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## Positive Covenant

### III. Misrepresentation: no expectation measure

- A. Loss
  1. Price paid – Fair / True market value of the business at the time of the transaction
  2. Price paid – resale price (*Toteff*)
    - a. Inflated market
    - b. Held onto (*Doyle v Olby*) / Locked in the transaction
  3. Causation: a facta  $\Rightarrow$  but for (*WA* s 51(1)(a))
  4. Remoteness:
    - Natural and probable consequence (*Doyle v Olby*)
    - Reasonable foreseeability (*Wagon Mound No 1*)
  5. Contributory negligence
  6. Mitigation
- B. Consequential distress
- C. Exemplary damages (*Musca*): Since [■] commits deceit, [●] might also apply for exemplar damages especially considering [●]'s vulnerability, and that [■] has taken advantage of / abuse his position of trust.
- D. AoP

### IV. ACL

- A. Compensatory for loss
  1. Purchase price – Market value at the time of the transaction
  2. Loss of chance (*Murphy*; *Marks v GIO* per
  3. Causation (*Hay Property*; cf *HTW Valuers, I & L Securities*)
  4. Remoteness (*Henville*)
  5. Contributory negligence (*CCA* s 137B)
  6. Mitigation (*Henjo*; *CCA* s 137B)
- B. Compensation for distress (*Kuzmanovski*)
- C. Exemplary: As French J found in *Musca*, since exemplary damages punishes wrongdoing rather than compensate for losses, such damages sit comfortably with the loss or damage captured under s 236.

- [■], even agreeing with reliance measure, might argue for a discount if establishing that [●] could not have fully exploited the economic benefit of ... even without [■]'s non-performance (*McRae* at 416-17). Whether [●] can recover the head of damages of ... depends on whether such expenses were reasonably necessary (cf Mr Johnson's prolonged trip in *McRae* at 417-18).
  - [●] should be advised that since like the equipment purchased by *McRae*, the asset of ... is durable assets, the capital expenditure of ... might therefore not be recoverable (*McRae* at 416).
  - Since ... had been purchased long before [●] and [■] entered into contract, the expenses were not incurred in anticipation of the contract that [■] breached and cannot be recovered (*McRae* at 416-17).

#### **6b. Presumption to be rebutted**

If [●] can establish one or more heads of reliance loss above, the onus shifts to [■] to demonstrate that such expenditure would not have been recouped even if the contract had been fully performed (*Amann Aviation* at 86).

- Given that the contract was entered into in commercial settings, [■] bears a heavy burden displacing the presumption that 'a party would not enter into a contract in which its costs were not recoverable' (*Amann Aviation* at 87).
- Like in *Amann Aviation*, the mere fact that [■] had power to terminate the contract does not automatically eliminate expectation loss (at 93).
- Like in *Amann Aviation*, although it is hard to establish the loss of profits flowing from [■]'s repudiation which forfeited also [●]'s opportunity to secure renewal of the contract, [■] would have considerable difficulty establishing that [■] would have denied renewal anyway because to start from negotiating a new contract with third party necessarily implicates that such third party might insist on large financial rewards in order to compensate for heavy initial expenditure of the kind already incurred by [●] (*Amann Aviation* at 94).

**C1. Limiting Principles Denying Full Recovery**

The money sum of ... is what [■] agreed to pay [●] under the contract, the payment of which is not dependent on finding of [■]'s breach (*Jervis v Harris* at 202). [●] can claim such money sum without limitations like causation or remoteness, provided that the contingency is met.

	<b>Enter contract</b>	<b>Breach</b>	
<b>Causation (reliance loss)</b>	[●] would not have <u>entered into contract</u> but for [■]'s making of promise ( <i>McRae</i> )		
<b>Causation (expectation loss)</b>	[●] would not have suffered loss but for [■]'s breach ( <i>Alexander</i> )		
<b>Remoteness</b>	Type of losses would have been within the parties' <u>reasonable contemplation</u> ( <i>Hadley; Achilles</i> )		
<b>Contributory negligence</b>	[●]'s unreasonable acts <u>lead to</u> the loss suffered ( <i>WA</i> s 26(1)(a))		
<b>Mitigation</b>			What [●] <u>reasonably ought to have done</u> once noticing the wrong ( <i>Burns</i> )

**1. Causation**

For each head of damages listed above, [●] need prove that [■]'s breach of contract was a necessary condition of the damage (*Alexander v Cambridge Credit*), and it is appropriate to extend [■]'s liability to the damages so caused (*Wallace v Kam* [11]). It is convenient to consider the normative issue of whether it is appropriate to extend [■]'s liability to the damages of ... in the Remoteness section below.

Factual causation is not be problematic for the expectation loss of ... because such loss is inherent in [■]'s breach of contract since [●] did not have his contractual expectations met.

## Declaration

### I. Apology

Though a court order that [■] to make an apology is possible, [●] should be advised that an apology is not an admission of wrongs and should evaluate how far one apology, possibly not genuinely made, functions to alleviate the mental harm and deter similar wrongs.

- [●] should also be advised that the court might refrain from ordering apology for fear that it might be ingenuine (*Eatock v Bolt* (FCA, Bromberg J)).
- It is useful to know whether the ... *Act* provides for an order of apology in such circumstances.
- If [■] declines to apologise, however, [●] might in turn be entitled to aggravated damages.

### II. Declaration

A declaration by which the court gives authoritative statement of parties' rights and obligations might be a better alternative to apology because it alleviates the concern over free speech (cf apology) and personal freedom (cf injunction).

- Since declaration is an equitable remedy available in case of common law wrongs, the court has wider discretion as to its availability and more flexibility as to how to frame the declaration (*Forster v Jododex Australia*; *Bass v Permanent Trustee* [89] (Kirby J)).
- This holds true even though no further damages have been caused necessitating more intrusive forms of relief.
- [●] has standing to apply for declaration because ....
  - The question posed for the court's determination is neither abstract nor hypothetical, but directed to legal controversies (*Re Judiciary Act 1903 and Navigation Act 1912*);
  - [●] claims in relation to circumstances that have occurred / might happen, and the court's declaration will foreseeable consequences for [●] and [■] (*Gardner v Dairy Industry Authority NSW* at 180 (Mason J), 189 (Aickin J)).
  - [●] has a real interest to seek a declaration because the dispute implicates his legal rights (*Foster v Jododex Australia* at 437 (Gibbs J));
- A declaration is appropriate considering ....
  - No other alternative remedy or tribunal is in place to redress the issue (*Foster v Jododex*).
  - Neither [●] nor [■] wishes to disrupt their ongoing / long term / neighbouring relationship.

### III. Nominal Damages

Even though [●] has suffered no loss (and therefore is not entitled to compensatory damages (*Baume v Cth*)) because of [■]'s defamation / trespass / breach of contract / assault / battery / ..., [●] might still be entitled to nominal damages as a monetary declaration that [■] has committed a wrong that is actionable per se.

- The court might however order costs against [●] to express that the action should never have been brought (*Connolly v "Sunday Times" Publishing*).