awarding **(0.8) * $4 951 61 ($3 961 290),** awards **(0.8) *$4 808 563+$143 049.**
  - ***So; Deane J deducted 20% from the reliance damages* (including expenditure occurred and the $113 000 security deposit – which could *actually* be described as a restitution interest if you wanted…)*, but not from the consequential loss* damages – the $143 049 "indemnity" interest. If the Commonwealth pursuant to cl 2.24 terminated the K validly, they wouldn't have got anything! so: damages total of $3 989 899 – overcompensation of $28 609. If being mean; would award as - $3 961 290.**
- **How did McHugh Get here?**
  - Figures
    - X = $8 609 135

        - 5 219 135 [Brennan J] + **3 390 000**
    - Y = $12 411 899; (Brennan J – 15 801 899 – **3 390 000**
    - Z = 3 913 572
    - X + Z
        - 8 609 135 + (-3 913 572) =
        - $4 695 563; + Termination payments and security deposit = **$4 951 612**
    - B – Y;
        - 17 107 462 – 12 411 899 + 113 000 + 143 049.
        - $4 951 612
- ***McHugh attributed the $3 390 000 borrowing costs as pre-incurred rather than to be paid later; logic being that it is an assumed debt. So; reduces Y and increases X proportionally – the same prima facie loss - $3 913 572*.**
- Explained; effectively this is Brennan J's prima facie damages + 3 390 000. Implicit in the question; if McHugh is right the majority are wrong – should have put the borrowing costs under X dollars. Thus, the majority undercompensated Amann; should have been compensated for; **$8 609 135 + 113 000 + 143 000**
    - Majority essentially gave full expenditure + consequential losses.

Extra *Amann* discussion.

<u>Question 1: Comparison of Calculable damages</u> – between Mason CJ and Dawson J vs. McHugh J.

- **Mason CJ and Dawson J**
    - *"Damages recoverable as lost profits are constituted by the **combination of expenses justifiably incurred** by a plaintiff in the discharge of contractual obligations and any amount by which **gross receipts would have exceeded those expenses**. The second amount is the net profit."*
    - in **Brennan J's** formula this is ***$X + $Z* – or**
    - **(previous amount expended) + (amount of profit or loss that would have eventuated)**

*McHugh's approach **appears** to be inconsistent with Mason and Dawsons award of damages but is not; they are both achieving the same common goal; putting P in the position they would have been if the K had been performed.*

- **McHugh J**
    - "*Where the breach of contract occurs after the plaintiff has incurred expense in preparing or performing the contract, the plaintiff's loss is ordinarily the difference between the **value of the benefits which it would have received under the contract**, as and from the date of breach, **and the expense which the plaintiff would have incurred, as and from that date, in performing its own contractual obligations**."*
    - **Example**: "*If a plaintiff has expended or incurred liabilities of $100 000 prior to breach and would have received $200 000 in the future if the defendant had performed its contractual obligations, the amount of the plaintiff's damages is the **difference between the $200 000 and the expenditure which the plaintiff would have incurred in performing its future obligations**. The $100 000 already expended or incurred is irrelevant*."
    - Essentially goes for **$B - $Y or; Benefits P would have achieved if K was performed – further expenditure required. Note that Brennan J used the $B - $Y as well.**

Question 2: assuming no contingencies, *prima facie* damages are **$1 561 612**

- $1 561 612: *net wasted expenditure – expenditure that would not have been recouped if K had gone through (- a loss) + return of forfeited security deposit + termination payments*
- (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**
    - This is the ordinary amount of damages that would have been recoverable – assuming no contingencies.
- *Examine as the separate "Interests"*
    - Expectation Interest: *prima facie* loss; **-$3 913 572**
        - Net expectation interest;
    - Reliance Interest: **$5 219 135** (aircraft and establishment costs).
        - in the sense of expenditure wasted as a result of BK.
    - Restitution Interest: **$113 000**
        - This could be classified as part of reliance interest; security deposit would surely not have been incurred except in reliance of the contract….
    - Indemnity Interest: **$143 049**.
- Calculate; (Reliance – Expectation) + Restitution + Indemnity
    - (5 219 135) – (3 913 572) = $**1 305 563** + (113 000) + (143 039) **= $1 561 612.**

Question 3: If The K was no longer *prima facie* a losing one and Amann was suing in the ordinary way for loss of bargain damages, how would this have affected the outcome?

- **Net expectation would be *positive* figure instead of a loss**.
- Cou**rt *probably* wouldn't have awarded further sum for an "even more valuable" contract**; McHugh J: "*… since it is common ground that, in the circumstances of the case, damages for loss of the chance are impossible to assess, Amann concedes that it could not obtain any expectation damages for that loss of chance*"
- **Still likely that the majority would have discounted the award by 20% due to cl 2.24**; Brennan J; "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the Full Court, would have reduced those damages*."
    - **can be explained that expectation interest and reliance interest are the SAME.**

Question 4: **examination of McHugh calculation of damages compared to Brennan J (Majority)**

Question 5: Look at "presumption of recoupment"; does it apply in every case where it is too tricky to calculate consequential loss damages?

- I.E. *Amann*; A are spending money on planes – all expenditure incurred would be covered by the consequential income received from the COA.
- or *CCC Films* where expenditure was incurred in order to exploit the right that was the property of the D – and from which *if all went well* the expenditure would be recouped…
- Doesn't mean that it would be applied in every case where this happened.
    - *Ti Leaf Productions Ltd v Baikie* (2001) CA.
        - **Facts**: were going to make a film – martial arts; T entered K to rent part of farm from B. Problems arose. New K – apparently included good faith case about not making public comments criticizing each other; B made public comment in Timaru paper.

        - **Lead to Ti Leaf's investors pulling out**! This was apparently foreseeable… Lots of money was expended with no film produced… T wanted over $1m for costs incurred on pre-production work.
        - **Argument**: Presumption of Recoupment.
        - **T loses at HC** – Judge (Pankhurst J) said that the project had lost its way; would not have been completed etc. Expenditure would have been wasted regardless. BUT there *was a presumption of recoupment* that had been rebutted.
        - **T appeals to CA**: Arguments (1) upset findings of fact, (2) not only is there a presumption of recoupment BUT B's must show *beyond a reasonable doubt* that they wouldn't have profited. (3) in effect B are *estopped* / precluded from arguing that they wouldn't have made a profit.
        - **CA outcome**: one thing to put onus on B, another thing entirely to do so on such a highly speculative business move.
- What is the difference between this case and *Amann*?
    - The expenditure would not have been recouped through the K with the B's – that was a mechanism; would not have recovered the expenditure.
        - the anticipated profit earning venture was not through the K with B.
    - one way of explaining this is to say; if the film had been completed they wouldn't have "made a profit" from the *tenancy* agreement.
- Look at *Yam Seng*;

Question 6: Re. Professional negligence situation;
"…*the amount of wasted expenditure will be the appropriate measure of damages in such a situation because it, having been established that the client would not have entered into the subsequent contract if proper advice had been given, it is not sensible to speak of loss of profits*."

Question 7: Difference between Brennan J figures and Trial J figures (used by Mason + Dawson)?

- "*if the contract had continued, Amann would have been liable to pay another $368 479 in respect of the acquisition of aircraft*."

Damages Calculation

Long way; calculate **Promised Position – Actual Position; PP – AP**
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*

Short ways (Brennan J From *Amann*); $B = $X + $Y +/- $ Z

B = total benefits/ revenue (K price) of the K for P
X = Prior expenditure to repudiation/ issue point: pre-breach expenditure, wasted expenses.
Y = Future expenditure to achieve the K
Z = the amount of expected **profit** (**if +**) or **loss** (**if -**)

Method 1: B – Y

Method 2: X +/- Z
Z = (B – X – Y)

Either Method;
Deduct off-setting gains (Mitigation)
Deduct value of any part performance by the Defendant
Consequential loss; Addition of costs caused by BK – legal costs etc.

Damages Calculation Questions in Workbook

Question 1: B = 100 000, X = 0, Y = 90 000, Z = +10 000

- B – Y = 100 000 – 90 000 = $10 000 damages
- (ii) X +/- Z = 0 + 10 000
- Damages = prima facie $10 000 (without interest)

Question 1 *extension*: P moves on immediately to a new project; would this affect the damages *prima facie*? Is this mitigation? Could argue it's an independent decision, but if this was so – where P could have not entered the same K.

- Dealer contracts to sell car for 50 000; dealer profit is 10 000. Buyer buys car. Dealer orders car in reliance. Buyer repudiates. Whether the dealer could recover lost profit depends on further facts:
  - Whether supply exceeds demand – if so then dealer can recover lost profits; loss value seller.
    - Truly a loss of bargain *even if a later sale comes up*
  - However, if demand exceeds supply, then the second sale is a true substitute – dealer was never going to sell, and no loss of bargain could be recovered (only nominal damages).

Question 2: B = 100 000, X = 20 000, Y = 70 000, Z = 10 000

- (i) B – Y = 100 000 – 70 000 = 30 000

- (ii) X + Z = 20 000 + 10 000 = 30 000.
- Prima facie, damages before mitigation = $30 000

- Mitigation = $10 000 pre-payment, + $5000 salvaging
- Damages – Mitigation = Real Damages
- = $15 0000

Question 2 *extension*: P; K with D to build a building – 100 000. D Repudiates after P has spent 20 000. It would have cost P a *further 90 000* (on top of the original 20 000); a bad bargain. D has paid nothing and P cannot salvage anything from the 20 000.

- Long way;
  - PP = 100 000 – 110 000 = -10 000
  - AP = 20 000.
  - PP vs AP; -10 000 – 20 000; 20 000 + (-10 000)
    - Damages prima facie = $10 000.
- Quick way.
  - *B – Y*; 100 000 – 90 000 = $10 000
  - *X – Z*; 20 000 – 10 000 = $10 000.

Question 3: Produce Question; we need to *assume* the anticipated total value of $1600. We will also assume she has *paid* for everything else (1000 for produce, 150 for transport, 100 stall, 100 staff, 50 disposal).

B = 1600, X =1400, Y = 0, Z = +200

- Long way; gross expected profit of $250 – her *actual* position is she has lost $400...
- (i) B – Y; 1600 – 1000 + 50 (disposal) = $650
  - B = all expenses currently incurred + all future expenses +/- profits expected.
- (ii) X + Z; = $650.
  - X = 150 + 100 +100
  - Z = 250
  - + 50 breach related costs

If the buyer HAD already paid for the produce, would receive more. In this case, would receive compensation for the expectation, reliance, indemnity, and restitution interests.

- Expectation; 250 net profit
- Reliance; 350
- Indemnity (compensation for other out of profit losses); $50 for disposal
- Restitution; $1000.

In practice, the $1000 would be reliance interests as it was a pre-requisite to complete the Contract.

- (i) B – Y; = 1600 – 0
- (ii) X + Z; = 1400 + 200
  - X = 1000 (expenses) + 150 (transportation) + 100 (market costs) + 100 (wages)
  - + 50 (trash)
- Prima facie damages will equal $1600.
  - This makes sense – Seller has *received* 1000, buyer has *wasted* other money.

Question 3 ***variation***: what if Seller can show that due to a flux of prices, the total receipts for the day would only have been $1200 rather than $1600. This evidence is established. Buyer concedes this, but still claims "in the alternative" damages for wasted expenditure including disposal costs. Assuming she hasn't paid the price of the produce, Buyer attempts to get $400 (150 + 100 + 100 + 50).

- Earlier we would have given her $650, now her total revenue has fallen by $400… give her $400 less in damages.

- **Long way**; PP = -$150 (B = 1200, X = 1350 – 1000 + 150 +100 + 100), AP = -$400. So compensation of $250.
- (i) B – Y; 1200 – 1000, + 50 (disposal costs) = $250
- (ii) X – Z; 350 – 150 + 50 = $250.

- Reliance interest was *historically interpreted as restoration to pre-K position*; there is no entitlement in BK to be restored to the K – the wrong is not the formation of K, the wrong is the BK: we are compensating for harm done from the failure to perform.
    - Courts will never knowingly put a P in a better position than whether they
- *If there were truly a reliance interest, she would receive $400 – would put her in a better position than if the K were performed. She has no entitlement to this position.*.

Question 4 *Variation*:

- K is repudiated before anything is invested; B – Y; 100 – 80 = $20
- BUT if P has already spent 40 of (X+Y) then need to award wasted expenditure plus net profit – as Mason + Dawson prefer.
    - Mason + Dawson; would award
    - X + Z; 40 + 20.

Question 5: B = 100 000, X = 10 000, Y = 55 000, Z = (B – Y – X) = (100 000 – 10 000 – 55 000) = 35 000

No possible mitigation costs

- (i) B – Y; 100 000 – 55 000; = $45 000
- (ii) X + Z; 10 000 + 35 000 = $45 000

- (iii) (long way)
  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*
    - PP = 100 000 – 65 000 = 35 000
    - AP = -10 000.
- PP – AP = 35 000 - -10 000; 35 000 + 10 000 = $45 000

- Therefore, regardless of method of calculation, prima facie damages without interest are equal to $45 000.

Question 6:

- K1 (initial K): B = 80 000 (2000 x 40p.unit), X = 0, Y = 30 000 (2000 x 15p.unit), Z = +50 000

- K2 (Changed Price of Production): B = 80 000, X = 0, Y = 42 000 (2000 x (15 + 6)), Z = +38 000.

- K3 (at repudiation) B = 80 000, X = 9000, Y = 33 000, Z = 38 000.
    - (i) B – Y; 80 000 – 33 000; Damages are prima facie $47 000.
    - (ii) X + Z; 9000 + 38 000; Damages are prima facie $47 000
- Mitigation = $12 000 (8000 advance payment + 4000 salvage)
- Therefore, damages are = $35 000.

  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*
    - PP = 80 000 – 42 000 = 38 000
    - AP = -9000 + 12 000 = 3000
- PP – AP = 38 000 – 3000 = 35 000.

- **Explanation**:

Question 7:

- K1 (initial K): B = 140 000 (2000 x 70), X = 0, Y = 85 000 (10 000 + 75 000 at 37.5 p.unit), Z = 55 000
    - Change of price; Y now = 77 000 (10 000 + 67 000), Z = 63 000
- K2 (at repudiation); B = 140 000, X = 67 000, Y = 10 000, Z = 63 000.

- Mitigation
    - 20 000 advance payment + 50 000 – (salvage K value) = +70 000
    - consequential losses = 3000 (storage) + 5000 (agents fee) + 5000 = 13 000.
- Total mitigation change = -70 000 + 13 000 = -57 000

- Damages (first instance)
    - B – Y; 140 000 – 10 000 = $ 130 000, - 57 000
        - 73 000
    - X + Z = 67 000 + 63 000 = $130 000
        - 73 000

- **Explain**: prima facie damages are $73 000.

Question 8:

Note; here it is the person *providing* the service. Because we cannot conceptualize the loss here – it's a fountain – it is unclear as to what that is worth.

- K to A: B = 5000, X = 2500, Y = 4000, Z = (B – X – Y), = -1500
- K to B: B = 6500, X = 2500, Y = 2500, Z = 1500.

  Long way; calculate **Promised Position – Actual Position; PP – AP**
  PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
  AP = *sum of costs incurred + any additional breach related costs*

- **PP** = 0 – 5000
- **AP** = -6500;

- PP – AP; (0 – 5000) – (-6500); -5000 – -6500; = $1500
- *prima facie damages will be $1500. Note that essentially B is getting an above market deal in the first place AND damages to restore him to that position!*
- ***Question: how to calculate via Brennan J formula***?

Question 9:

Long way; calculate **Promised Position – Actual Position; PP – AP**
PP = *total revenue/ benefits from full performance – expenditure to earn benefit/ revenue*
AP = *sum of costs incurred + any additional breach related costs*

- **PP** = 0 – 30 000
- **AP** = -(33 000 + 3000 + 5000) = -41 000

- PP – AP; -30 000 – -41 000; = $11 000
- *Prima facie damages will be $11 000*.

Tutorial Questions – tutorial worksheets

Question 3:

Initial K;

- B = (500 x 65) 32 500. X + Y = 25 000. Z = 7 500.

K at repudiation; *things to note; manufacturing price goes up, Z goes down – now prima facie a losing K*

- B = 32 500, X = 10 000, Y = 25 000, Z = -2500.
- Mitigation
  - 10 % K = 3250 + onsell materials = 2000
  - total mitigation = 5250
- Brennan
  - B – Y – Mitigation
    - 32 500 – 25 000 – 5250 = $2250
  - X + Z – Mitigation
    - 10 000 – 2500 (losing K) – 5250 = $2250
- Long way
  - Total mitigation is equal to $5250 – loss is equal to 10 000 - $5250 = $4750
  - losing K, would have lost $2500
- PP – AP
  - PP = $-2500, AP = $-4750
  - -2500 - -4750
  - = $2250.

Question 4:

Initial K; B = (500 x 60) 30 000, X + Y = 20 000, Z = 10 000

K at Repudiation; dollar changes; so (X + Y goes down), Z goes up.

- B = 30 000, X = 17 500, Y = 0 (K was completed) Z = 12 500
- Mitigation = 13 000 (income)
    - Income of 15 000 (replacement sale)
    - additional *losses* of $500 (transportation)
- Brennan J
    - B – Y – Mitigation
        - 30 000 – 0 – 13 000
    - X + Z – Mitigation
        - 17 5000 + 12 500 – 13 000
    - Both routes; prima facie damages = 17 000.

<u>Question 7</u> (a)

B

19 000 000

X

500 000 +
4 500 000 (net loss on aircraft – i.e. 6 000 000 expended – 1 500 000 residual value)

= 5 000 000

Y

3 025 420 (fuel)
3 600 000 (salaries/ wages)
398 101 (remaining pre operational expenditure)
4 000 000 (maintenance)
400 000 (facility expenses)
408 000 (legal expenses / miscellaneous aircraft related expenditure)
410 000 (insurance)
368 479 (acquisition)
3 390 000 (borrowing costs)

= 16 000 000

Z

= (B – X – Y)
= 19 000 000 – 5 000 000 – 16 000 000
= -2 000 000
prima facie a losing K

Consequential losses

100 000 (security deposit)
150 000 (termination payments)

= 250 000

B – Y

19 000 000 – 16 000 000
= 3 000 000
+ 250 000 consequential losses

X + Z

5 000 000 + -2 000 000
= 3 000 000
+ 250 000

prima facie recoverable damages will be $3 250 000.

Question 7(b)

Mason CJ + Dawson J

damages
5 000 000 (X)
+ 250 000 (consequential losses)
= $ 5 250 000

Explanation

Endorsed the presumption of recoupment; Amann was entitled to damages for BK re. "wasted expenditure" (Reliance damages). Because of the unquantifiable "strong" prospect of renewal, D couldn't discharge the probative onus on them to show Amann's expenditure was wasted.

Viewed Full Federal Court finding of 20% chance of valid cancellation as statistically negligible – did not want to impugn damages.

Because of these contingencies, neither $B nor $Z Could be calculated.

Brennan J (Majority)

Damages
would have awarded the same as Mason and Dawson CJ.
$ 5 250 000.

Explanation

Treated *very* similarly to Mason and Dawson but reasoned that prospect of renewal was an *implicit*, "substantial" but unquantifiable benefit. The COA was unable to discharge onus of proving that

$B – Y < X$

Brennan J treated the 20% chance of cancellation relevant to the *value* of B but this still didn't enable the COA to discharge onus

$0.8(B – Y) < X$.

Toohey J

Damages

awarded 50% of the Majority.
O.5(5 250 000)
$ 2 625 000

Explanation

Disagreed COA was under probative onus to show K was losing one; instead an evidentiary onus – this will be established due to prima facie loss of $2 000 000. Thought that "fair compensation" was to consider the contingencies (chance of termination + chance of renewal) and half the majority.

Gaudron J

Damages

awarded majority
$ 5 250 000

Explanation

Agrees with Toohey that there was only an evidentiary onus on the COA – but didn't balance contingencies. Because she thought that the aeroplanes would have been worth more than their book-value at the end of the K, impossible to say that the K would have been profitable.

Despite finding an evidentiary onus re. profitability, was content to simply agree with Mason and Dawson re. possibility of valid termination.

Deane J

Damages

80% of majority award
0.8 (5 250 000)
= $ 4 200 000

Explanation

Chance valid K under cl 2.24 was not solely relevant to determination of benefits; thought that presumption of recoupment + chance of cancellation was an 80% probability that Amann would recover its wasted expenditure (reliance damages)

This was because;

If the K wasn't renewed, and planes *couldn't* have been sold at above book value, then K would have been unprofitable.
But, couldn't quantify the commercial advantage Amann was in due to preparation etc.

AND if COA had used cl 2.24 Amann would have received nothing; thinks this is a superimposed risk over the whole K.

McHugh J

Damages

prima facie damages
3 000 000 + 3 390 000 + 100 000
= 6 490 000

0.8 (6 490 000) = $5 192 000, + 150 000

$5 342 000

Explained

Awards *expectation* damages and treats planes as pre acquired *entirely*. Rejected presumption of recoupment as contrary to both commerce and the trajectory of evidence law. Reliance damages could only be justified if D's breach made it too uncertain to ascertain whether P would have made net profit; this couldn't be satisfied.

Therefore, assessed damages through orthodox loss of bargain damages – compared actual position to position if K was performed; to this McHugh added the borrowing costs as a pre-acquired expense.

Consistently with Deane J, McHugh then deducted 20% chance of valid K cancellation (pursuant to cl 2.24), however did *not* reduce termination payments – presumably because they were consequential to the BK (note this actually is not consistent with law).

7(c); impermissible to take into account prospect of renewal and that there was no justification for reversing the onus of proof; what would this do to Mason and Dawson, and Brennans' judgment?

- Brennan J
  - $B would only include remuneration payable by the commonwealth; further consequence that Amann could only claim for damages for wasted expenditure rather than loss of profit; there would have been no principle of recoupment at all.
    - **P would have needed to establish how much better off Amann would have been; $1 561 612 in the real case; on these altered facts would be 3 250 000**.
    - would this be discounted? Yes.
      - No longer impossible to undertake an assessment of damages
    - "*Had Amann borne the onus of proving its damages as expectation damages, the assessment would have had to allow for the possibility that the power to terminate under cl 2.24 would have been exercised. That possibility, assessed at 20% by the full court, would have reduced those damages*."
    - Damages would thus be $2 600 000.
- Mason and Dawson JJ
  - Damages would stay at 3 250 000.

Misrepresentation

Primary focus on MRP – some on BK. Some more on damages.

Starting Point

During negotiations and at K formation, the parties will make statements / promises to each other. Some statements will be incorrect; some promises will not be honored – the "victim" of this will want a remedy.

- either to escape K or claim damages (compensatory) for the false statement or promise not honored.
- whether there is a remedy (and which one) will depend on other things – the status / category the law attributes to the particular statement or promise;
    - what category does it belong to;
    - what legal status does the statement or promise enjoy?

Distinction between Incorrect Statement and Broken Promise

incorrect statement is, in law a misrepresentation.

- Statement: ***relating*** *to a verifiable (past or existing) fact that is* false;
- These also be promises in the sense that the representor accepts contractual accuracy for the statement; i.e. may be such a promise as the statement of intention to do something.
    - These are **terms of the contract**
- **Example**: House is on concrete foundations, has a new roof.
- **Example**: (Past fact); turnover of the business last year was $X.

Broken promise

- Promise: *referring to statement of intention that amounts to an undertaking to do or refrain from doing something in the future*.
- A promise to do something or refrain from doing something is not a breach of contract in the sense that failing to do it is a misrepresentation.
    - **Example**: D promises to do X; then doesn't.
    - If that promise wasn't honored, as such wouldn't call it one.
- A promise to do or refrain from doing something is only a representation to the extent that the promisor is implying their intention;
    - Can say that the *misrepresentation* is to the extent of the purported intention.
    - The statement might be a misrepresentation if the Promisor *never* had the intention of carrying out the promise.
        - On this case, is *fraudulent* the misrepresentation is the *promisor's intention*.
    - However, it is rare that the promisee can establish this dishonesty. Usually, the promisee wants to enforce the representation in this instance rather than receive a remedy for the misrepresentation of the state of mind.
    - In order to succeed in action for a breach of promise, the promisee must establish that it is a contractually binding term – that it is part of the K

Historical Treatment; finding a promise to be a misrepresentation

Historically – OBJECTIVE test; is it reasonable to infer that promisor intended to be bound (*assuming legal responsibility for the promise*). If the promise is **sufficiently unequivocal** and is **proven**, then it is likely the court will find intention to be bound.

Historic obstacles that CL placed in the way; **Parol (*extrinsic*) Evidence Rule** (still exists in diluted form): ***oral*** *evidence is inadmissible to add to, vary or contradict the terms of the written contract.*

- Where parties didn't record the promises in their written agreement; law assumes that *only written statements are intended to be binding*.
    - NB DMAC thinks this is a misrepresentation of the contractual formation process.
- In many cases this has prevented "**just outcome**" i.e. Court believes the P but refuses to accept evidence and thus tacitly accepts *fraud* on the part of D.

Equity comes to the rescue to some extent; **Equitable Remedy of Rectification**:

- Where oral promises were "forgotten" Equity would provide relief via **rectification** – i.e. puts it right. Would be unconscionable for P to seek to enforce K that doesn't reflect true intention of the parties.
- Thus notwithstanding the absence of the promise from the writing the courts would simply say "this is a part of the K" and will write it in. ***Where a promise was not included in the K due to a mistake, the court would write it in***

There were also many cases where promises were ***deliberately exempted***. One of the mechanisms to ensure enforcement was the **collateral contract**; whereby they inferred the separate promise was treated as a 2nd K – the consideration for which is the primary K.

- **Example**: oral/ informal promise (collateral K) and sale of land (principle K).
- Courts treated this as a way to get around Parol evidence rule.
    - Because they aren't adding terms – the written K contains all of the terms relevant and this oral K is separate.
    - Totally artificial – parties only intended one K. "*We are not adding terms; the second K is merely consideration for the primary K*."

But later, found that the **PER** was difficult;

- Later the court recognizes that don't need to invent a collateral K to get around **PER**. No reason in principle why parties cannot have a partly written and partly verbal K – unless there is a statutory requirement; **example** the sale of land (Property Law Act).
    - Courts got around **PER** by saying it only applied re. written K.
    - So the initially strict rule was boiled down to a presumption that if a document looks to be a complete record of the whole deal it should be treated as the whole deal.
    - BUT this can be rebutted – once court hears the evidence and believes it that promises not in the writing existed and were objectively believed and represented then it would take this into account.
- **Example**; passage of goods for ship at sea – on top deck; prior to K owner of the goods obtained *unequivocal promise* to keep goods *below deck*.
    - Nowadays, courts can say "will not allow writing to overrule what was said because this is the real K."

Entire Agreement Clauses

Position in the UK; Entire Agreement Clause – i.e. "Everything is contained within this written contract". Such clauses are conclusive, ***but*** can be **circumvented;** (**1**) Through a collateral contract – the extra terms consist of K2, (**2**) Mistake – once the oral terms have been clearly proven, there must be a mistake in the written contract.

Position in NZ re. Entire Agreement Clauses;

- **section 4 Contractual Remedies Act**; will only be conclusive where it is reasonable to treat the clause as conclusive and all the circumstances; look to
    - **Value** of the transaction
    - **Bargaining strength** of the parties.
    - **Legal advice** received by both parties.

Silence is not a misrepresentation – can strike a good bargain even when you know the other party doesn't know everything (Exceptions: some K's need to disclose full knowledge – such as Health Insurance K; need to disclose all medical evidence; medical K are K of the "utmost good faith")

CL position in NZ prior to Statutory Reforms (Contractual Remedies Act **and** Fair Trading Act).

Two dominant types of Misleading statements; (**1**) statements incorporated into K, were ***terms*** (**2**) unincorporated statements were ***mere*** **representations**; no right to relief unless P could show fraud or dishonesty – in particular no right to damages - had to show misrepresentation was a term of a K.

- Obstacles (above) get in the way. Gave rise to problems as well…

Incorporated Statements – Terms of the K

Gave right to relief via K measures;

Mere Representations – 3 categories

Innocent misrepresentation, common law wouldn't allow enforcement or remedy; Equity softens this through *rescission*.

- Equity softens the harshness of the common law – shouldn't allow the misrepresentor to enforce a K; either will deny Specific performance or more commonly allow ***rescission***. Unconscionable to allow enforcement.
- **Curious**: could get the "drastic remedy of rescission" for a ***statement*** where had it been a ***term*** would only have given a right to damages.
    - Essentially, the remedies became imbalanced – DMAC thinks this might have contributed to the need for statutory reform.

fraudulent misrepresentation; rescind K and gain damages for the tort of deceit.

- Situation 1; lie – knowledge of the falsity of the statement
- Situation 2; absence of belief in truth (don't know if it is) but don't know its false either.
- Situation 3; Recklessness – not caring either way.

Negligent misrepresentation; *Hedley Byrne v Heller* (1963) HL.

- Initially no distinction was drawn between purely innocent misrepresentations and *negligent* misrepresentation. *Hedley Byrne v Heller* clarified this.
- A negligent misrepresentation is a:
    - representation made without belief in its truth,
    - that is in breach of DOC owed to representee.
    - within a special relationship
- *Hedley Byrne* wasn't concerned with a "special relationship" arising through a K – it was concerned with a different special relationship.
    - wasn't clear whether there was a special relationship between 2 contracting parties.
    - this has been clarified now.
    - Still requires a *special relationship*
- *Example*
    - Property developer makes statements re. floor space/ materials re. apartments being built – it is reasonable to infer that the PD is *assuming responsibility* for the accuracy of the statements!

Terms

Warranty;

- A minor term of K – there is no basis for *cancelling* the K as it is relatively minor. V can only seek damages; but can do so for any breach.

Condition / essential term;

- An essential term "going to the root of the K"; V can get both damages and rescission
    - this is because a BK in this sense deprives V of the real benefit of the K.
- Example: Car dealer sells a "new car" V finds out that for short periods it was twice owned by other owners. Court is likely to say that it is a fundamental term that it is new. So terminate K and claim damages. Damages might be; amount over and above the purchase price to obtain a new model.

Innominate Term/ Intermediate Term/ Hybrid Term/ Honk Kong Term…;

- Some breaches may or may not
- Example: Ship is chartered – term of K that the ship is seaworthy; that term might be breached in minor ways (i.e. lack some safety stuff, or some documentation temporarily), OR it might be a ***serious*** breach (i.e. a rusty hull which will split); in the latter instance this has very substantial effects.
    - NOTE this is why the COA termination was wrongful in *Amann* – essentially they terminated too quickly.

Damages in both types of subcategories are different – the remedy has different objectives.

Unincorporated Statements

- **NM** and **FM** are both ***torts*** – the V is complaining about harm caused through reliance on the actionable and wrongful misrepresentation;
    - **reliance damages?**
- **we ask; how much worse off is P due to the wrongful conduct.**

Incorporated statements

- this is damages for BK – where the wrong is the breach of the promise;
- V is not saying they have been caused a reliance harm, rather that they haven't obtained the position they would have if the misrepresentation were true.
    - **Expectation damages?**
- Thus, for breach of a term we ask how much better of P would have been if the K had been performed. The right infringed is for an interest. V is entitled to demand the financial equivalent of the position they would have been in if representation was correct.

Note; **<u>statements that have no legal consequences</u>** – a "mere puff" exaggerated commendation that nobody could take seriously; NB is this ***subjective*** *or objective – what about older people? the feeble minded? the morons that hold back society?*

- Some of the older cases re. Mere puffs wouldn't be taken the same way today!

Statements of **<u>opinion</u>** will have no legal consequences; although they necessarily represent a statement…

Procedure; P might (a) try and establish *fraudulent misrepresentation*, then *negligent misrepresentation* or finally *innocent misrepresentation*.

- FM = rescission and damages
- NM = rescission and damages
- IM = rescission.

NOTE talking about rescission via Mere Representation in the sense that the entire K is entirely set aside and done away with; deemed never to have existed – this is because *equity* sees the K as not agreed with. Compare to rescission used in the **term** sense where it means to simply set aside the K – no obligation to continue.

Clef Acquitane **example – Art dealer (page 139)**

A offers to sell to B a Manet for $1m – B is induced to purchase thinking he can sell for $2m. Painting is a fake worth $1000.

- Damages in deceit is; ***the difference between the price paid and its actual value*****.**
  - $1m - $1000 = **$999 000 in damages.**
- Damages if a contractual warranty is given is; ***the difference between the price paid and the value had it been genuine*****.**
  - $2m - $1m = **$1m in damages**.
  - ***Problem here is that he has taken into account the price paid – we compare the actual position with the purported position*****.**
  - ***He should actually receive $2m - $1000; $1 999 000 in damages*****.**

Price paid in these cases should not be considered if there is a warranty!

Sometimes if you are calculating K damages the price will come into it; **Example**

A offers B house for $2m; A reneges when house values increase by 20-30%. B sues for damages after accepting B's repudiation. B pays $2.5m to acquire house in the same area.

- **The Damages B will receive will be the difference between the promised position and the position he ends up in – so $500 000.**

Vary facts; Even if the Manet was *genuine* painting was a lesser work; market value was only $700 000

- Award in Deceit would be: 1 000 000 – 1000; 999 000.
- Award under K warranty: 700 000 – 1000; $699 000 to put him in the position he would have occupied.
- **Here B has made a *bad bargain***

A offers to sell to B a Manet for $1m – B is induced to purchase thinking he can sell for $2m. Painting is a fake worth $1000.

- **Variation; proved that B would have bought a MONET *instead of* the Manet; on sale at $1m and it can be established that the market value was $800 000; in other words, if this K hadn't been entered into B would have entered *another* losing purchase. Look at Yam Seng case.**
- Damages in deceit is; ***the difference between the price paid and its actual value*****.**
  - $1m - $1000 = **$999 000 in damages; he would have lost $200 000 on the alternative transaction so simply remove $200 000 from the prima facie $999 000 damages.**

We are only concerned with alternatives in tort damages.

Contractual Remedies Act 1979

Misrepresentation is not defined in the Act; we take it at its CL face value – a statement that purports to be fact.

CRA 1997 Overview

Purpose was to rationalize and simplify the common law by **providing the same remedies for MR and BK**. Damages for **MR** are recoverable under the Act on the same basis as for BK; provided for in **section 6** (in many respects is the key provision of the act).

The effect was to ***abolish the distinction between Mere R and TK***. Process of **assimilating** these remedies is in **sections 7** and **8**; enact a set of rules governing ***Cancellation* of K** and **requisite criteria to be satisfied** – these criteria are the same for MR and BK!

Section 7; Statements giving rise to the right to cancel.

Under **section 9** the **Courts are given powers of wide relief** to grant remedies dependent on the "justice of the case".

- Restitution matters come down to *judicial matters*.

Statements giving rise to damages - categories

- Statements with no legal consequences.
- Statements giving rise to damages; ***important***; no need to prove that a representation is a TK – under s6 can get damages as if it was a term. For practical purposes abolishes the difference between terms and representations.
    - Misrepresentation
        - either Fraudulent or Negligent.
    - Breach of a term
        - We still have some statements remember that will be "promises" to do or refrain from something. O
        - Or alternatively something *in the written K* – i.e. We hereby warrant that the Businesses profit last term was X
        - However, P still needs to show that this was part of a K – this can be hard; essentially means that the **CRA97** may give rise to scenarios where promises result in a lower tier of punishment…
    - Breach of a collateral K
        - as an alternative to a Breach of Term, can use collateral K – gets around the PER.
            - *so PER is somewhat redundant?*

Section 6 of CRA97

Summary

- **Abolishes actions for FM and NM (can get per se damages for an IM)**; removes the need for P to show MR – don't need to categorize it as either a term or collateral K! subject to **ss4 and 5** P has statutory right to ***damages*** regarding an innocent MR made by the other party.
    - Previously, for MR could only receive *rescission* – no right at all to recover damages.
    - Under the **CRA97** the law is entirely different – remedy is damages.
        - Right to Cancel has been restricted.
- Actionable MR ***per se*** gives right to **KD;** no longer necessary to establish BK, no longer possible to bring tort actions. **Philosophy**; where D makes MR that induces P to enter K, should be responsible for that irrespective of fault.
- Removes "take it or leave it"; no longer needs to decide between K under-compensation or drastic rescission.
- Necessarily, because IM, FM, NM were amalgamated then the damages were changed to *TK* damages (i.e. BK) – the **tort of deceit** was essentially abolished.
    - measures were seen as important to help simplify the law – *note that nobody told the Parliamentarians of this act when they Passed the Fair Trading Act later*.

Conditions of Liability/ action;

- (1) show there was an MR
- (2) that MR (1) was made "by or on behalf of" another party to K (D or D's agent)
- (3) that MR (1) induced K entry.

Recover *Contract damages*; Damages under Section 6 is to be assessed as if the MR were *T.K*; But can no longer sue in tort.

- Nowadays, victims of MR usually have the ability to pursue the **Fair Trading Act** remedies.
    - There is a "statutory tort" under the FTA; so can't mislead or deceive – will need to pay damages; court can award damages for "loss suffered"
        - loss suffered is essentially the *tort measure of damages*.
    - Not uncommon for people to pursue both damages under **s9 FTA** and **s6 CRA97**.

Section 6(1)(b); cannot recover damages from "***that other party***" for **deceit or negligence re. MR**:

- Suppose the MR is by an *agent* who made the statement NM or FM;
    - (1) only the ***Contracting party who is responsible for the MR who is liable*** to pay damages under s6, as if the MR was a TK.
    - (2) only the Contracting Party who cannot be sued in Tort.
        - **personal Tort liability of Agents and 3rd Parties is *unaffected* by s6**.
    - Example
        - Real Estate Agent continues to be liable for FM or NM. Can't sue the agent under the **CRA97** – they aren't a *party* to the act; but you can sue them in tort.
        - Real Estate Agent's MR's make the *vendor* liable
- Liability may arise from a statement not made by the party, but by its agent.
    - **Section 6(1)**; MR "***by or on behalf of***" another party.
    - Real Estate Example Continued:
        - So a Real Estate agent statements that are FM or NM, may make the *vendor* liable in damages payable to the purchaser under s6. So Vendor can be sued for NM or FM by the purchaser;

    - So agent might be ordered to indemnify the Vendor if it is the agent's fault; so the agent has a fixed liability in quantum with the damages.
        - what about if the Agent is bankrupt?
        - there are examples of people going bankrupt for the FM or NM of their Agent.
    - The position would be reversed; if the Vendor passed on MR to agent, and agent became liable the Vendor might need to pay.
- Issue: "innocent misrepresentation made negligently"; seems to be an oxymoron
    - how can we have "innocent misrepresentation" *fault*.
    - At CL all non-fraudulent MR were treated as innocent; there was initially no remedy for IM until *Hedley Byrne*.

Differences between Contract Damages (KD) and Tort Damages (TD)

KD are designed to put P in the *post-K position* (forward looking!); P is being compensated for loss of bargain damages. This is assessed through **Purported Position – Actual Position.**

TD are designed to achieve *restitutio in integrum;* to put P in the pre-tortious-wrong position (looking backward!) and compensating for P's "**out of pocket losses**". This is assessed through **Expenditure – Actual Value**.

Recovery of Tort damages vs. Contract Damages under s6 CRA97 – the K measure

1. P will recover greater damages under **s6 CRA97** where, had the **R** been true his *assets would have increased or situation improved*. In this sense, **s6** enables a P who hasn't suffered a loss to be put in position he would have been – thus obtain benefit. ***Look to DMAC criticism 2; this can result in P being overcompensated at the expense of D***.

- Example: P is induced to buy land – NM – by D's *now insolvent* real estate agent; P buys the land for 100 000; the land is still worth 100 000 but if the **R** was true, land would have been worth 200 000.
- in the absence of a proven lost opportunity, P would have recovered no damages under tort measure, but now recovers $100 000 under KD in s6.
    - Now, may not be an unfair burden – at CL if P could establish that MR gave rise to Collateral K. However, collateral K would be with the *insolvent real estate agent*.
    - agents do not have authority to bind their principals contractually – REA only have *apparent* rather than *actual* authority; D could recover the damages he has to pay P from the agent, but agent is now insolvent.
    - this is a serious burden put on D
- P previously had 100 000 in the pocket, now has land! P previously had land, now has money! this money is now *gone*.

- Example: Art dealer; Where A Offers B a Manet. Says he will accept $1 000 000 for it – B thinks this is a good deal evidentially, if it were a real Manet would be worth $2 000 000; turns out to be a fake (duh). Evidence is established that unequivocally, A couldn't have known it was a fake; neither FM or NM, however it only has a value of $250 a pack of smokes and a box of

beers (highest bid that was made on it…). The K stipulates that none of the risk is on A regardless – call it an industry standard.

- B's interest of $1m – (250, beers and smokes) is retrievable.
- BUT s6 would put B in the position if the K was *real*; term of K… thus, A is liable to pay $2m – (250, beers smokes)
- ***Can it thus be said that in instances like this – where P has an "expectation" measure due to MR, that the effect of s6 acts as a "Warranty" did in the above fact scenario from Clef Acquitane?*** *Restitutio in integrum* seems valid ($1m – smokes/ beer and 250) but becoming B's guarantor less so…

Case Example: *Marlborough District Council v Altimarloch* (2012) SC.

- P will be worse off under CRA because the *tort* measure of damages is barred in instances where there are no K damages;
  Example: P buys D's house for 500k relying on D's MR that zoned for School; Actual value of the house is 450k and the reputation of the school is not such that the house would have been worth more if D's representation was true. As a result of buying the house, P is 50k out of pocket.
- Here, in tort could claim prima facie 50k.
- Under **section 6 CRA97**, there are no damages at all – court needs to ask how much better off P would have been if the MR was true, and here it makes no *financial* difference. This effectively means that D could lie provided that the value didn't change… ***Q: what about***
- TD; Price paid – value; 500 000 – 450 000 = 50k
- KG; Promised position – actual position? 450k - 450k; the 50k is *imposed by P*.
  - In this example, and the previous one, no damages are recoverable for the loss suffered even though the loss would have been avoided if the **R** was not made.

Case Example: *Capital Motors v Beechum* (1975) HC.

2. Sometimes, the "benefit of the bargain" will mean that KD and TD are the same; where the amount required to restore P to *status quo ante* is the same required to put him in the position he would have occupied post-K;

- either the K wouldn't have *improved* Ps resources or would have at least restored retention of status quo.
  Example: D induces P into purchasing a Painting; premise that it is a Manet worth 2 000 000; actually a Manet worth 1 000 000!
- Under **s6 CRA97**, P will recover the difference –1 000 000; this is ***also*** P's out of pocket loss!

3. P may not be better off under **s6** in situations where if **R** was true, position would be too uncertain/ speculative to examine or the contract measure is otherwise inappropriate – will only receive TD to *restitutio in integrum*.

- ***McRae v Commonwealth Disposals Commission* (1951) HCA.**
- ***Anglia Television Ltd v Reed* (1972) QB.**
- ***Commonwealth of Australia v Amann Aviation* (1991) HCA.**

4. P will recover less damages than under pre-Act law are those where he is induced to enter a losing K *irrespective of the MR*.

Example: P buys land from D due to **R**; pays $100 000 thinking that half the land is covered in timber; half of this only (quarter of the land is covered!) As a result, the land is worth $60 000. Evidence that if the **R** was true, land would be only worth $80 000.

- prima facie under TD; 40 000 (Price paid – value)
- Now, receives only $20 000 under KD (**s6 CRA97**);
    - This is literally half the expected amount recoverable under tort…

Variation to Facts; P can establish that but for D's MR, P would have offered and D would have accepted the land at price of $50 000.

- Damages in tort; price paid vs. price that would have been paid.
    - 100 000 – 50 000 = 50 000 *prima facie damages*.
    - P could recover the lost opportunity, even if the value of the land was the same as (or more than) the value of the land.
- such an award could be made, even if P had made a good bargain! Even if the land was worth $100 000; in which case Price paid and value are the same.
- *Clef Acquitane v Laporte Materials (Burrows)* (2001) EWCA.
    - Fraudulent K was a *lucrative K* but would have been even more lucrative without the MR. P recovered the price paid for goods in question and the lower price that P would have paid! ***Historically***, the court would have said that it was a K position – realistically was *restitutio in integrum*.

5. There could be instances where there is no *causal* connection sufficient to find **KD** – however; **TD** do not require an immediate causal connection between the MR and the loss; it is sufficient to show the MR has induced an *alteration of position* (such as K entry) and that loss flows from that altered position.

Example: P is induced to buy shares in co. by D's NM or FM that X (wealthy entrepreneur) has invested in co. P loses most of her money when the co. collapses; BUT it still would have collapsed even if X had invested!

- Can only pursue under **CRA97**; if acting for D can merely say – there is no *causal connection between MR and loss* – to put P in the position she would have been in if the MR were true doesn't result in compensation!

DMAC Criticism of Section 6

DMAC thinks that section 6 is misguided; 2 problems arise by the decision that damages were to be assessed by the Contract measure.

Critique One*: the essential complaint of most victims of MR is that they have been wrongfully induced to enter K they wouldn't have if the MR hadn't happened.*

- they want it *undone*; the complaint is not "you broke your promise and must put it right", rather that the complaint is that they wouldn't have entered the K.
- Thus want damages for *reliance on representation* rather than *putting the statement right*.
- QUESTION: is this not the same thing?

- Since **section 6** is about reparation, the compensation is to ***rectify the statement***; will often lead to greater recovery (sometimes to an unfair degree) than P would receive under **tort**.
    - But in other cases, they have prevented recovery at all.

Example – First case in NZ for tort that recognized Damages recoverable for NM made by one contracting party to another;

***Capital Motors Ltd v Beechum* (1975) SC.**

Illustrates the theoretical availability of damages for NM in *tort* where damages are greater than the amount recoverable under BK. If this case came up again, would not recover damages due to **section 6**; the effect of the Act is to deny damages in tort!

Facts: D bought a car on MR (salesperson) that car hadn't had previous owners – it actually had 6… claims damages for MR; **was awarded $100**… the difference between the Price Paid and its Actual Value. **P had paid $1400 for a car worth $1300**.

Appealed: Seen by **Cooke J**:

- *Hedley Byrne* applied in respect of NM made from one party to another.
- Prima facie looks like a case with simple application – look at $K damages. The $100 put him in the position he would have been in if the MR was true in *both tort and Contract* at surface
    - Tort; P paid $1400 for car with Market Value of $1300 (result of multiple owners)
        - Recovers the difference; $100, and puts him in the positon he would have been.
    - Contract:
        - Amount required was prima facie $100; PP-AP.

BUT the first owner was a rental car company – ***this*** was what had altered the value. Thus, if the action had been brought in breach of Warranty as a TK, P could only recover nominal damages – the MR was not the cause of the loss! **Even if the MR had been true and the car had only had 2 owners, P would still have suffered a loss**!

- In Essence, P had made a *bad bargain*. But he could still recover in Tort… Essence of P's complaint is that he wouldn't have bought the car without the MR; and consequently need to be compensated for altering his position.
- **Doesn't need to be a causal connection between MR and the loss which is required by K law**. So the decision of **Cooke J** was correct, but problematic regarding Contract damages. And in modernity, would have to pursue under **CRA97**.

DMAC Critique Two*: where the availability of (the equivalent of)* ***loss of bargain damages results in greater recovery than under the TD****, such damages could result in an* ***unfair burden being imposed upon D****. Here* ***s6*** *allows for a greater recovery than the original situation – where it would be rectified.*

- Effectively can be argued here that we are compensating for P's ***expectation*** interests and simultaneously in some instances acting as an *insurer* for P!

Case Example; ***Marlborough District Council v Altimarloch* (2012) SC.**

Facts: Representation was made by **agents who had no contractual authority** to bind principals contractually; **A purchased land in Marlborough at $2 675 000. Land was to grow grapes for wine**.

- note that this case was *complex*, and there were tortious elements as well.

- A had purchased after being **assured negligently by Vendor's** (1) **estate agent and** (2) **solicitors**, that the **land had resource consents permitting extraction of some 1500 cubic liters of water per day** for irrigation (a necessity for the grape vines). In reality, because the land had been subdivided **there were only rights for some 750 cubic liters**.
- Because of this the actual value of the land was $2 550 000,
    - PP = $2 675 000, AP = $2 550 000; and RV = $2 950 000 if R was true.
    - PP – AP = 125 000
    - These figures were found by the trial judge; but by the time it got to the SC, the cost of building the dam had *doubled*. The difference between AV and RV was *far higher*.
- **A found this out, went for damages under s6 of the CRA97**. Vendors were liable for the representations of their agents; despite being utterly innocent of the foul! Were thus technically liable for enormous damages.
- SC by 3/2 majority found damages of over $1m. **This represented the cost of purchasing *additional water rights* AND the cost of building a dam in which to store water for the future; these were the only ways of preventing future shortfall**.

Law

- Probably correct in the sense that **s6** makes MR part of the K.
- Compare to *Ruxley*? In this case it wasn't so wholly unreasonably expensive to build the dam.

David is concerned with D overcompensating V

- (**1**) Agents were joined as 3rd parties by the vendors ("defendants to the defendants"); and were actually ordered to compensate for the burden imposed on them. The agent was ordered to indemnify the vendors. Ended up needing to compensate for over 1 000 000.
    - Variation; the Agents were not worth suing – totally insolvent. Here the Vendors who were completely innocent would have needed to pay more than $1m out of their pocket… this deprives them of *40%* of a hard earned asset.. '
- (**2**) award of over $1m would be entirely unjust! CJ Elias referred to the disparity between the sum of $1m and the Price Paid differential and Represented value differential; the value of the land with and without the represented rights.
    - there is no doubt where CJ Elias' sympathies lay; she thought this was a "*Ruxley*" case where awarding the cost of cure was far too high.
    - **DMAC disagrees**; in Ruxley there was no difference between actual value and represented value. Here there was a substantial one. Perhaps, her sympathies would have been better directed to get parliament to reassess s6.
- Theoretically, the vendors were almost deprived of 40% of the asset. Historically, the purchasers would have been confined to their out of pocket loss – they wouldn't have been given the benefit of a bargain.

Section 7 of Contract Remedies Act 1979.

In line with objective of the act, the ability to terminate the K has been severely limited. The Act changes nomenclature from ***Rescission* to *cancellation***; the explanation (succinctly) is that **cancellation** only halts the K (neither party is required or entitled to perform the K further);

- Example: If bought a business, wouldn't be entitled to receive damages after *cancellation* – would need to go to court under Section 9
- ***So no absolute entitlement of what was conferred under K…***

Statements "giving right to cancel" are handled under **Section 7 CRA97**.

- (aside from Outright repudiation of K)
- Essential representations and TK;
    - expressly or impliedly agreed to be essential.
    - Example: Parties agreed that the truth of a representation is essential, then it is a TK.
- Misrepresentation and Breach having "substantial effects"
    - set out in the Act -

Fair Trading Act 1986

Introduction; 7 years after passing the **CRA97**, parliament passed this Act without even considering that is undermines its purpose!

Section 9 FTA; "*No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*."

- **Strict liability** – effectively a ***statutory tort***.
- Only **applies to conduct in *trade*** – essentially must be in a business context. Representation in selling a house or car on Trademe wouldn't be covered – if it was by a motor dealer or real estate agent, would be covered.
- One ***advantage*** under s9 FTA there is no need to show culpability in terms of either **Fraud or negligence**; this is a form of **Strict Liability Tort**.
    - One of the consequences of this section is that is has **essentially superseded the previously available common law action for MR**; do not need to show negligence or carelessness or breach of DOC as was necessary under *Hedley Byrne v Heller*.

***Civil* Consequences of contravening s9 is set out in section 43**;

- Essentially the court is given a wide discretion to make a variety of orders where a Person (A) has suffered damage or is likely to suffer loss from another person (B).
- These orders include (amongst other things)
    - subsection 3(f); order B to pay damages to A – compensatory *tort* measure for the losses incurred as a result of the conduct.
- an order can also be made relating to C – another person who was indirectly or directly knowingly concerned in or involved in a contravention of a relevant section
    - Effectively a person could be made liable to pay damages under s9 (including a vendor) who is not actually acting in trade….
    - for example: I supply the wrong information to real estate agent knowing it will be passed on to prospective purchases – I'm not in trade; but can be liable as an accessory under section 43(1)(d);

- this only applies where D has MR – knowingly takes advantage.
- DMAC is unconvinced

Section 45; conduct of servants or agents

- essentially conduct within the scope of an agents actual or purported authority is deemed to be the action of the principal.
- Q; is the conduct *acting in trade*?

Curious elements of the FTA remedial provisions;

- (1) During passage of the Bill, Parliament deleted a provision that would have conferred a statutory right to damages for loss caused by misleading conduct; **DMAC thinks this was a mistake**! As we essentially copied the Australian equivalent, seems that they read an Australian Textbook that discussed an overlap (both referred to damages) between s43 and the provision giving a separate right to damages. Read this as meaning that the section conferring the right to damages was superfluous.
  - **Direct Consequence; instead of statutory right to damages for loss caused by misleading conduct (as in Australia), s43 provides for *judicial discretion*, part of which permitted damages.** CA in NZ has stressed discretionary element to damages under s43; both ***whether to award*** AND its ***quantum***.
    - Ordinarily, P will get the award – but strictly it is within discretion, and thus enable more discourse.
  - There was no conscious decision to remove damages as a statutory right; it was a mere mistake.
  - **Q** is it not ironic that to prevent this overlap, might have created the same one in NZ…?
- (2) **No attempt was made to harmonize the new schemes of remedies with the reforms enacted through the CRA97**; seems that CRA and s6 right to damages were "*simply overlooked in the rush to copy the Australian Act* – DMAC"
  - consequently, there are many situations where P will have **alternative remedies** under s6 of CRA and s9 of FTA.
    - Process; usually court works out relevant damages under either and the plaintiff chooses.
  - Undermines the holistic purpose of the CRA redefining the area of law.

Initially contentious area – measure of damages under s9

- In many of the early cases induced Party to enter into K with representor (or 3rd party**); question arose whether the Party was**
  - **Entitled to be put in the position they would be if the representation was true (KD/ expectation loss/ loss of bargain damages**),
  - **or the alternative view under which the award was limited to reliance loss (TD/ compensatory for the harm done**).
- DMAC thinks this should be a non-issue; examining the statute it is clear that the intended reading "damage caused" is the outcome; TD.
  - several cases have adopted the view that you can get K loss of bargain damages – expectation damages!
  - disapproved in *Cox & Coxon Ltd v Leipst* (1999) CA

Cox & Coxon Ltd v Leipst (1999) CA.

DMAC thinks **Majority are correct** (Gault, Blanchard, Henry JJ) (Minority Richardson P, Tipping J)

- "*minority dissent is not convincing at all….*" – DMAC.

Facts: Respondents bought lifestyle block with small orchard; in doing so they were provided property production and income statements at the pre-purchase inspection. Statement included that the property had rights to sell 58 boxes of pears – for $12 000; in reality previously had sold for $8800.

Majority held; that **P's claiming damages for MR can only claim for the damages that stem from reliance on the K. P cannot claim damages under the FTA in respect of benefits or advantages that would have been gained if the representations had been true**.

- [**(161) 21/3**] Citation from HCA in ***Marks v GIO Australia Holdings Ltd* (1998) HCA**; dealing with the equivalent Australian statute;
  - "The bare fact that a contract has been made which confers rights or imposes obligations that are **different from what one party represented to be the case does not demonstrate that the party that was misled has suffered loss or damage**…
  - A party that is misled suffers no prejudice or disadvantage **unless it is shown that that party could have**
    - acted in some other way
    - (or refrained from acting in some way)
  - which would have been of **greater benefit or less detriment** to it than the course in fact adopted."
- [**(162) 22/ 44**] from Gault J; "**Section 9** of the Act [FTA] prohibits conduct**, it does not render representations binding**. It is s6 of the Contractual Remedies Act **which in New Zealand has that effect**. The representation, if it induced entry into a contract, gives rise to a claim as on breach of contract with the measure of damages appropriate for that."
- [**(166) 26/ 19**]; "*Section 9 creates a duty not to mislead…*
  - *money may be awarded to make good or compensate for, loss or damage which has been caused by the breach…*
  - *remedy by way of monetary award is to put the wronged party in the same position as he or she would have been but for the wrong.*
    - [Where MR results in K] *for purchase of property the position to be restored is that which would have ensured had the MR not been made…*
  - *Had there been no MR, that is no breach of duty, there is no logical basis for asserting the purchasers here would have obtained the benefit now claimed.*
    - *If they would not have purchased at all, then prima facie the loss would be based on the difference between the value of the property and the price paid, or in some circumstances, the loss of an opportunity to buy a different property.*
    - *On the other hand, if they still would have purchased, the resulting loss could only be one arising in some collateral way, such as lost opportunity to buy at a reduced price or some other direct out of pocket consequence*."
      - **<u>Point XX</u>: this is DMAC's interpretation of what would happen with *Clef Acquitane* in NZ Law.**

- "Section 43(1) does not purport to make a representation enforceable against a representor. It says there is liability for loss or damage resulting from the representation…
  - To hold that misrepresentation inducing a contract can give rise for expectation damages under s43(2)(d) is to turn on its head the whole rationale of the measure of damages for a civil wrong….

- In short there is no justifiable basis for construing s43(1) in such a way as to give a representee a right to enforce a representation which is misleading."

- DMAC Translation of Page 26:
  - If you can prove a lost opportunity - that you would have been even better off still if the misleading statement had not affected you, you can receive that instead.
    - I.e. where you are induced to buy property, worth what it was paid for it, BUT for the misleading conduct you could have secured it for a lower price, then you have still technically suffered a *loss*.
    - Look to *Clef Acquitane SARL v Laporte Materials (Barrow) Ltd* (2001) EWCA.
    - Point **XX above**.
  - An alternative available measure of tort damages where the facts justify that finding.
    - Finding that P has been denied the chance to make a better bargain.
  - Also means that a contentious case – such as *Clef Acquitane* could be decided the same way in NZ under the FTA!

Clef Acquitane SARL v Laporte Materials (Barrow) Ltd (2001) EWCA.

NB – remember this is under tort of deceit; essentially gone under NZ law…

Facts: Clef entered a K with Sovereign; Clef were obliged under K to purchase Sovereign's products and market and distribute them – this was induced under a FM concerning the discounts available to Sovereign's UK trade customers. The FM was a downright lie. Clef were told that the discounts that were allowing were the lowest discounts permissible! In fact, sovereign charged much lower prices.

- This means that they were locked into an agreement to pay higher prices than they would have been able to negotiate if the truth was told.
- **Council for Sovereign argued this was an illegitimate mechanism to achieve *expectation* damages (loss of bargain). Agreement was still profitable**; however, was not as profitable as it would have been if the truth had been told; if this was the case then Clef would have been able to negotiate lower prices, and make more money! **This is a *loss***.
- **EWCA awarded over 370 000 pounds (well over $1m NZD).**

This was not a loss of bargain claim, but a claim for being induced into entering K where if no MR had been made they would have been in a better financial position.

- This is a measure of harm done; if the facts reach the mark for Tort damages.
- Normal Measure – Price Paid – Value.
- If you can show you were deprived of the opportunity to secure a better bargain then can recover in respect of that!
- Although, *Clef Acquitane* was a tort case in deceit, the principle was applied in a context for a claim of damages.

Court essentially finds that P can suffer harm despite being better off; if the harm hadn't been committed could/ would have secured a better K.

Hypothetical; where purchaser buys property on MR from agent on behalf of the vendor. Induced.

- I.e. as to where the boundaries were, the features of the house, whether it was subject to a building restriction.

Cause of Action	Vs. Vendor	Vs Real Estate Agent
CRA – s6	Purchaser will have an action against the vendor under s6 CRA; V is liable for the RA. This is partially due to the fact that REA have *ostensible authority* for their statements; the Purchaser can rely on these.	REA is not a party to K; purchaser cannot pursue. If the REA ***exceeded its authority*** **(thus breaching K with vendor)** then the vendor will have a claim against the REA will *ideally* (i.e. might be insolvent) be responsible to **indemnify** the Vendor or compensate the vendor; realistically case will proceed similar to ***Altimarloch*** and REA will be ***joined as a 3rd party.***
FTA – s9	Need the vendor to be ***in trade***. • LAC or Land trust? One man company If the vendor is in trade, then he could be liable *even without knowing about the misrepresentation.* A *vendor without a business context* will not be liable. If it is merely a **private individual** where will they be liable? • If the vendor comes within **s43(1)(d)**; broad. • i.e. if **V** passed on false information can be liable.	Will be **liable**; they are a professional acting in trade. Job is to act responsibly and effectively. The REA's conduct is what induces the 3rd party into the K. **Can be sued under FTA but not CRA**. This can be vital – especially if the *bargain was not a losing one*; then when receiving TD the REA will be liable for nominal damages.
Tort (FM/ NM)	Possible action in NM or FM? No. Purchaser cannot be sued in tort. **Under s6(1)(b)**; no entitlement via FM or NM *unless* within CRA!	However, purchaser can sue the REA; within CRA s6(1)(b); omits to remove the ability to pursue ***the other parties i.e.*** REA in tort; Disadvantage of tort; need to establish liability if can find a NM + DOC or FM then REA will be liable in tort… note that the **same result can be achieved via s9 of FTA**; doesn't require fault, but under **FTA**, due to *discretion* might not receive desired outcome.

Breach of TK; *Conceivable but unlikely unless R was incorporated into K.*	Unlikely to arise; because REA cannot be making a representation that would have authority to bind a vendor. If there was a *term* that included the MR then would sue simply on BK.	

<u>Misrepresentation Question</u>:

Under s6 CRA get Breach of K measures. Under s9 of FTA we get the tort measure.

<u>Question 8 Tutorial Sheet</u>:

(a) Breach of Contract Measure
- PP = 185 000, AP = 150 000
- PP – AP = 35 000.

Tort Measure
- Price Paid = 100 000
- Actual position = 150 000
- No damages – *prima facie* P hasn't made a loss; *restitution in integrum* demands no compensation.

(b) With modification.
- Breach of K measure
    - No change. The figures are the same in terms of value.
- Under the FTA, can argue that because P missed an "opportunity" of the $10 000 – *restitution in integrum*, despite the fact P profited needs compensating for that.

(c)
- Contract Damages
    - PP = 75 000 and AP = 60 000; still having spent 100 000;
    - Damages = 15 000; P has made a *bad bargain*.
- Tort damages
    - Price Paid = 100 000, AP = 60 000
    - Damages = 40 000

(d) Variation where P *could have entered another K*.
- Contract damages
    - completely uninterested – the same damages from (c)
- Under Tort damages
    - Difference between PP and AV; in the losing K would have only lost 20 000.
    - so mitigate – (40 000 – 20 000) = $20 000,

Final Contract Lecture; Examination information.

100 marks converted to a percentage of 60;

13 questions; and a short amount of reading; "pithy"

4 mark q; 2-3 sentences
6 mark q; 5-6

First tutorial on *Difference between English Privity Act and NZ Privity Act.*

Always has something from the tutorials in the Examination.

Initially was going to be 50/50; Now like 40/60 – more emphasis on DMAC T 2.5

No materials.

Example q;

"Do you agree that the result in HBF Dalgety v Morton (1987) *would have been different if the Mortons had clearly offered the payment in full and final satisfaction and the offer had been accepted?*

1 sentence answer – apparently.

General points;

- precise knowledge and understanding of the material at the level we covered it in class.
- *Example q; Is it correct that reliance damages (Wasted expenditure) would be the 5.5m awarded by the majority and expectation damages (loss of bargain) would be the pf amount of 1 561 612."*
    - The award in that case for damages of wasted expenditure was the closest approximation of expectation damages. This is why the Judges said that reliance and expectation damages are the same thing and why they emphasized the presumption of recoupment (which wasn't rebutted) the law assumes you would have at least recovered expenditure; therefore although it is artificial, the 5.5m awarded *was* expectation damages.

Previous exams will not be any help.

It is permissible to use abbreviations;

CRA – Contractual Remedies Act 1979
CPA – Contracts Privity Act 1982
K – Contract
TK – Term of a K.
BK – Breach of K
P – Plaintiff
D – Defendant
3P – 3rd party
TD – Tort measure of Damages
KD – Contract measure of Damages
MR – Misrepresentation
R - Representation

VK – variation of K
TPB – Third Party Beneficiary
CL – Common Law
EQ - Equity

Damages – MR
PP – purported position (if Term was true)
AP – Actual position
Ppd – Price paid

Damages; in K
B – benefit under K
Y – Future expenditure required
X – Past expenditure
Z – Net *profit*.
PP – AP.