

## BACK TO BASICS: RELIANCE DAMAGES FOR BREACH OF CONTRACT REVISITED\*

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### INTRODUCTION

Many years ago Professor D J Joubert suggested that there was no real distinction in principle between positive and negative interesse and that the terms should be avoided because they were likely to cause confusion ('Negatiewe interesse en kontrakbreuk' (1976) 39 *THRHR* 1 at 13–14). More recently a judge has defended the distinction as a practical one (Horwitz AJ in *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 at 473n1). That case is the latest in a series grappling with the question whether or to what extent the victim of a breach of contract may elect to claim damages measured according to its negative rather than its positive interest (see *Probert v Baker* 1983 (3) SA 229 (D); *Svorinic v Biggs* 1985 (2) SA 573 (W); *Hamer v Wall* 1993 (1) SA 230 (T); *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C); *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W); *Masters v Thain* (supra)). The cases reveal such a wide variety of judicial opinion on these points — particularly as regards which losses are covered by the terms positive and negative interest — that one cannot help but begin to share Professor Joubert's misgivings about the usefulness of the distinction.

After the decision in *Probert v Baker* — the first in the series of cases just mentioned — Professor Gerhard Lubbe of Stellenbosch University wrote a very helpful article in which he attempted to clear up some of the misconceptions and confusion apparent from that decision ('The assessment of loss upon cancellation for breach of contract' (1984) 101 *SALJ* 616). That article has proved most influential: it has been cited in almost every subsequent case dealing with the issue, by judges on either side of the debate. It is not an easy read, however, and at times one is left with the uncomfortable feeling that its arguments have not been properly understood. In fairness, it should be said that the more recent cases reflect, to my mind at any rate, a better understanding of the issues and principles involved, and in this regard particular mention should be made of the very learned judgment of Farlam J (as he then was) in the *Mainline Carriers* case. Nevertheless, taken as a whole, the body of case law on the topic represents a confusing and almost impenetrable mass for most students, and no doubt for many practitioners, law teachers and even judges.

What follows is a modest attempt to shed some light on the topic, and on the cases dealing with it, by stating the law in very simple terms. My

\* This note is a revised version of a paper delivered on 12 October 2001 at a conference on Contractual Damages organized by the Department of Private Law, UNISA. It owes much to lecture notes that I 'inherited' from my erstwhile colleague, Professor Belinda van Heerden, now a judge of the Cape High Court.

contribution does not purport to be original, and much of it may be considered trite. It draws heavily on the article of Lubbe, and on one of his main sources: the famous article by L L Fuller & William R Perdue Jr 'The reliance interest in contract damages' (1936) 46 *Yale LJ* 52, 373.

#### THE FUNDAMENTAL RULE (DIFFERENTIAL THEORY)

The fundamental rule in regard to the award of damages for breach of contract was stated by Innes CJ in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1 at 22 and has since been frequently reaffirmed by the Appeal Court: the aim is to place the innocent party in the position he or she would have occupied had the contract been properly performed, so far as that can be done, by the payment of money and without causing undue hardship to the defaulting party. In other words, the victim of the breach is entitled to be placed in his fulfilment position: the position he would have occupied had there been no breach. This means that he is entitled to damages measured according to his positive or expectation interest; he must be given the benefit of the bargain he contracted for.

The application of that fundamental rule entails a comparison between two different financial positions of the plaintiff, or injured party: the notional or *hypothetical position* he would have occupied on proper fulfilment of the contract, and the *actual position* in which he now finds himself subsequent to the breach (see e.g. *Culverwell v Brown* 1990 (1) SA 7 (A) at 25F; *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643D).

This method of assessing damage, or recoverable loss, by comparing two 'sum totals' or global positions — the value of the plaintiff's estate after the damage causing event, and the value it would have had had that event not occurred — is known as the differential theory, or 'sommeskadeleer', and finds its origins in nineteenth century German scholarship. The *Differenztheorie* was clearly articulated for the first time in 1855 by Friedrich Mommsen (see H J Erasmus 'Aspects of the history of the South African law of damages' (1975) 30 *THRHR* 104 at 113–14).

It is important to note that this differential theory applies equally in contract and in delict: it defines recoverable loss as the difference between the plaintiff's present position in fact and what it would have been but for the commission of the wrong — be the wrong a delict or a breach of contract.

This civil law method of measuring recoverable loss is superficially very different from the more concrete 'interest analysis' of the common law systems, but as we shall see it delivers essentially the same results. Indeed, as Lubbe has shown, the interest analysis can be very useful as a supplement to our more abstract theory; if one can think through a damages problem using both methods of assessment, one is far less likely to fall into the errors that sometimes still plague our courts.

The application of the differential theory presents numerous difficulties in practice. Determining the plaintiff's hypothetical position, had there been no breach, is often a highly speculative exercise. And when determining the

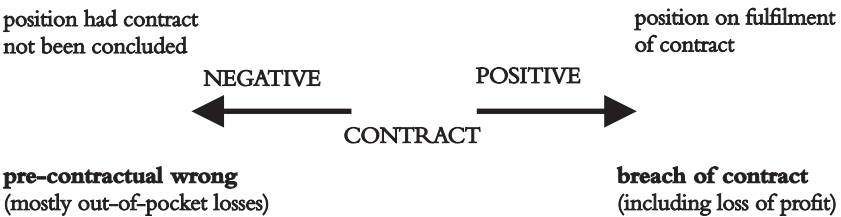
plaintiff’s actual position, after the breach, one must take account of not only the detrimental but also the beneficial consequences of the breach. Moreover, where the contract is cancelled one must also consider the restitutionary relief that follows such cancellation; a refund of the purchase price, for example, or a return of the goods will inevitably affect the plaintiff’s present position, and is a necessary prelude to the calculation of damages.

THE DISTINCTION BETWEEN POSITIVE AND NEGATIVE INTERESSE

This distinction is not of Roman origin: the Roman jurists mentioned merely a party’s *id quod interest*, embracing both out of pocket losses (*damnum emergens*) and loss of profits or gains that would otherwise have accrued (*lucrum cessans*) (see Erasmus *op cit* at 108–9).

Like the differential theory, the distinction between positive and negative interest originated in nineteenth century German scholarship. It constitutes a refinement of the differential theory, and was introduced in 1861 by Rudolf von Ihering in his pioneering article on *culpa in contrahendo* (*‘Schadenersatz bei nichtigen Verträgen’* in *Jahrbücher für Dogmatik* 4 (1861) 16ff: see Erasmus *op cit* at 114). In terms of that doctrine, which is now ‘a firmly established feature of the legal landscape of German private law’, as soon as parties commence pre contractual negotiations they enter a (quasi ) contractual relationship that entails certain rights and duties, including a duty of care owed to the other party. Infringement of such a duty entitles the other party to claim damages suffered in reliance on the eventual conclusion or validity of the contract (see Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 244–5).

As Ihering recognized, applying the differential theory to such a pre contractual wrong would result in restoring the injured party to his or her pre contractual position (or more correctly, the position he would now have occupied had he not entered the contract): but for the misrepresentation, for example, the deceived party would not have concluded the contract. Here, then, was a form of contractual damages that differed markedly, in terms of the ultimate outcome, from the more usual damages for breach of contract, where application of the differential theory results in the injured party being placed in the position he would have occupied had the contract been properly performed. Hence the distinction between two forms of (contractual) damages: negative interest damages (for pre contractual wrongs) and positive interest damages (for breach).



It is important to note that the distinction thus obtained, between negative damages that take one backwards, and positive damages that take one forward, results not from any distinction between delict and contract, nor from any principled difference between the two forms of damages, but merely from applying the differential theory to two different *wrongs*: a pre contractual wrong such as misrepresentation or duress (without which there would have been no contract) and breach of the contract (without which there would have been proper performance of the contract, and hence no loss of profit — assuming the contract to have been a profitable one for the plaintiff).

In South African law the distinction between positive and negative interest damages arises most frequently, as in German law, when one is dealing with a wrong committed in the pre contractual stage (in *contrahendo*); and in that context the distinction is, in my opinion, a valuable one that assists in understanding how the application of the differential theory to different wrongs connected with a contract can produce markedly different results. Since our law does not recognize the doctrine of *culpa in contrahendo*, the damages awarded for a pre contractual wrong, such as a misrepresentation, are delictual in character, rather than (quasi ) contractual, but that should be of no real consequence, for the same fundamental principle (the differential theory) applies equally in contract and delict.

Nevertheless, since pre contractual wrongs are delicts in our law, the distinction between positive and negative interest damages translates all too easily into a distinction between contractual and delictual damages; with the associated idea that the former are concerned with loss of profit and the latter with out of pocket loss.

Compare the often cited statement by Van den Heever JA in *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B–C, a case dealing with damages for fraudulent misrepresentation:

‘A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.’

Read in context, this statement is perfectly true and explains why, for example, loss of anticipated profit on the deal will feature in a claim for damages for breach, but not in one for fraud inducing the contract. However, taken out of context, the statement tends to give rise to a number of misleading and even dangerous generalizations. For example:

- The often encountered idea that damages in delict are always measured according to the plaintiff’s negative interesse. In fact, the distinction between positive and negative interest only has meaning in a contractual context, and cannot sensibly be applied outside of that context, for example to a motor accident.
- The idea, still sometimes encountered (for example in connection with disappointed beneficiary claims), that loss of profit or *lucrum cessans* is never recoverable in delict. Not only is this contention historically unfounded (cf Zimmermann op cit 972), a moment’s reflection will show

that it is obviously untenable. The owner of a minibus taxi, for example, who earns R5 000 a week net profit by conveying passengers, will be able to recover in delict from a negligent driver who collides with his taxi not only the cost of repairing his vehicle but also the profit lost while the taxi is out of action.

- The related idea, apparent from some of the cases in favour of awarding negative interest damages for breach of contract, that reliance or out of pocket losses are not recoverable in an action for positive interest damages, being recoverable only in a claim measured according to the plaintiff's negative interest (see, in particular, *Probert v Baker* (supra) at 233H–234A, 234H; cf too *Masters v Thain* (supra) at 473n1, where the misconception that the positive interest covers only loss of profits appears very clearly). As will be demonstrated below, the positive interest embraces such reliance losses, as well as so called expectation losses. This misconception, like the previous one, stems from the unfortunate tendency to associate particular types of loss, or heads of damage, with particular forms of action: loss of profit with a contractual claim, and out of pocket loss with a delictual claim.

## COMPARISON WITH THE INTEREST ANALYSIS OF THE COMMON LAW SYSTEMS

In their celebrated article, Fuller & Perdue op cit identified three interests that might be served by an award of contract damages: the restitution, reliance and expectation interests.

### *Restitution interest*

In reliance on the contract, A has conferred a benefit on B, by performing his side of the bargain, wholly or in part. B commits a breach by refusing to counter perform. The benefit or its value must be disgorged by B in order to prevent unjust enrichment, say Fuller & Perdue. In our law, where the contract is cancelled, the claim for the return of the benefit is not an enrichment action but rather a distinct contractual remedy (*Baker v Probert* 1985 (3) SA 429 (A) at 438J–439B; *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 201E–F; *Tweedie v Park Travel Agency (Pty) Ltd* (supra) at 807B; *Masters v Thain* (supra) at 471D–F; but cf D P Visser 'Rethinking unjustified enrichment: A perspective on the competition between contractual and enrichment remedies' (1992) *Acta Juridica* 203 at 225ff; Sally J Hutton 'Restitution after breach of contract: Rethinking the conventional jurisprudence' in Daniel Visser (ed) *The Limits of the Law of Obligations* (1997) 201).

Whatever its true juristic nature, the process of restitution following cancellation will clearly take account of the plaintiff's restitution interest. And where the contract is not cancelled, the restitution interest (being the financial equivalent of restitution, i e the difference in value between performance made and counter performance received) will be a component part of both positive and negative interest damages, as the example below will illustrate.

*Reliance interest*

In reliance on the contract, A has altered his position to his detriment, for example, by incurring expenses in preparing to make his performance under the contract. Even if this expenditure confers no benefit on B, A should be entitled to recover it as damages if the purpose, or one of the purposes, of awarding contractual damages is to undo the harm suffered by the plaintiff as a result of detrimental reliance on the defendant's promise. In other words, the aim of reliance damages is to place A in the position he would have occupied had he not concluded the contract with B. The reliance interest is thus the same as our negative interest. It includes consequential losses that are not too remote, since these would not have been suffered had A not entered the contract with B. For example, B's breach causes A to default on another contract with C, rendering A liable in damages to C (a specific form of reliance loss now sometimes referred to as falling within A's *indemnity* interest: cf Lubbe op cit at 622).

*(Gross) expectation interest*

Even if A has neither conferred any benefit on B nor altered his position to his detriment, we may want to give him the value of the expectancy created by the contract, in order to place him in the position he would have occupied had B not breached the contract. This is the (gross) expectation interest, the protection of which 'is par excellence the function of contract law' (John Adams & Roger Brownsword *Key Issues in Contract* (1995) 89), though this function has been questioned by some modern writers, notably Patrick Atiyah (see, for example, *Promises, Obligations and the Law of Contract* (1978)). The expectation interest includes, as one component of the overall damages, loss of profit that would have been made on the contract had there been no breach (the net expectation interest), and is clearly the equivalent of our positive interest.

*An example to illustrate the interests*

To illustrate the various interests, and to demonstrate their relevance in our law, consider the following example: A buys a champion racehorse from B for stud purposes, having been assured by B that the animal is free of disease. The price is R100 000, a bargain because A has already on sold the stallion to C for R150 000, delivery to C to occur at a future date after the stud has performed its expected function. The horse turns out to be diseased and wastes away to a sickly skeleton worth only R1000, but not before infecting A's mare, which was worth R60 000 but now dies. C justifiably refuses to take delivery of the stallion and cancels the contract with A.

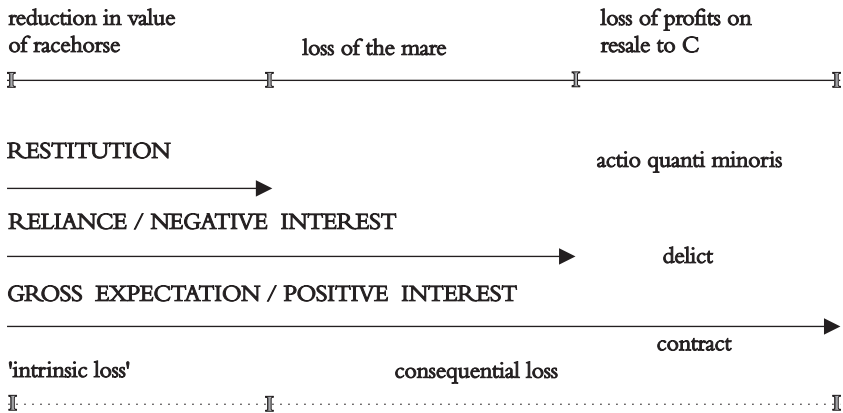
A does not cancel his contract with B but wishes to claim compensation. On the facts, he has a choice of the following remedies:

- Price reduction under the *actio quanti minoris*, on the grounds of a latent defect or *dictum promissumve*. The amount recoverable is R99 000

(difference between price paid and actual value) and represents A's restitution interest. Consequential losses are not included.

- A delictual action for damages for fraud (assume B knew of the disease and that A would not have bought the horse at all had he been aware of the true situation: *dolus dans*). The amount recoverable is R99 000 (intrinsic loss: price less value) plus R60 000 (consequential loss of mare) = R159 000. This represents A's reliance or negative interest. Loss of profit on the sale to C is not included because but for the fraud A would not have bought the horse and hence would in any event not have made the profit.
- A contractual action for damages for breach (assume B warranted the horse to be free of disease). Had there been no breach, i.e. had the warranty been true, A would not have suffered the following losses: intrinsic loss on the purchase of the horse itself (R99 000); consequential loss of the mare (R60 000); loss of profit on resale to C (R50 000); possibly even loss on sale of the anticipated foals (though here remoteness becomes an issue). Hence his recoverable damages, measured according to his positive or (gross) expectation interest, are R209 000, the sum total of his restitution, reliance and (net) expectation interests.

Diagrammatically this may be represented as follows:



*Overlapping of the interests*

As Fuller & Perdue pointed out (op cit at 71ff), and as the foregoing example clearly demonstrates, there is a considerable overlap between the various interests identified by them:

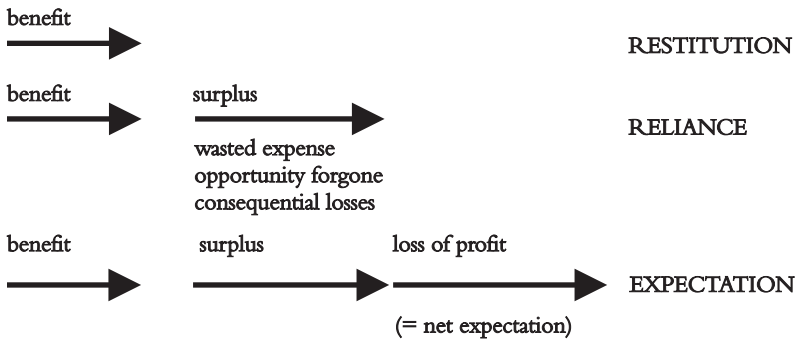
*Reliance and restitution interests*

The restitution interest is merely a special case of the reliance interest, since A confers the benefit on B in reliance on the contract. The reliance interest therefore embraces the restitution interest, but is wider in that it covers forms

of detrimental reliance that confer no benefit on the other party: wasted expenditure, opportunities forgone and consequential losses.

*Reliance and expectation interests*

Apart from reliance damages in the form of opportunities forgone — on which see below — the gross expectation (or positive) interest embraces the reliance (or negative) interest; but it goes further in that it also includes the element of loss of profit (i.e. the net expectation interest).



A number of important implications arise from the foregoing:

- The positive interest is the sum total of the restitution, reliance and net expectation interests (again, subject to what is said below about opportunities forgone). In assessing contractual damages, therefore, one can either apply the global comparison of the differential theory, or one can identify the various heads of damage according to the common law interest analysis and simply add them up to obtain the plaintiff's loss (measured according to the traditional criterion of positive interest).
- A plaintiff who believes that it will be too difficult, or too speculative an exercise, to attempt to prove a loss of profit on the contract, may restrict his claim to out of pocket losses. By doing so, he is not deviating from the fundamental rule spelled out above, nor is his claim one for negative interest, rather than positive interest. As will be argued below, it is fundamentally wrong in principle to award negative interest damages for breach of contract, as opposed to a pre contractual wrong.

ELABORATION ON THE OVERLAP BETWEEN POSITIVE AND NEGATIVE INTEREST

I have suggested above that, apart from the restitution component, the negative or reliance interest comprises wasted expenditure, opportunities for gone and consequential losses; and that with the exception of opportunities

forgone, all these elements will also feature as elements of positive interest damages. Let us test this proposition by looking at each element in turn.

### *Consequential losses*

There is, as far as I am aware, no controversy about the proposition that these losses feature as elements of both positive and negative interest damages. Consider the example of the racehorse that is diseased. The consequential loss of the mare would not have been suffered either if A had never contracted with B (negative interest), or if there had been no breach by B, i.e. if the stallion had been free of disease (positive interest); so the consequential loss is recoverable whether A sues in delict for fraud or in contract for breach.

### *Wasted expenditure*

In reliance on the contract, A has incurred expense in preparing to perform his side of the bargain, or he has actually commenced performance; for example, A is a building contractor who has hired labour, purchased materials and commenced construction of the building when B repudiates.

Such expenditure was caused not by the breach, but by A's reliance on the contract with B. Nevertheless, to the extent that such expenditure becomes wasted and is rendered futile by B's breach, A incurs a loss (see *Tweedie v Park Travel Agency (Pty) Ltd* (supra) at 809F). Obviously, the loss would not have been incurred had A not contracted with B, so the loss features as an element of A's negative interest (despite a surprising statement to the contrary by Goldstein J in his otherwise impeccably reasoned judgment in *Hamer v Wall* (supra) at 240E–F). What is not so obvious is that the loss also features as part of his positive interest. In *Hamer* Goldstein J accepted the conventional explanation for this fact by stating that (at 240F–G)

'on cancellation a plaintiff is without the defendant's prestation, and in order to acquire such prestation anew, will have to incur the expenses again. Thus the expenses go towards placing him in the financial position he would have been in had the contract been performed.'

As Cloete J pointed out in *Tweedie* at 809B, this reasoning strikes one as rather artificial. A straightforward application of the differential theory offers a much simpler explanation for the inclusion of wasted expenses in positive interest damages. Assume that A's wasted expenses amount to R20 000, and that he can show that he stood to make a net profit of R10 000 on the contract. Imagine also that he opened a special bank account for this contract. That account is now R20 000 in the red. Had the contract been properly performed the account would have shown a positive balance of R10 000. In order to place A in his fulfilment position we must award him  $R20\ 000 + R10\ 000 = R30\ 000$ . His positive interest comprises both his reliance loss of R20 000 and his net expectation loss of R10 000.

Of course, if A would have made a net loss on the contract of say R2 000, the difference between his actual and hypothetical positions is R18 000, and his positive interest damages are limited to this amount. Or in the more obscure language used by common law writers, A's reliance interest is limited

by his expectation interest; the (gross) expectation interest sets the limit of recovery (cf Fuller & Perdue op cit at 75ff; *Mainline Carriers* (supra) paras 53 and 64).

There is authority, both local and foreign, for the proposition that the courts will make a factual assumption that if the contract had been properly performed, the plaintiff would at least have recovered such expenditure as had reasonably been incurred; in other words, that A would at least have broken even on the contract. Where A anticipates difficulty in proving that the contract would have been a profitable one, he may limit his claim to recovery of his reliance losses; the burden will then fall on the defendant to show that the contract would have been a losing one for A. (See in this regard *Mainline Carriers* (supra) paras 44–56, and the authorities cited there; see too Lubbe op cit at 624–5; *Hamer v Wall* (supra) at 238E–H; *Trichardt v Van der Linde* 1916 TPD 148; *Boyd v Nel* 1922 AD 414.)

### *Opportunities forgone*

These losses represent what economists would call the opportunity cost of the transaction. By electing to contract with B, A has had to forgo the opportunity of contracting with C. For example, a busy doctor who accepts an appointment to see patient X in a particular time slot necessarily sacrifices the opportunity to see Y in the same period; a university professor who gives up her secure job to go into partnership with another must necessarily sacrifice her university salary in order to reap the possibly much greater rewards of private practice.

These lost opportunities are a form of *lucrum cessans*: they are gains that are prevented through the plaintiff's reliance on the contract. Detrimental reliance occurs not only when there is an outflow from a person's estate but also when a definite inflow to the estate is sacrificed. In logic, therefore, we must recognize, along with Fuller & Perdue (op cit at 55), that opportunities forgone constitute part of the reliance or negative interest, despite the unwillingness of the court in *Svorinic v Biggs* (supra) to do so. After all, on a proper application of the differential theory, the aim of negative interest damages is surely not merely to restore the plaintiff to his pre contractual position; it is to place him in the position he would *now* have occupied had the wrong not been committed, and accordingly had he not entered into the contract (cf *Probert v Baker* (supra) at 234A–B).

In a claim for negative interest damages on the grounds of fraud, duress and the like, therefore, the submission is that the plaintiff should be able to recover this form of loss as well. The important question, however, is whether it should also be recoverable in a claim for damages on the grounds of breach of contract. Do lost opportunities, like wasted expenditure, constitute part of the plaintiff's positive interest? Some of our academic writers seem to be of the view that they do (see R D Sharrock 'Damages for breach of contract: The recovery of lost opportunities' (1985) 102 *SALJ* 616 at 618–19; J R Harker 'Damages for breach of contract: Negative or positive interesse' (1994) 111

*SALJ* 5 at 17). For the reasons that follow, I submit that this is logically incorrect; and I take considerable comfort in the knowledge that Fuller & Perdue are of the same opinion (op cit at 81–2). As we shall see, there is also support for my view in recent case law.

By electing to contract with B, A has forgone the chance of contracting with C. The reason, presumably, is that he expects to make a bigger profit on the contract with B than he would have made on the contract with C. We have here two mutually exclusive potential gains: if A contracts with B he makes profit x; if he contracts with C he makes profit y. He has elected to contract with B instead of with C.

If A cancels the contract for fraud and claims negative interest damages, he should be able to claim the profit that he would have made had he not entered the contract with B (subject of course to proper proof); that is to say, he can or should be able to recover the lost opportunity of profit y on the contract with C. Logically, he cannot recover also, or in the alternative, profit x on the contract with B, because the basis of assessment is that but for the fraud he would not have contracted with B.

If A claims positive interest damages for breach by B, he can recover the profit x that he would have made had B fulfilled his side of the contract; but he cannot in addition claim the profit y that he would have made on the contract with C, because he could hardly have contracted with both B and C. Nor can he claim profit y instead of profit x, because the basis of assessment assumes fulfilment of the contract with B, and no contract at all with C.

In a market characterized by perfect competition, the amount of the profit forgone on the contract with C would be the same as that which A stood to make on the contract with B, and the damages would be the same whether measured according to the positive or the negative interest (cf the example given earlier of the busy doctor who makes the same profit irrespective of which patient she sees; and see further Fuller & Perdue op cit at 74–5).

Of course, if the courts were prepared to make the factual assumption not only that A would have broken even on his contract with B, but also that A would have made at least as much profit on the contract with B as the profit that he would have made with C, then in a sense it might be said that they were permitting A to recover in respect of that lost opportunity. Quite apart from the fact that it is most unlikely that our courts would be prepared to make that assumption, given the inherent risk of contracting in financial markets (see, however, the minority judgment of Strydom J in *Hamer v Wall* (supra) at 238E–H; and cf also Schalk van der Merwe et al *Contract: General Principles* 2 ed (2003) 394), the loss of profit would in reality still be on the contract with B, not the one with C.

In both *Svorinic v Biggs* and *Hamer v Wall* contractual claims for damages based on lost opportunities failed. In *Svorinic* the claim was denied on the grounds that while the victim of a breach of contract may elect to claim negative rather than positive damages, opportunities forgone do not constitute an element of the negative interesse. In my view, while the denial

was justified, the reasoning was wrong on both counts: the victim has no such election, and the reason for the non-recovery is because such losses form part of the negative rather than the positive interest. This appears to have been the view of the majority in *Hamer v Wall* (at 241E–H), though the judgment of Goldstein J is not absolutely clear on this point. Much more explicit, albeit obiter, is the statement by Cloete J in *Tweedie's* case (at 808H–I), with reference to these two cases, that

‘to allow a party to claim for gains that he could have made but for the contract, would be to ignore the fact that he did enter into the contract. The fact that he could have followed another course is irrelevant, as he did not do so.’

That sums up the position rather neatly, and must surely be correct; a plaintiff cannot have his cake and eat it.

### NEGATIVE INTEREST DAMAGES FOR BREACH OF CONTRACT?

As indicated at the outset, the case law is at sixes and sevens on the question whether the victim of a breach may elect to claim damages measured according to his negative rather than positive interest, and clarification from the Supreme Court of Appeal is awaited. The general tendency is to hold that he may do so, with this proviso: that the damages should not exceed the positive interest (see especially *Mainline Carriers* (supra)).

Like many others, I believe that it is fundamentally wrong in principle to calculate damages on the basis of negative interest when the wrong complained about is breach of contract. To do so is not only a deviation from the fundamental rule outlined earlier (cf *Hamer v Wall* (supra) at 239G). More significantly, it has the effect of compensating the plaintiff for losses caused by the conclusion of the contract, rather than by the breach: it places the plaintiff in the position he would have occupied had he not contracted, rather than had the breach not occurred. The aim of awarding damages is undeniably to compensate for loss caused by a wrong, and in the case of breach of contract that wrong is undeniably the breach, not the entry into the contract.

Why then are the courts sometimes willing to allow recovery of negative interest damages for breach? The main motivation, it seems clear, is a laudable desire to compensate the victim of a breach for out of pocket or reliance losses, coupled usually with the unfounded belief that such losses are recoverable only as part of the negative interest, and not as part of the positive interest (see *Probert v Baker* at 233H–234A, 234H; *Masters v Thain* at 473n1).

To allow without qualification a plaintiff the freedom to elect to claim negative rather than positive damages would be to allow him to escape the consequences of his own bad bargaining, in the case of a losing contract. Hence the qualification that the negative damages cannot exceed the positive damages, or, more cryptically, that the reliance interest is capped by the expectation interest (see *Mainline Carriers* (supra) para 57). But that qualification gives the game away, for it demonstrates that the real intention is simply to compensate for out of pocket losses, not to restore the party to the position

he would have occupied had he not concluded the contract. As I hope to have made abundantly clear, there can be no objection to a plaintiff recovering such losses in an action for breach, but there is no need to make an unprincipled deviation from the fundamental rule in order to do so: reliance losses constitute an important component of positive interest damages. They will feature very often in a claim for damages caused by breach, and to deny the plaintiff the right to recover them would result in severe under compensation.

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#### SAUVERGARDE

‘Sauvergarde was essentially a remedy for apprehended violence to the person, resting on a criminal sanction, but it had its uses as a possessory remedy when the complainant’s possession was also threatened. Apparently it was granted by the Hof van Holland only, for I have been unable to discover any evidence that it was ever granted by the Hoogen Raad. It seems to have been derived from the same overriding jurisdiction of the Sovereign in all matters affecting the public peace as the possessory remedies properly so called.

The Complainant was required to present a petition to the Hof van Holland, complaining of the “violence, molestation or other physical ill-treatment” of which he went in fear, and asking that he be taken under the Court’s protection by a grant of *Mandament van Sauvergarde*. The onus of proof was high, because of the social stigma which attached to any person against whom *Sauvergarde* was allowed, but if the Court was satisfied that there was substance in the complaint, the Mandament was allowed. This took the form of an order to the Sheriff of the Court, who was instructed to proceed to the place where the disturbances had taken place or were about to take place. There he would publish the terms of the order by Edict, that is, by public recital, from, say, the marketplace, announcing that he took the complainant under his protection, by order of the Court, calling upon all persons to take note of this fact; furthermore, the defendant was specifically ordered to mind his behaviour, unless he wished to incur criminal punishment, and, if necessary, all local Magistrates, Officers and other public servants were called upon to assist the Sheriff in the execution of his duty.

If the Mandament had, in the defendant’s opinion, been brought maliciously, and without due cause, he could sue the applicant in Delict, and claim damages.’

T W Price *The Possessory Remedies in Roman-Dutch Law* (1947) 65 6.

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