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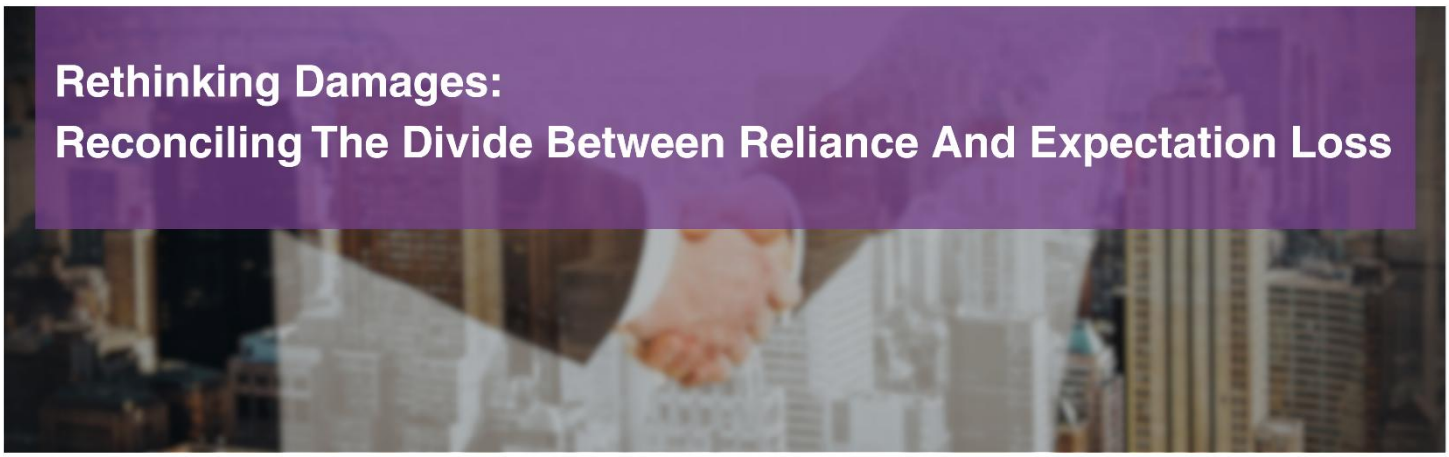
Rethinking Damages: Reconciling The Divide Between Reliance And Expectation Loss



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In assessing contractual damages, the traditional Malaysian approach distinguishes strictly between expectation loss—the value of the bargain—and reliance loss—expenditure wasted due to the breach. This dichotomy requires claimants to elect between the two, on pain of having their claims struck for uncertainty.

The most recent pronouncement on reliance and expectation losses in Malaysia is *China Comservice (Hong Kong) Ltd v Sediabena Sdn Bhd* [2024] 4 MLJ 684. The Court of Appeal affirmed that expectation and reliance losses remain conceptually distinct, and a claimant must elect between claiming lost profits or wasted expenditure. The two heads of claim may be pleaded alternatively, and not concurrently.

This position is rooted in an earlier authority, *Delpuri-Harl Corp JV Sdn Bhd v PKNS* [2015] 2 MLJ 24, where the Court of Appeal held that concurrent claims of expectation and reliance losses render such claims uncertain, and thus resulting in an award of nominal damages only. The reasoning, echoing *Anglia Television v Reed* [1971] 3 All ER 690, rests on the idea that courts cannot be left to parse overlapping remedies on the claimant's behalf.

The logic appears straightforward: expectation loss aims to place the claimant in the position as if the contract had been performed; reliance loss, by contrast, aims to restore the claimant to the position before the contract was made. Because the objectives are different, they are considered mutually exclusive and cannot be claimed concurrently. They may, however, be pleaded in the alternative. This approach reflects a bright-line rule that recapitulates the analysis.

Yet this clarity comes at a cost—it arguably overlooks the nuance that both measures of loss, while analytically distinct, are ultimately directed toward the same compensatory end. In rigidly insisting on election, Malaysian courts may inadvertently deny full recovery in cases where a claimant cannot precisely quantify lost profits and fails to clearly elect to pursue reliance loss, even if wasted expenditure is demonstrable.

The Contemporary Approach

Far from the shores of Malaysia, courts in Australia, the United Kingdom and Singapore have steadily chipped away at this strict dichotomy. These jurisdictions have embraced a more principled and pragmatic approach, recognising that both forms of loss are not competing remedies but rather different lenses through which the same compensatory principle is applied.

Instead of insisting on a formal election, courts in these jurisdictions now focus on a more substantive question: Has the claimant suffered a measurable loss due to the breach, and what is the most appropriate way to quantify it? This shift, still anchored in *Robinson v Harman* (1848) 1 Ex Rep 850, reflects a broader, rationalised consensus that form should not triumph over substance in the law of contractual damages.

The clearest expression of this rationalised view comes from the High Court of Australia in *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17. The court held that so-called "reliance damages" are not an alternative basis of claim, but a method of proving loss where it is impossible or impractical to prove the value of the expected performance. The court explained that wasted expenditure is recoverable not because it is distinct from expectation loss, but because it is a proxy for it—an indirect way to measure the value the claimant would have received had the contract been performed:

> *"…the expressions 'expectation damages', 'damages 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." No question of election arises. That is, this is not a plaintiff choosing between competing remedies.*
>
> *"…the plaintiff would simply focus on the total profits that would have been made, with the wasted expenditure merely being an expense in the production of those profits."*

Under this framework, wasted expenditure is not a standalone category of loss, but merely an expense that would have been recouped through the profits had the contract been performed. It is treated as a cost incurred in the course of earning the expected benefit, and therefore, a component of expectation loss, not an alternative to it.

The primary measure of consequential loss is, therefore, anticipated gains or profits that would have arisen from performance. Only where it is impossible, impossible with any certainty, or difficult to prove such gains, may the claimant turn to recover "reliance loss". Even then, the claimant must show that:

(a) the expenditure was incurred in reliance on the contract;

(b) it was wasted due to the breach (i.e., it would have been recouped had the contract been performed); and

(c) any benefit obtained despite the non-performance of the contract is duly accounted for, as the *Robinson v Harman* principle continues to operate as a ceiling.

Similar reasoning appears in English law. In *Omak Maritime Ltd v Mamola Challenger* [2010] EWHC 2026 (Comm), the court concluded that reliance loss is "a species of expectation loss," and does not form a distinct "juridical basis of claim". This position was reaffirmed by the English Court of Appeal in *Soteria Insurance Ltd v IBM UK Ltd* [2022] 2 All ER (Comm) 1082, which further reinforced this position, describing the distinction as more important to academics than practitioners, especially where it is "*(wrongly) suggested that reliance loss were, in some way, a separate head of loss and not recoverable pursuant to the compensatory principle*."

In Singapore, the courts have adopted a measured but converging approach. In *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, the Court of Appeal endorsed the view in *Omak Maritime*. More recently, in *Liu Shu Ming v Koh Chew Chee* [2023] SGHC(A) 15, the Appellate Division clarified that reliance loss is conceptually grounded in the assumption that, had the contract been properly performed, the claimant would have at least recouped the expenditure incurred. On that basis, reliance loss is not an alternative to expectation loss, but rather a proxy for it—available only where it is impossible or extremely difficult to quantify anticipated profits, not merely because the claimant has failed to do so.

Conclusion

While Malaysia continues to adhere to a formalistic divide between reliance and expectation losses i.e. requiring claimants to elect between them on pain of uncertainty, developments abroad reveal a more nuanced understanding of commercial reality. The jurisprudence from Australia, the United Kingdom, and Singapore suggests that these categories are not competing heads of claim but alternative methods of quantifying the same compensable loss. Wasted expenditure is not distinct from lost profits; it is often a cost incurred in their pursuit.

Seen in this light, Malaysian law should be reconsidered. The rigid requirement of election between reliance and expectation loss, while offering conceptual clarity, fails to align with the true compensatory purpose of contractual damages. This insistence risks denying claimants fair recovery, especially where the loss suffered cannot be neatly characterised or where lost profits are difficult to prove with precision.

Ultimately, both forms of loss aim to uphold the *Robinson v Harman* principle: to put the claimant, so far as money can do it, in the position they would have occupied had the contract been performed—not merely as if the transaction had never occurred. This has been recognised as the only approach to measuring damages in *Tan Sri Khoo*. To place a party as though the contract never existed is to adopt a tortious basis of damages, not a contractual one. Thus, if Malaysian law continues to insist on a strict election between reliance and expectation losses, it risks departing from the very principle it purports to uphold.

At a policy level, commercial parties do not experience or quantify loss in doctrinal silos; they assess the financial impact of a breach holistically without forcing artificial categorisation. The law should reflect this reality i.e. by not allowing double recovery, but by removing procedural hurdles that obstruct fair compensation.

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