



Expectation, reliance and restitution: one measure of damages under multiple names¹

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The decision in *Cessnock City Council v 123 259 932 Pty Ltd*² demonstrates the potential complexity of the law of damages for breach of contract. The subject is of course large, covering nominal and substantial damages, pecuniary and non-pecuniary loss, *Hadley v Baxendale*, mitigation, the rule on penalties, and so on. Taking its lead from *Cessnock*, this paper focuses on just one aspect of this area of the law: the proper measure of damages. It aims to assist practitioners by providing an overview of some settled principles, recent cases and boundary issues.

The starting point for any discussion of the measure of damages for breach of contract is Parke B's statement of principle in *Robinson v Harman*, that 'where a party sustains a loss by reason of a breach of contract, [they are], so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'.³ This statement is invariably cited when an issue of contract damages comes before a superior court and has, quite rightly, been described as the 'ruling principle' in the law of damages for breach of contract, including by the High Court.⁴

Implicit in the ruling principle are two important corollary principles. The first is that damages for breach of contract are compensatory in nature. Awards of exemplary or punitive damages are unknown to the law of contract, and considerations such as the motive of the defendant are irrelevant.⁵ The second, and related, principle is that damages for breach of contract cannot place the plaintiff in a better position than he or she would have occupied had the contract been properly performed.⁶ Thus, the fact that a defendant has gained by reason of a breach of contract is not a basis for an award of damages, unless the defendant's gain is coextensive with the plaintiff's loss.

Damages awarded to place the plaintiff in the position he or she would have occupied, had performance occurred, are described as 'expectation damages', since they are awarded to 'protect a plaintiff's expectation of receiving the defendant's performance'.⁷ However, a plaintiff seeking expectation damages still bears the onus of establishing, on the balance of probabilities, that their particular expectation would have been realised but for the breach.⁸

The terminology of 'expectation damages' was coined by Fuller and Perdue in their influential 1936 article in the *Yale Law Journal*.⁹ In the same article, the authors identified two further measures of damages in addition to the expectation measure. The first was the reliance measure, under which damages are assessed in terms of the sum required to put the plaintiff in the position he or she would have occupied had the contract not been entered into. The second was the restitutionary measure, under which damages are assessed in terms of the sum necessary to disgorge the defendant of any benefits gained by reason of their breach.

The reliance and restitutionary measures occupy a controversial place under Australian law. They are discussed in the second and third sections, with particular attention given to the reliance measure, as clarified in *Cessnock*. However, this paper begins with an overview of the expectation measure, which is both the least controversial as a matter of principle and the relevant measure in the vast majority of breach of contract cases.

Expectation damages

Viewed at a high level, the expectation measure of damages involves a simple exercise. Courts are required to compare the state of affairs which obtains as a result of the defendant's breach with the state of affairs which would have obtained had the defendant performed. Adam Kramer KC has helpfully described these as the 'breach position' and 'non-breach position'.¹⁰ Expectation damages are whatever sum is required to bridge the gap between the two, subject to considerations of remoteness and mitigation where relevant.¹¹

In practice, assessing expectation damages can involve a great deal more complexity. As in other areas of contract law, complexity is generated by the sheer variety of relationships capable of being created by contract. To meet it, the law has developed a series of *prima facie* measures for assessing expectation damages. These represent the default understanding of how the ruling principle in *Robinson v Harman* should be applied in particular cases. A brief survey of the *prima facie* measures therefore pro-

vides a useful illustration of the ways expectation damages are measured. As *prima facie* measures, however, the circumstances of a particular case may necessitate a divergent approach.¹²

Difference in value measures

The most common *prima facie* measure is the 'difference in value' measure. It is most familiar in the sale of goods context, where it is codified in the various Sale of Goods Acts. It applies to breach of contract by a failure to deliver, where damages are measured as the difference between the contract price and market price for the goods, either at the time they ought to have been delivered or, if no such time was specified, when the seller refused to deliver.¹³ It also applies to breach of warranties as to quality, where damages are measured as the difference between the value of the goods received and the value of goods meeting the warranty.¹⁴ The value of goods as warranted will usually be equivalent to the contract price.¹⁵

The 'difference in value' measure is also applied at common law in various other contexts. It applies to breaches by purchasers of contracts for the sale of real property, where damages are measured in terms of the difference between the contract price and the market value of the land at the time the bargain was lost.¹⁶ It applies to breaches of lease by lessees, where damages are measured as the difference in the value of the rent unpaid and the rent received on a reletting.¹⁷ It has also been applied to contracts for the sale of shares, where damages are measured as the difference between the shares as warranted and the market value of the shares in fact received.¹⁸

The primary consideration for courts in determining whether a 'difference in value' measure should be applied is whether the contract concerns goods or services for which there is a readily 'available market'.¹⁹ The rationale for this consideration was given by the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*:

'[I]n the case of the supply of defective goods, the *prima facie* measure of damages is the difference in value between the contract goods and the goods supplied. ... such a measure of damages seeks only to reflect the financial consequences of a notional transaction whereby the buyer sells the defective goods on the market and purchases the contract goods. ... However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases, diminution in value damages will not restore the innocent party to the "same situation ... as if the contract had been performed".'²⁰

In *Cappello v Hammond & Simonds NSW Pty Ltd*,²¹ for instance, the respondent builder breached a contract with the appellant homeowners by failing to complete renovation works within a stipulated time. The homeowners sought damages, measured in terms of the difference in value between the property at the time of actual and promised delivery. The NSW Court of Appeal refused the measure on the basis that the

house was non-fungible and saleable only with a deal of effort, emphasising also that the appellants had no intention to sell during the delay period.²² Similarly, in *Ellis's Town House Pty Ltd v Botan Pty Ltd*,²³ the NSW Court of Appeal rejected a submission that the difference in value measure should be applied to a lessor's breach of painting and repairing covenants. The Court emphasised that a lessee's interest in premises being in a state of good condition and serviceable repair was not a marketable commodity.²⁴

Even in cases where a difference in value measure clearly applies, considerable complexities can attend its proper application, as is demonstrated by the High Court's decision in *Clark v Macourt*.²⁵ The case concerned the sale of an in vitro fertilisation business, including 3500 straws of donor sperm. The seller had warranted that the straws of sperm complied with relevant regulatory standards. In fact, the majority of them had to be discarded. In response, the buyer procured replacement sperm from the United States, at a price substantially exceeding the purchase price for the business, and passed the extra cost on to her patients.

A majority of the Court upheld the trial judge's decision, that damages were appropriately measured as the difference in value between straws of sperm which met the contractual warranty and the straws of sperm actually acquired. The value of sperm meeting the warranty was determined on the basis of the market price for acquiring that sperm as at the date of breach. The best evidence of this was the actual price paid to acquire the replacement sperm. The value of the defective sperm in fact acquired was nil, as it had to be discarded. On this basis, the appellant was awarded the entire cost of the replacement sperm as expectation damages.

A detailed consideration of *Clark v Macourt* is beyond scope. However, two points may briefly be made. First, the contract was a contract for the sale of a business, not for the sale of the straws of sperm as chattels. It might therefore be thought, as Emeritus Professor Carter and Professors Courtney and Tolhurst have argued, that the 'difference in value' measure which should have been applied was the difference in value between the business as warranted and the business actually received.²⁶ If damages had been so quantified, the appellant's case would have failed, since there was no valuation evidence for either.

Secondly, the majority in *Clark v Macourt* considered immaterial the fact that the cost of procuring the replacement sperm was passed on to the appellant's patients. However, the arguable effect of this approach was that the appellant was placed in a better position than she otherwise would have been but for the breach, since she both passed on the costs of procuring the replacement sperm and recovered the value of the contract sperm.²⁷ Precluding this outcome may have justified taking into account the losses avoided by the appellant in passing on the cost of the replacement sperm.²⁸

On the other hand, it has also been argued that the award in

Clark v Macourt justifiably vindicated the appellant's 'performance interest' in the contract.²⁹ On these views, damages have two aims — either to provide a pecuniary substitute for performance or to compensate for the negative financial consequences of a breach.³⁰ Difference in value measures are said to be concerned with providing a substitute for performance. Insofar as this is their function, it is said to be irrelevant whether the promisee has avoided any consequential losses.³¹ The fact that the appellant passed on the cost of the replacement sperm to her patients would therefore be irrelevant.

Another complexity which can attend the application of difference in value measures concerns the date at which damages are to be assessed. The usual rule is that damages are to be assessed as at the date of breach.³² However, this rule does not preclude the Court from evaluating the position at breach by reference to subsequent events.³³ The usual rule may also 'give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered'.³⁴ The party who wishes to depart from the usual rule bears the onus of establishing that it would be unjust for the usual rule to apply.³⁵

*Vieira v O'Shea*³⁶ provides an example of when departure from the usual rule may be justified. The respondent breached a contract with Vieira by advising him to purchase an interest in a racehorse with a progressively worsening health condition. The trial judge assessed damages in terms of the difference between the amount paid for the interest and the value of that interest, not as at the date of breach, but as at the date Vieira could reasonably be expected to sell it. This was over two years after the date of breach, since it took some time to discover the existence of the health problems, and it thereafter became necessary for the horse to undergo surgery. The Court of Appeal upheld the decision, explaining that the usual rule could be deviated from:

'... where the plaintiff has acquired an asset which would not otherwise have been acquired and the asset is not readily marketable at the time of acquisition; or if the plaintiff does not discover until some time after acquisition, the matter which meant that the asset would not have been acquired; or if for some other reason the plaintiff is 'locked in' to holding the asset.'³⁷

Vieira v O'Shea is an example of when an asset's defect is not discovered until after its acquisition. Situations in which an asset is not readily marketable at breach include those where an asset cannot immediately be sold on an available market or for fair value.³⁸ Situations in which a plaintiff may otherwise be 'locked in' include those where a plaintiff is obliged under a contract for sub-sale to on-sell defective goods to a third party.³⁹ Additional circumstances beyond those identified in *Vieira v O'Shea* have also been identified. Thus, where a plaintiff does not terminate by accepting a repudiation and seeks specific performance, but specific performance subsequently ceases to be available, damages may be assessed as at the date specific performance was no longer available and the contract was lost.⁴⁰

Cost of cure measures

The other *prima facie* measure commonly applied to assess expectation damages is a 'cost of cure' measure. This measure is most commonly applied in cases where the relevant breach of contract consists in a failure to build, maintain or repair real property to a particular standard. In such cases, damages are quantified in terms of the reasonable cost of rectifying the property so that it conforms with the contract.

This measure is sometimes referred to, after the leading case, as the rule in *Bellgrove v Eldridge*.⁴¹ In that case, a builder breached a contract for the construction of a home by using defective concrete and mortar, rendering the foundations of the house unstable. The High Court rejected a submission that the appropriate measure of damages was the difference in value measure, observing:⁴²

'[The owner's] loss can, *prima facie*, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.'

In *Tabcorp*, the High Court rationalised the rule in *Bellgrove v Eldridge* by observing that Parke B's insistence on placing the plaintiff in the same position as if the contract had not been breached does not necessarily involve placing the plaintiff in 'as good a financial position'.⁴³ This statement has been interpreted as supporting the view, mentioned above, that an award of damages may vindicate a plaintiff's performance interest in a contract, as opposed to compensating for loss.⁴⁴ *Tabcorp* itself concerned the breach of a negative undertaking in a lease agreement by the tenant of an office building, who had renovated the foyer of the premises without consent. In rejecting a submission that a difference in value measure should be applied, the Court emphasised that the owner was contractually entitled to the preservation of their particular property, such that the proper measure was the cost of restoring the property.⁴⁵

Two main qualifications have been recognised to the application of a cost of cure measure: first, only those costs which are necessary to produce conformity with the contract are recoverable under the measure; and secondly, rectification must also be reasonable in the circumstances.⁴⁶ Significantly, however, it does not appear to be a requirement that the plaintiff actually intends to apply their cost of cure damages to the rectification of the defective works.⁴⁷ Indeed, a cost of cure measure may be available even in cases where the plaintiff has sold or intends to sell the property.⁴⁸ Whether the plaintiff intends to carry out rectification works, and whether such works are in fact still possible for the plaintiff, may, however, be relevant to the question whether cost of cure damages are reasonable in the circumstances.⁴⁹

The requirement that rectification works must be 'necessary to produce conformity' with the contract does not mean that those works must be of a kind which were within the scope of the contract. For instance, it may be necessary to demolish and reinstall parts of a property which were not within the scope of

works which had been contracted for, in order to then be in a position to rectify the defective works.⁵⁰ Insofar as such works are necessary to produce conformity with the contract, they will still be recoverable under a cost of cure measure.

In respect of the second qualification, the High Court in *Tabcorp* emphasised that a cost of cure approach will only be considered unreasonable in 'fairly exceptional circumstances'.⁵¹ It referred in this respect to plaintiffs 'merely using a technical breach to secure an uncovenanted profit'.⁵² Beyond this, however, there are few authorities explaining exactly when sufficiently exceptional circumstances will exist. The key question is generally said to be 'whether the cost of remedying the defect is out of proportion to the achievement of the contractual objective'.⁵³ It appears the defendant bears at least the evidentiary onus of establishing unreasonableness in this sense.⁵⁴ In cases where rectification works have been undertaken before damages are assessed, allowances may also be made for betterment.⁵⁵

The decision of the Full Court of the Supreme Court of South Australia in *Stone v Chappel*⁵⁶ provides an interesting case study. Mr and Mrs Stone contracted with the owner of a retirement village for the construction of a top-floor apartment. The terms of the contract included that the ceilings were to be 2700 mm high throughout the unit, which Mr and Mrs Stone considered essential to properly displaying their collection of paintings. Multiple sections of ceiling were, however, constructed between 32 and 57 mm lower than the contractually stipulated height, and the Stones sued for damages in excess of \$500,000, assessed on a cost of cure basis.

All three judges held that it was unreasonable to measure damages on the cost of cure basis. Kourakis CJ emphasised the 'great disproportion' between the costs of rectification and the contract price, as well as the fact that the ceilings, although lower than contracted for, were still substantially higher than normal.⁵⁷ However, the decisive consideration for his Honour was the fact that the rectification works would have created a significant risk of damage to the property of other apartment owners.⁵⁸

Doyle J (with whom Hinton J agreed) identified the key issue as the extent to which the breach involved a departure from the objectives of the contract, and the proportionality of the costs of rectification relative to this departure.⁵⁹ His Honour considered the contract had both functional and aesthetic objectives. The functional objective had been achieved, since the apartment was fit for use, and there had been only a slight departure from the aesthetic objective, since the difference in height did not meaningfully impact the amenity of the apartment. Rectification costs were considered disproportionate to this level of deviation from the contractual objectives.

The fact that the cost of cure measure is predominantly applied in cases involving real property might be thought to reflect the law's general insistence on the specialness of land. However, the measure is not so limited. In *Renown Corp Pty Ltd v SEMF Pty Ltd*,⁶⁰ for instance, it was applied in respect of

a contract for the supply and installation of computer systems, on the basis that such contracts are analogous to construction cases.⁶¹ In the same case, the Court of Appeal made the important point that the usual rule, that damages are to be assessed at the date of breach, does not apply where a cost of cure measure is applied. Where a cost of cure measure applies, damages are instead to be assessed in terms of the reasonable costs of rectification at the date the costs were actually incurred, or, if they have not been incurred by the time of the trial, the reasonable costs as proved at trial.⁶²

Limits of *prima facie* measures and other forms of quantification

The *prima facie* measures are not a panacea. It will frequently be the case that no *prima facie* measure applies. This will sometimes happen even with respect to relatively common forms of breach of contract. There is, for example, no settled *prima facie* measure of damages 'where real property, intended for personal use, is made unavailable by reason of a breach of contract'.⁶³

Even where a *prima facie* measure does apply, it also fail to adequately capture the extent of a plaintiff's loss. Courts may therefore prefer to measure a plaintiff's loss on a separate or additional basis to any applicable *prima facie* measure. In *Tabcorp*, for instance, the owner's damages were not limited to the costs of rectifying the renovations undertaken in breach of the negative covenant, but also included the rental income lost by the owner during the period in which the rectification works would be undertaken.

The point is also well-illustrated by the High Court's decision in *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd*. The contract in that case was for the sale of a stone crushing machine, which the buyer intended to use to perform a separate contract with the Commonwealth. The machine delivered was not fit for purpose and the buyer sued. Applying a 'difference in value' measure, damages would have been assessed as the difference in value between the machine received and a machine which answered the warranty. However, the Court held that it was open to the buyer to instead frame its case on the basis that its true loss was not being able to exploit the machine to recoup its expenditure and generate a future profit. The Court explained:

'... the seller (in effect) promised the buyer that the machine was such that upon the buyer laying out £X in acquiring and installing the machine he would be able to get £X + Y by working it. For breach of the promise the buyer, having laid out his £X, may recover, if he chooses, what the machine would have been worth to him if it had been as promised (presumptively £X) minus the actual value of the machine. Alternatively he may recover £X+Y.'⁶⁴

Nevertheless, plaintiffs will confront additional hurdles where no *prima facie* measure applies. For example, it is usually unnecessary to consider issues of remoteness and mitigation

where a prima facie measure applies. Loss assessed on the basis of a prima facie measure will generally fall within the first limb of *Hadley v Baxendale*, as loss flowing ordinarily and naturally from the breach. In respect of 'difference in value' measures, at least, mitigation is also built into the court's assessment of damages, since damages are measured on the basis of a 'notional transaction', whereby the plaintiff has resorted to the market for substitute performance.⁶⁵ Where a default measure is not available, issues of remoteness and mitigation are more likely to prove decisive.

In cases where no default measure applies, or where one is not relied on, it may also be difficult to precisely quantify the extent of a plaintiff's loss. Difficulties in quantification do not bar an award of substantial damages, since the court is entitled to engage in some degree of 'estimation' or 'guess work'.⁶⁶ However, a plaintiff must still be able to adduce evidence which establishes the fact of substantial loss. Where it cannot, only nominal damages will be awarded.

One type of case in which precise quantification can prove particularly difficult is where the alleged loss depends on the occurrence of a contingent future event. In such cases, the concept of damages for loss of chance or opportunity may arise. A detailed consideration of this area is beyond scope. One illustrative decision of the NSW Court of Appeal may, however, briefly be mentioned. In *Mal Owen Consulting Pty Ltd v Ashcroft*,⁶⁷ the vendor of a business engaged solicitors to recover the outstanding balance on the purchase price. The solicitors commenced but failed to properly prosecute proceedings and they were dismissed. Fresh proceedings were commenced by a new solicitor years later, and a judgment was obtained. By this point, however, the purchaser had entered bankruptcy and the judgment could not be satisfied. The vendor sued for lost opportunity damages.

The trial judge dismissed the claim because it was impossible to conclude, on the balance of probabilities, that the purchaser would have been in a better financial position at an earlier date. The solicitor's failure to properly prosecute the initial proceedings and obtain judgment at an earlier date could not therefore be said to have caused any loss. On appeal, Macfarlen JA agreed with the trial judge, holding that it was necessary to prove, on the balance of probabilities, that the chance lost would in fact have been realised.⁶⁸

Basten JA and Barret AJA disagreed, holding that it was only necessary to prove that 'the lost opportunity had a real value' and was not 'in the realms of the merely theoretical or negligible'.⁶⁹ This test was met, since there was at least a recognisable possibility that a comparatively beneficial outcome would have been obtained, whether by settlement or judgment, had the proceedings been properly prosecuted at an earlier date. Their Honours then turned to the proper measure of loss, explaining that damages for loss of chance are to be measured on the basis of the probability of the plaintiff succeeding but for the breach.⁷⁰ Their

Honours considered there was around a 50% chance that the purchaser would have recovered its outstanding debt in full but for the breach. 50% of that sum was therefore the measure.

The result in this case likely turned on the fact that the object of the contract was to provide the chance of a benefit, viz, the chance of successfully obtaining judgment. In cases where the object of the contract is not to provide the chance of a benefit, and where the defendant has not expressly or impliedly promised the plaintiff as much, it will likely be necessary to establish on the balance of probabilities that the opportunity would in fact have been realised but for the defendant's breach of contract.⁷¹

Reliance damages

Fuller and Perdue described the reliance measure of damages as one which quantifies loss with a view to placing the plaintiff in the position he or she would have occupied had the contract not been entered into. If understood in this sense, there is no such thing as the reliance measure of damages under Australian law. To award damages to put the plaintiff in a pre-contractual position would be inconsistent with *Robinson v Harman*, which requires the plaintiff to be placed in the position he or she would have occupied had there been performance.

However, it is not unknown for an award of damages to compensate the plaintiff for expenditure incurred in reliance on a contract and wasted due to non-performance. The case of *TC Industrial Plant*, where the buyer of a defective stone crushing machine was able to recover the costs incurred in acquiring and operating the machine, has already been mentioned. Insofar as the practical effect of such an award is to place the plaintiff in a pre-contractual position, it makes sense to speak of a reliance measure of damages in the Australian context. Following Professor McLaughlin, however, it may make more sense to use the phrase 'damages for wasted expenditure', not 'reliance damages'.⁷²

Until recently, the leading cases on reliance damages for wasted expenditure were *McRae v Commonwealth Disposals Commission*⁷³ and *Commonwealth v Amann Aviation Pty Ltd*. *McRae* concerned a contract for the sale of an oil-tanker, allegedly shipwrecked on the Jourmand Reef. The buyers spent considerable sums fitting out an operation to salvage the tanker from the reef. However, the tanker did not exist and the buyer sued for damages. The High Court found that the expenditure was incurred in reliance on the Commission's promise that the tanker existed and was wasted due to breach of the promise. These facts were said, in turn, to give rise to a '*prima facie*' case for recovery of the wasted expenditure. To overcome the *prima facie* case, the Commission needed to prove the expenditure would have been wasted in any event, even if the tanker had existed. The High Court explained:

'It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis [of valuing a non-existent tanker]. It is not impossible, however, to undertake an

assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain.⁷⁴

At issue in *Amann* was a contract for the provision of aerial coastal surveillance services. The contract was for a three year term, but there was a high chance it would be renewed, for reasons of comparative advantage. Amann spent considerable sums acquiring and fitting out an aircraft in reliance on the Commonwealth performing and renewing the contract. At the beginning of the term, however, the Commonwealth repudiated. Amann accepted and sued for damages. The High Court held it was extremely difficult to determine whether a profit would have been made, primarily due to uncertainty concerning the prospect of renewal. In these circumstances, Amann was said to benefit from an 'assumption',⁷⁵ 'presumption'⁷⁶ or 'inference'⁷⁷ that, had the contract been performed, it would at least have recouped its expenditure acquiring and fitting out the aircraft. To prevent recovery, it was said to be necessary for the Commonwealth to prove the expenditure would have been wasted in any case.

In both of the leading cases, the party who breached the contract bore the onus of preventing the recovery of damages for wasted expenditure by demonstrating that the expenditure would have been wasted in any event. In neither case was this established. For plaintiffs unable to properly quantify their loss on the usual basis, this reversal of onus may be highly desirable. However, the justification for the reversal of onus, and the precise circumstances in which it will occur, were left unclear by *McRae* and *Amann*.

*Cessnock*⁷⁸

These issues have been substantially clarified by the High Court's recent decision in *Cessnock*. The facts were as follows. Cessnock Council entered into an agreement for lease with 123 259 932 Pty Ltd (formerly, Cutty Sark Holdings Pty Ltd), under which the Council promised Cutty Sark a 30-year lease of Cessnock Airport. The Council promised to take all reasonable action to apply for and register a plan for the subdivision of the airport, with the date of subdivision serving as the date after which the lease would operate. The Council also granted Cutty Sark a licence to occupy a lot prior to the lease coming into effect.

Cutty Sark spent approximately \$3.6 million constructing a hangar on the licensed lot, from which it planned to operate a joy flight business for the duration of the lease. However, the Council failed to take all reasonable action to apply for and register a plan of subdivision (apparently because doing so would have required it to spend approximately \$1.3 million connecting the proposed lots to an existing sewerage system). Cutty Sark was therefore never granted its 30-year lease and the money it spent constructing the hangar was wasted. Cutty Sark terminated the contract and sought over \$3.6 million in reliance damages.

Cutty Sark sought to establish its entitlement to damages by arguing that it benefited from a 'presumption', of the sort recognised in *Amann*, that it would at least have recouped its expenditure had the contract been properly performed. Adamson J rejected this claim, finding that any such presumption was not enlivened and, in any case, would have been rebutted. The NSW Court of Appeal unanimously overturned the primary judge's decision, holding that the presumption both arose and was not rebutted. The High Court upheld the decision of the Court of Appeal.

In dismissing the appeal, the High Court agreed on a number of important points concerning damages for wasted expenditure. First, it was unanimous that recovering damages for wasted expenditure requires a plaintiff to prove both that it incurred expenditure in reliance on the defendant's promise and that the expenditure was wasted because of the defendant's breach.⁷⁹ Secondly, it was agreed that a plaintiff need not prove that the relevant expenditure was required under the contract for it to be incurred 'in reliance on' the contract.⁸⁰ Instead, it appears that a plaintiff needs only to prove that the expenditure was made to acquire some benefit from the contract. This holding was important, since Cutty Sark was not contractually obliged to spend \$3.7 million constructing a hangar on the licensed lot.

The Court also agreed that a plaintiff does not elect between reliance damages for wasted expenditure and expectation damages for loss of profits, since the aim of damages, however measured, is always to give effect to Parke B's ruling principle.⁸¹ As was recognised in *TC Industrial Plant*, a plaintiff can recover damages both for wasted expenditure and lost profits, so long as the plaintiff is not thereby placed in a better position than he or she would otherwise have occupied. Of course, the fact that no question of election arises does not mean that a plaintiff cannot frame its case with a particular measure in mind. Indeed, a noticeable fact of *Cessnock* was that at no point did the plaintiff argue that it would have made a profit, but for the breach.

Finally, the Court agreed that, where relevant preconditions are satisfied, defendants will incur an onus, of the sort recognised in *Amann*, of proving that the plaintiff's expenditure would have been wasted, even if the contract had not been breached.⁸² As to what the relevant preconditions were, however, opinions diverged.

Relationship between the reliance and expectation measures

The point of primary theoretical disagreement in *Cessnock* concerned the nature of the relationship between reliance damages for wasted expenditure and expectation damages for lost profits. Gordon J and the plurality (consisting of Edelman, Steward, Gleeson and Beech-Jones JJ) held that damages for wasted expenditure function as a 'proxy' for, or 'species' of, ordinary expectation damages.⁸³ This is because they are awarded on the basis of the 'assumption', 'presumption' or 'inference' that, had the contract been performed, the plaintiff would at least have

recouped its expenditure. Insofar as damages for wasted expenditure are underpinned by this assumption, they are theoretically consistent with *Robinson v Harman*, since they are still placing the plaintiff in the hypothetical non-breach position.

This raises the question of why the law should impose a presumption of recoupment. The plurality rejected the idea that the presumption is made because ‘the ordinary expectations of the world of commerce [is] that the value of a contract will be no less than the cost of performance’.⁸⁴ As their Honours observed, it ‘is not uncommon in the ordinary course of commercial dealings that a party might make what, in hindsight, turns out to be a bad bargain’.⁸⁵ Seeing this idea as tied to the terminology of a ‘presumption’ of recoupment, their Honours also preferred the terminology of an ‘assumption’ of recoupment. By contrast, Gordon J arguably accepted this idea as a justification for the presumption of recoupment.⁸⁶

The plurality instead justified the assumption of recoupment by characterising it as a manifestation of what it called the ‘facilitation principle’. This was described as the principle that plaintiffs should be given the ‘benefit of any relevant doubt’, and a ‘fair wind’ to establish their loss, in circumstances where quantification of loss has been rendered difficult because of a defendant’s breach. Tort law in England and the United States was drawn on to illustrate the operation of the principle. Gordon J also accepted that considerations of fairness justified the imposition of the assumption.⁸⁷

Gageler CJ advanced a very different view, according to which reliance damages are awarded not on the basis of any assumption of recoupment, but because wasted expenditure is itself a distinctive ‘category of loss’.⁸⁸ On this view, a plaintiff is made ‘worse off’ when expenditure is wasted, not in the sense they would have recouped the expenditure had the contract been performed, but simply in the sense that their expenditure has been ‘thrown away’ and rendered ‘incapable of yielding any benefit or gain’ as a result of the defendant’s breach of contract.⁸⁹ In contrast to expectation damages for lost profits, which are forward looking, damages for wasted expenditure were therefore characterised as backwards looking, concerned with the fact that expenditure has been incurred, but thrown away.

In endorsing this view, Gageler CJ denied he was going so far as to recognise a ‘reliance interest’, of the sort recognised by Fuller and Perdue.⁹⁰ He insisted that damages for wasted expenditure were still circumscribed by *Robinson v Harman*.⁹¹ In particular, consistency with *Robinson v Harman* required that defendants still be afforded the opportunity of proving that the plaintiff’s expenditure would not have yielded a gain or benefit, even if there had been no breach.⁹² In at least many cases, however, this would seem to require the defendant to prove that the plaintiff would not have recouped expenditure had the contract been properly performed. This allowance can therefore arguably be seen as an implicit concession that an assumption of recoupment is in fact being made when damages for wasted expenditure are awarded.

Is there an uncertainty requirement?

Of more practical relevance was the High Court’s divergence on the question of what must be established before the defendant incurs the onus of proving that the plaintiff’s expenditure would have been wasted in any event. In particular, the Court disagreed as to whether the defendant’s breach must have generated uncertainty as to the position the plaintiff would otherwise have occupied before the defendant incurs this onus. Gordon J and the plurality held there was an uncertainty precondition, but adopted different formulations. Gageler CJ and Jagot J denied an uncertainty precondition, finding that it only needed to be proved that expenditure was made in reliance on the contract and wasted due to breach.

According to the plurality, it is a precondition to the enlivening of an assumption of recoupment that the defendant’s breach of contract has ‘caused or increased’ uncertainty as to the position which the plaintiff would otherwise have occupied.⁹³ By failing to register the plan for subdivision, the Council was found to have caused or increased uncertainty as to whether funding for the development of the airport would have been obtained post-subdivision (which would have had financial consequences for Cutty Sark’s business).⁹⁴ It had also caused or increased uncertainty as to the extent to which there would have been an increase in demand for Cutty Sark’s business and as to how Cutty Sark would have operated its business.⁹⁵

Gordon J formulated a stricter version of the uncertainty precondition. In her Honour’s view, the precondition would only be satisfied where a defendant’s breach had made an assessment of damages on the ordinary basis ‘impossible’, ‘impossible with any certainty’ or ‘very difficult’.⁹⁶ Her Honour also considered that the assumption of recoupment would not arise in respect of aleatory contracts (such as insurance contracts), where uncertainty is ‘inherent in the nature of the contract and so ‘cannot be said to have been caused by the breach’.⁹⁷ This was in contrast to the plurality, who considered that there was no in principle reason why the facilitation principle would not apply to aleatory contracts.⁹⁸

Gageler CJ and Jagot J held that there was no uncertainty precondition to the defendant incurring an onus of proving that expenditure would have been wasted in any event. Their Honour’s relied principally on *McRae* for this purpose, since there damages had been awarded only on the basis of explicit findings that expense had been incurred in reliance on the defendant’s promise, and the defendant’s breach meant that expenditure was wasted. Like Gordon J, however, Jagot J appeared to accept that the assumption would not arise in respect of aleatory contracts.⁹⁹

Rebutting the assumption

There were also divergent views on what is required to rebut an enlivened assumption of recoupment. In particular, their Honours disagreed as to whether the defendant’s onus should be characterised as legal or evidential in nature, and whether the

burden placed on the defendant to rebut the assumption of recoupment is variable or static.

According to the plurality, the assumption of recoupment, understood as a manifestation of the facilitation principle, serves as a mechanism for facilitating the discharge of the plaintiff's legal onus, not for shifting that legal onus.¹⁰⁰ The onus incurred by the defendant is therefore evidentiary only.¹⁰¹ To discharge it, their Honours were clear that demonstrating a mere prospect of non-recovery would not suffice. However, the precise strength of the assumption, and the evidence required to rebut it, was held to be contingent on the extent of the uncertainty caused by the defendant's breach.¹⁰² The uncertainties caused by the Council were found to have made it 'very difficult' for Cutty Sark to prove its loss.¹⁰³ Accordingly, the Council had 'to lead substantial evidence as to these matters of uncertainty' to prevent recovery.¹⁰⁴

Gordon J appeared to treat the defendant's onus as evidential, but did not explicitly address the issue.¹⁰⁵ Her Honour did, however, expressly reject the view that the strength of the assumption of recoupment was tied to the extent of the uncertainty caused by the breach. Instead, her Honour warned against undertaking 'a forensic assessment of the gravity of the wrongdoer's conduct'.¹⁰⁶ In every case, it is incumbent on the defendant to establish, on the balance of probabilities, that the plaintiff would in any case have made a loss. If not established, then 'these findings show that awarding the amount wasted will so far as the evidence reveals' put the plaintiff 'in the position it would have been in had the contract been performed'.¹⁰⁷

Jagot J held that the defendant's onus was legal, but denied that the presumption of recoupment varied in strength.¹⁰⁸ The evidence necessary to discharge the defendant's legal onus was, however, said to be variable, according to a number of factors. Those factors included the nature of the contract and the allocation of risk under it, as well as 'the nature and degree of the expenditure', 'the expected source of recoupment', 'degree of speculation inherent in the contract or expenditure', and 'the actual conditions referable to the contract leading up to the breach'.¹⁰⁹ Thus, her Honour apparently accepted to some degree the variability.

Gageler CJ also considered that the defendant's onus was legal in nature, at least 'in the sense that the claim of the plaintiff will prevail if the defendant does not so prove'.¹¹⁰ Strictly speaking, the question of the variability of the assumption did not arise for his Honour, since Gageler CJ denied that the law makes such an assumption when awarding damages for wasted expenditure. However, there was certainly no indication that his Honour regarded the defendant's legal onus as variable.

Taking stock

Notwithstanding these disagreements, the judgment of the plurality gives a clear picture of the state of the law of reliance damages for wasted expenditure. It can be stated as follows. In

cases where a breach of contract has caused or increased uncertainty as to the position the plaintiff would have been in if the contract had been performed, the law assumes that the plaintiff would have recovered the expenditure it incurred in reliance on the contract. The strength of the assumption, and the correlative weight of the burden placed on the party in breach to rebut it, depends on the extent of the uncertainty that results from the breach.

Restitutionary damages

Under Professors Fuller and Perdue's framework, damages for breach of contract may also be measured on a third, restitutionary basis, to disgorge from the defendant benefits wrongfully obtained as a result of a breach of contract. Damages awarded on this measure are even more controversial than damages awarded on a reliance measure. As Heydon JA observed in *Brambles Holdings Ltd v Bathurst City Council*,¹¹¹ 'the award of restitutionary damages for breach of contract is largely if not totally unknown to the law'.

Some Australian decisions on damages for breach of contract have a flavour of the restitutionary measure. In *McRae*, for instance, McRae's award of damages included not only a sum representing the cost of fitting out and conducting the expedition in search of the non-existent oil-tanker, but also a sum equivalent to the amount which had been paid to the Commission under the contract for the sale of the tanker. One might, therefore, sensibly say that McRae was able to recover the sum which the Commission wrongly obtained by its breach of contract.

However, decisions such as *McRae* are ultimately reconcilable with the ruling principle in *Robinson v Harman*. As noted above, the result in *McRae* can be justified on the basis of an unrebutted assumption that McRae would have recovered the purchase price and costs of preparing to exploit the tanker had the contract been performed. While it may sometimes make sense to think about damages in terms of the restitutionary measure, it must therefore be remembered that a defendant's benefit will only be recoverable if it is also the plaintiff's loss. If a defendant's gain cannot be explained as the plaintiff's loss, there will be no recovery on a restitutionary measure.

The position is different in the United Kingdom, where there is authority for the proposition that damages may be awarded on a restitutionary basis in some circumstances, even where the defendant's gain is not equivalent to the plaintiff's loss. The leading case is *Attorney General v Blake*.¹¹² Mr Blake was employed as a spy in the British Secret Intelligence. His employment contract contained a term preventing him from disclosing official information acquired in the course of employment, including after his employment ceased. Mr Blake subsequently began working as a double agent for the Soviet Union and later published a book about his life, while in Russian exile. The information he divulged was no longer confidential, so no claim lay

for breach of confidence. However, Mr Blake had breached the confidentiality term of his employment contract.

By majority, the House of Lords held that the Government was entitled to damages representing a sum equal to the amounts due and owing to Blake from his publisher. Delivering the principal speech, Lord Nicholls explained:

‘... Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. ... A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant’s profit-making activity and, hence, in depriving him of his profit.’¹¹³

Blake has not had a positive reception in Australia. It was described as ‘controversial’ by the NSW Court of Appeal in *Sydney Local Health District v Macquarie International Health Clinic Pty Ltd*¹¹⁴ and as resting on ‘insecure footing’ by the same Court in *BB Australia Pty Ltd v Danset Pty Ltd*.¹¹⁵ In *Hospitality Group Pty Ltd v Australian Rugby Union Ltd*,¹¹⁶ it was explicitly rejected by the Full Court of the Federal Court. Hill and Finkelstein JJ explained the domestic position in the following terms:

‘Whether or not the law of contract is “seriously defective” ... if the court is unable to award disgorgement damages ... the position in Australia is that the loss recoverable for breach of contract is limited to that laid down in *Robinson v Harman* ... That is, the aggrieved party is entitled only to compensation. If he has suffered no loss, he is not entitled to be compensated. In an appropriate case, the aggrieved party may be able to recover (by a claim in restitution) benefits that he has made available to the wrongdoer; for example, he may be able to recover the price paid under an incomplete contract or recover possession of goods sold but not paid for. Presently, however, it would be inconsistent with the current principles laid down by the High Court to confer a windfall on a plaintiff under the guise of damages for breach of contract.’¹¹⁷

Other categories of case have been identified in England as potential candidates for restitutionary damages. In the Court of Appeal decision in *Blake*, for instance, two general categories were identified by Lord Woolf: first, where the defendant has obtained a profit ‘by doing the very thing which he contracted not to do’; and secondly, where there has been ‘skimped performance’.¹¹⁸ No examples were offered of the former category of case. As an illustration of the latter, his lordship referred to the Louisiana case of *City of New Orleans v Firemen’s Charitable Association*.¹¹⁹

The defendant in that case promised to dedicate a specified number of men and horses to provide firefighting services to the City of New Orleans. The defendant failed to provide the specified men and horses. However, this failure did not prevent any fires from being extinguished during the contract term. The

Louisiana Supreme Court did not consider that substantial damages were available, since the plaintiff suffered no loss from the defendant’s skimmed performance.

There may be an intuitive sense that a plaintiff in this position ought to be entitled to substantial damages, which may in turn support recognition of a restitutionary measure. However, the competing view is that where the plaintiff has been deprived of proper performance, that is itself compensable, in the sense that damages can legitimately be awarded to provide a pecuniary substitute for the lost performance.¹²⁰ If damages are awarded on this basis, they may not be inconsistent with *Robinson v Harman*, since the defendant’s gain is still characterizable as the plaintiff’s loss.

It remains to be seen how Australian courts will respond to these and other sorts of cases, which have been suggested as candidates for a restitutionary measure.¹²¹



1 This paper is based on a seminar delivered by the authors to the Commercial Law Association in Sydney on 29 July 2024.

2 [2024] HCA 17 (‘Cessnock’).

3 *Robinson v Harman* (1848) 1 Ex 850 at 855.

4 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) (‘*Tabcorp*’); *Cessnock* (n 2) at [6] (Gageler CJ), [48] (Gordon J).

5 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6 [13] (Gleeson CJ, McHugh, Gummow and Hayne JJ), quoting *Butler v Fairclough* (1917) 23 CLR 78 at 89 (Griffith CJ).

6 *Haines v Bendall* (1991) 172 CLR 60 at 63 (Mason CJ, Dawson, Toohey and Gaudron JJ); *James Hardie & Co Pty Ltd v Newton* (1997) 42 NSWLR 729 at 735 (Handley JA).

7 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80 (Mason CJ and Dawson J) (‘*Amann*’).

8 Ibid.

9 LL Fuller and WR Perdue, ‘The Reliance Interest in Contract Damages: 1’ (1936) 46 *Yale Law Journal* 52.

10 Adam Kramer, *The Law of Contract Damages* (Hart Publishing, 2nd ed, 2017) 14–15.

11 Cf David Winterton, *Money Awards in Contract Law* (Hart Publishing, 2015); Robert Stevens, ‘Damages and the Right to Performance: A Golden Victory or Not?’ in Jason Neyers, Richard Brunaugh and Stephen Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) 171.

12 *Wenham v Ella* (1972) 127 CLR 454 at 466 (Walsh J).

13 See, eg, Sale of Goods Act 1923 (NSW) s 53(3).

14 See, eg, Sale of Goods Act 1923 (NSW) s 54(3).

15 *TC Industrial Plant Pty Ltd v Robert’s Queensland Pty Ltd* (1963) 180 CLR 130 at 142 (Kitto, Windeyer and Owen JJ) (‘*TC Industrial Plant*’).

16 *Ng v Filmlock Pty Ltd* (2014) 88 NSWLR 146 at [50] (Emmett JA, Gleeson JA and Tobias AJA agreeing) (‘*Ng*’).

- 17 *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at [55] (Gleeson CJ, Kirby, Heydon, Crennan and Kiefel JJ).
- 18 *Ailakis v Olivero* (No 2) [2014] WASCA 127 at [138]–[145] (Martin CJ, Buss JA agreeing).
- 19 *Francis v Lyon* (1907) 4 CLR 1023 at 1036 (Griffith CJ).
- 20 *Tabcorp* (n 3) at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
- 21 [2021] NSWCA 57.
- 22 *Ibid* at [84] (Leeming JA, Macfarlan and McCallum JJA agreeing).
- 23 [2017] NSWCA 20.
- 24 *Ibid* at [31]–[32] (Gleeson JA, Leeming and Simpson JJA agreeing), [55]–[59] (Leeming JA).
- 25 *Clark v Macourt* (2013) 253 CLR 1 (*‘Clark v Macourt’*).
- 26 JW Carter, Wayne Courtney and GH Tolhurst, ‘Issues of Principle in Assessing Contract Damages’ (2014) 31 *Journal of Contract Law* 171, 185–197 (*‘Issues of Principle’*); cf *Clark v Macourt* (n25) at [13] (Hayne J), [30] (Crennan and Bell JJ), [68] (Gageler J), [108] (Keane J).
- 27 Carter, Courtney and Tolhurst, ‘Issues of Principle’ (n 26) 184; Katy Barnett, ‘Contractual Expectations and Goods’ (2014) 130 *Law Quarterly Review* 387.
- 28 For discussion of avoided loss see, eg, *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443 at [40]–[44] (Giles JA, Santow and Hunt JJA agreeing); *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at [189]–[190] (Handley JA), [255] (Giles JA); Wayne Courtney, ‘Contract Damages and the Promisee’s Role in Its Own Loss’ (2019) 42 *Melbourne University Law Review* 406.
- 29 See, eg, David Winterton, ‘*Clark v Macourt*: Defective Sperm and Performance Substitutes in the High Court of Australia’ (2014) 38(2) *Melbourne University Law Review* 755; Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 335; James Edelman, ‘Unnecessary Causation’ (2015) 89 *Australian Law Journal* 20, 29.
- 30 This distinction was arguably endorsed in *Clark v Macourt* (n25) at [101] (Keane J). See also *Pourzand v Telstra Corporation Ltd* [2012] WASC 210 at [201] (Edelman J), citing *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 at 418–419 (Tipping J).
- 31 Cf David McLauchlan, ‘Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events’ in Djakhongir Saidov and Ralph Cunningham (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 349.
- 32 *Clark v Macourt* (n 25) at [109]–[110] (Keane J).
- 33 *Willis v Commonwealth* (1946) 73 CLR 105 at 109 (Latham CJ), 116 (Dixon J); *McIntosh v Williams* [1979] 2 NSWLR 543 at 550–551 (Moffitt P and Samuels JA).
- 34 *Johnson v Perez* (1988) 166 CLR 351 at 355–356 (Mason CJ).
- 35 Ng (n 16) at [59] (Gleeson JA, Tobias AJA agreeing); *Baguley v Lifestyle Homes Mackay Pty Ltd* [2015] QCA 75 at [53] (Gotterson JA, McMurdo P and Douglas J agreeing).
- 36 [2012] NSWCA 21.
- 37 *Ibid* at [45] (Basten and Meagher JJA, Handley AJA agreeing).
- 38 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 266; *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [190] (Leggatt J).
- 39 See generally, Andrew Dyson and Adam Kramer, ‘There is No “Breach Date Rule”: Mitigation, Difference in Value and Date of Assessment’ (2014) 130 *Law Quarterly Review* 259.
- 40 *Eli Ali v Tritton* [2019] NSWCA 111 at [54] (Payne JA, Macfarlan and Leeming JJA agreeing).
- 41 *Bellgrove v Eldridge* (1954) 90 CLR 613 (*‘Bellgrove v Eldridge’*).
- 42 *Ibid* at 617 (Dixon CJ, Webb and Taylor JJ).
- 43 *Tabcorp* (n 3) at [13] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), approving *Radford v De Froberville* [1977] 1 WLR 1262 at 1273 (Oliver J).
- 44 See, eg, David Winterton, ‘Two Conceptions of the ‘Performance Interest’ in Contract Damages’ in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar Publishing, 2019) 132.
- 45 *Tabcorp* (n 3) at [15] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
- 46 *Bellgrove v Eldridge* (n 41) at 618 (Dixon CJ, Webb and Taylor JJ).
- 47 *Bellgrove v Eldridge* (n 41) at 620 (Dixon CJ, Webb and Taylor JJ).
- 48 *Scott Carver Pty Ltd v SAS Trustee Corporation* [2005] NSWCA 462 at [47] (Hodgson JA), [120] (Ipp JA); cf *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158 at [88] (Keane JA, Holmes JA agreeing).
- 49 *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253 at [61] (Giles JA, McColl and Campbell JJA agreeing).
- 50 *Lichaa v Boutros* [2021] NSWCA 322 at [56(4)] (Rein J, Macfarlan and Gleeson JJA agreeing), citing *Harbutt’s Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447.
- 51 *Tabcorp* (n 3) at [17] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).
- 52 *Ibid* at [16] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), citing *Radford v De Froberville* [1977] 1 WLR 1262 at 1270 (Oliver J).
- 53 See *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [81] (Macfarlan JA, McColl and Basten JJA agreeing) and the authorities cited therein.
- 54 *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 at [119(3)] (Kirk JA and Griffiths AJA); *Owners SP 92,450 v JKN Para 1 Pty Ltd* [2023] NSWCA 114 at [71]–[72] (Gleeson JA, Brereton and White JJA agreeing).
- 55 Cf *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* (2017) 94 NSWLR 108 at [193]–[207] (Bathurst CJ, Beazley P and Gleeson JA agreeing).
- 56 (2017) 128 SASR 165.

- 57** Ibid at [69].
- 58** Ibid at [72].
- 59** Ibid at [256]-[263].
- 60** *Renown Corp Pty Ltd v SEMF Pty Ltd* (2022) 110 NSWLR 246.
- 61** Ibid at [12], citing Justice James, Edelman, McGregor on Damages (21st ed, 2021, Sweet & Maxwell) at [31-012]-[31-013].
- 62** Ibid at [20].
- 63** *Cappello v Hammond & Simonds NSW Pty Ltd* [2021] NSWCA 57 at [81] (Leeming JA), citing *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384 at [2] (Tate JA), [177]-[179] (McLeish JA).
- 64** *TC Industrial Plant* (n 15) at 141 (Kitto, Windeyer and Owen JJ).
- 65** Carter, Courtney and Tolhurst, 'Issues of Principle' (n 26), 201; G H Treitel, 'Damages for Breach of Warranty of Quality' (1997) 113 *LQR* 188.
- 66** *Di Liristi v Matautia Developments Pty Ltd* [2021] NSWCA 328 at [76]-[77] (Gleeson JA, Macfarlan and Brereton JJA agreeing), citing *Paino v Paino* [2008] NSWCA 276 at [76] (Hodgson and McColl JJA) and *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10 at [38] (Hayne J).
- 67** *Mal Owen Consulting Pty Ltd v Ashcroft* (2018) 97 NSWLR 1163.
- 68** Ibid at [62], [66]-[70] (Macfarlan JA).
- 69** Ibid at [19], [36]-[39] (Basten JA), [98]-[99] (Barrett AJA).
- 70** Ibid at [19], [42] (Basten JA), [100], [112]-[113] (Barrett AJA).
- 71** *Sellars v Adelaide Petroleum* (1994) 179 CLR 332 at 355 (Mason CJ, Dawson, Toohey and Gaudron JJ), 359 (Brennan J); JW Carter, *Contract Law in Australia* (8th ed, 2023 JW Carter Publishing), 842-844.
- 72** See, eg, David McLaughlin, 'The Limitation on 'Reliance' Damages for Breach of Contract' in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar Publishing, 2019) 86.
- 73** *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ('McRae').
- 74** Ibid at 414 (Dixon and Fullagar JJ).
- 75** *Amann* (n 7) at 156 (Gaudron J).
- 76** Ibid at 87 (Mason CJ and Dawson J).
- 77** Ibid at 165-166 (McHugh J).
- 78** The following draws on Henry Higgins and Daniel Reede, 'Controversies in Damages for Wasted Expenditure: Swapping the Old for the New' (2025) 2(3) *Contract and Commercial Law Review* 172.
- 79** *Cessnock* (n 2) at [3] (Gageler CJ), [50], [52], [61] (Gaudron J) [48], [60], [127], [129], [138], [146], [149] (Edelman, Steward, Gleeson and Beech-Jones JJ), [224], [226] (Jagot J).
- 80** Ibid at [4] (Gageler CJ), [53]-[54] (Gordon J), [162]-[164] (Edelman, Steward, Gleeson and Beech-Jones JJ), [191], [224].
- 81** Ibid at [27], [30], [33] per Gageler CJ, [51] per Gordon J, [140], [145] per Edelman, Steward, Gleeson and Beech-Jones JJ.
- 82** Ibid at [26] (Gageler CJ), [56] (Gordon J), [138] (Edelman, Steward, Gleeson and Beech-Jones JJ), [236] (Jagot J).
- 83** Ibid at [49]-[50] (Gordon J), [119] (Edelman, Steward, Gleeson and Beech-Jones JJ); see also [190] (Jagot J).
- 84** Ibid at [150].
- 85** Ibid at [150].
- 86** Ibid at [53].
- 87** Ibid at [56].
- 88** Ibid at [12].
- 89** Ibid at [12], [16].
- 90** Ibid at [12].
- 91** Ibid at [8], [16], [25].
- 92** Ibid at [16].
- 93** Ibid at [61], [67], [160].
- 94** Ibid at [175].
- 95** Ibid at [179], [181].
- 96** Ibid at [50], [56].
- 97** Ibid at [59].
- 98** Ibid at [160].
- 99** Ibid at [227].
- 100** Ibid at [61].
- 101** Ibid at [128], [166]-[167].
- 102** Ibid at [61].
- 103** Ibid at [183].
- 104** Ibid at [184].
- 105** Ibid at [56].
- 106** Ibid at [56].
- 107** Ibid at [58].
- 108** Ibid at [236].
- 109** Ibid at [236].
- 110** Ibid at [20].
- 111** (2001) 53 NSWLR 153 at [93].
- 112** *Attorney-General v Blake* [2000] 3 WLR 625.
- 113** Ibid at 639 (Lord Nicholls, Lord Goff and Lord Browne-Wilkinson agreeing).
- 114** (2020) 105 NSWLR 325 at [111] (Bell P, Gleeson and Payne JJA).
- 115** [2018] NSWCA 101 at [7] (Barrett AJA, Meagher JA and Simpson AJA agreeing).
- 116** (2001) 110 FCR 157.
- 117** Ibid at [159] (Hill and Finkelstein JJ, Emmett J agreeing).
- 118** *Attorney General v Blake* [1998] 2 WLR 805 at 818; cf *Attorney-General v Blake* [2000] 3 WLR 625 at 639-640 (Lord Nicholls, Lord Goff and Lord Browne-Wilkinson agreeing).
- 119** *City of New Orleans v Firemen's Charitable Association* (1891) 9 So 486.
- 120** See, eg, Janet O'Sullivan, 'Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 337-42.
- 121** For a fuller account of issues in this area, see Katy Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012).