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Update Summary

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COMMERCIAL DAMAGES

S Jacobs

Highlights

- Commentary has been added to the following chapters:
 - The Measure of Damages in Contract;
 - Mitigation;
 - The Windfall Defence (now renamed “Defences”);
 - Interest;
 - Damages and the Sale of Goods;
 - Damages and compensation for breach of equitable obligations; and
 - Evidentiary and procedural matters.

Note

The author welcomes any positive criticism, comment, or indeed any dialogue on the topics covered by this work. Correspondence should be addressed to sjacobs@wentworthchambers.com.au, and may be copied to Thomson Reuters at ariel.galapo@thomsonreuters.com.

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COMMENTARY

Commentary and case materials have been updated in the following chapters which have been revised:

- The Measure of Damages in Contract;
- Mitigation;
- The Windfall Defence (now renamed “Defences”);
- Interest;
- Damages and the Sale of Goods;
- Damages and compensation for breach of equitable obligations; and
- Evidentiary and procedural matters.

New discussions which have been added include:

Exposure to a risk of loss is not a category of loss

The proposition in the heading is derived from *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; 78 ALJR 324; 204 ALR 26; [2004] HCA 3 at [37] (CLR). The facts of *Consort Express Lines Ltd v J-Mac Pty Ltd (No 2)* (2006) 232 ALR 341; [2006] FCA 833 illustrate this proposition. See [5.120].

Where the contract provides alternatives as to performance

Where a defendant in a damages action has a right under the contract to alternative methods of performance, a court will infer, absent evidence to the contrary, that the defendant would have performed the contract in the way least advantageous to the plaintiff and most advantageous to the defendant. See [5.290].

Compare *Evans Marshall & Co v Bertola SA [No 2]* [1975] 2 Lloyd's Rep 373 at 390 per Buckley LJ.

Breach of warranty regarding goods sold as part of a sale of a business

Where goods are sold as part of a sale of a business, and are not as warranted, damages *may* be claimed on the basis in the difference in value between what was obtained, and what warranted: *Clark v Macourt* (2013) 88 ALJR 190; [2013] HCA 56. For a full discussion see [5.825].

Recovery of pre-contract expenditure

Pre-contract expenditure can be included in reliance loss if reasonably contemplated by the parties as likely to be wasted if the contract was broken, although in reality this may be limited by the plaintiff's duty to mitigate: see *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; 66 ALJR 123; 104 ALR 1. For a full discussion see [5.2610].

The reliance interest, wasted expenditure

A claim for expenses rendered useless by the breach of contract is generally claimed as part of the damage pursuant to the general principles set out in *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363; [1843-60] All ER Rep 383 and *Hadley v Baxendale* (1854) 2 CLR 517; (1854) 9 Exch 341; (1854) 2 WR 302; (1854) 156 ER 145 at 356 (Ex). See [5.2810].

Drawing the line between failure to mitigate and unreasonably aggravating damage

Where a defendant's case is not that the plaintiff had failed to mitigate its damage, but that it had unreasonably aggravated it, that engages the principles articulated by Glass JA in *Munce v Vinidex Tubemakers Pty Limited* (1974) 2 NSWLR 235 at 240.

Whilst this principle is readily applied in personal injury cases such as *Commonwealth of Australia v W L McLean* (1996) 41 NSWLR 398; [1996] NSWSC 657, it seems readily capable of extending to commercial disputes. See [11.60].

Drawing the line between what benefits to take into account; and what not

The line is drawn between benefits derived "directly" from the wrong (which must be credited to the wrongdoer) and those which are indirect, or *res inter alios acta*.

The trick, of course, is to know what is *direct*, and what not, on the facts of a given case. The rule plays out across the widest range of commercial conduct, from sales of turbines (*British Westinghouse*) to the provision of sperm (*Macourt v Clark* [2012] NSWCA 367). See [11.154].

Social security benefits

Social security benefits are not taken into account in damages awards (subject to statute): *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443 at para [38]. See **[11.305]**.

Interest in equity

Equitable principles permit the award of interest on an award of equitable compensation: *Re Hatton Developments (Aust) Pty Ltd* (1978) 3 ACLR 484; *Hillig v Darkinjung Local Aboriginal Land Council* (2006) 205 FLR 450; [2006] NSWSC 1371 (both the aforesaid cases were cited as authority for this proposition in para [37] of *Giller v Procopets (No 2)* (2009) 24 VR 1; [2009] VSCA 72. See **[20.810]**.