REMEDIES NOTES

SAMPLE

Contents

Hypothetical Structure

1. What are the causes of action? Or breaches
   - ***FIRST****: P will have the following claims:... The best is X, followed by X… because [WHY?]…*
     - ACL no fraud needed, generous remoteness, other remedies possible…
     - Deceit - generous remoteness
     - Compensation - no factual loss so only nominal damages available…
   - Common law
     - Contract
     - Tort
       - Trespass - goods/land
       - Nuisance
       - Negligence
       - Deceit / negligent misrepresentation
     - If no loss ⟶ **nominal damages**
   - Equitable
     - Breach of trust
     - Breach of fiduciary duty
     - Breach of DOC/skill
     - Breach of confidence
     - If no loss ⟶ **declaration**
   - Statutory - ACL s18
2. What are the losses? Identify based on BREACH.
   - Direct
   - Consequential
   - Distress
3. IDENTIFY the possible remedies & rule!
   - Compensatory damages
     - Contract
     - Tort
     - ACL
     - If damages **'inadequate'** ⟶ may seek specific relief through equity's 'auxiliary' jurisdiction
     - Also 'reasonable fee'
       - User = tort
       - Negotiating = contract
   - Specific relief
     - Specific performance
     - Injunction
       - Permanent
       - Interlocutory: anything **ongoing**
   - Equitable
     - Account of profits
     - 'Equitable' compensation
   - Rescission - anything **unwinding**
   - Aggravated damages
   - Exemplary damages
4. What is the measure of loss for the direct/consequential losses? For each loss!
5. Limiting principles

- Causation
  - Needs to be proven on probabilities.
- Remoteness
- Mitigation
  - **Eg. selling property, identify possibilities**

6. Defences
   - All equitable bars to relief
     - Hardship/public interest
     - Laches - delay + acquiescence / prejudice
     - Unclean hands
   - SP bars to relief
     - Lack of mutuality
     - Continuous supervision
     - Readiness & willingness
   - Then pick the most advantageous

Compensatory damages for breach of contract

Expectation compensatory damages are the default remedy for breaches of contract. Plaintiff is to be put in the same position as if the contract has been performed (Robinson v Harman; Clark).

Identify loss

P's loss includes: [identify what they've lost - compare A & B].

- *Compare situation P would've been in had K been performed vs situation NOW*
  Direct compensation: the 'performance' itself
- **Indirect compensation/consequential losses:** beyond the promised performance but not too remote, incl non-economic losses
- **If no loss?** Nominal damages

Subject matter of contract:

- Goods, services, shares → **difference in value**
- Goods being sold → **cost of substitutive performance**
- Where a breach causes contingent business opportunity to not be pursued/outcome of performance is uncertain *(Amann)* → **reliance or loss of chance**
- Contract for enjoyment → **rectification/cost of cure**
  - If not reasonable/necessary →
    - **Difference in value**
    - **Loss of amenity**
- Contract for enjoyment → **distress or loss of amenity (possible)**
- Aleatory contract (gambling, insurance) → **loss of chance**

How to measure the loss?

Difference in value (most common) + wasted expenditure:

***START WITH THIS!!* FORWARDS LOOKING!**

The difference in value is measured by calculating the difference between the value of promised performance incl wasted expenditure) & actual performance.

Steps

1. Is it for **goods, services, shares?**
   - Goods
     - …
   - Services
     - …
   - Shares
2. Is it a commercial context?
   - Award **loss of profits** *(Cth v Amann Aviation)*
3. Is the difference in value impossible/speculative? **EXTREMELY rare**
   - If not → **CAUSATION**
   - If yes → **RELIANCE DAMAGES**
4. Measure 'reliance' damages (wasted expenditure)

- There may also be a loss of a chance