Cambridge Law Journal, **83(3)**, November 2024, pp. 425–428
doi:10.1017/S0008197324000540

THE High Court of Australia has decided many of the common law's leading cases involving "reliance damages" for breach of contract, with the latest in the series being *Cessnock City Council v 123 259 932 Pty Ltd.* [2024] HCA 17 ("*Cessnock*"). This note focuses on whether "reliance damages" are a separate independent category of loss, as suggested by Coulson L.J. in *Soteria Insurance Ltd. v IBM United Kingdom Ltd.* [2022] EWCA Civ 440, [2022] 2 All E.R. (Comm) 1082, at [84], [85]. Although Gageler C.J. agreed with that suggestion, the other six judges of the High Court of Australia disagreed and found that these damages are based upon an evidentiary presumption or principle which arises in certain circumstances to allow the measurement of expectation loss by reference to wasted expenditure, reaching a position equivalent to that in orthodox English law (at [152]–[154]) (see e.g. *Omak Maritime Ltd. v Mamola Challenger Shipping Co.* [2010] EWHC 2026 (Comm)).

The dispute arose when Cessnock granted 123 259 932 Pty Ltd (formerly known as "Cutty Sark") a 30-year lease over a portion of Cessnock Airport, to operate from the date of subdivision of the land. In the contract, Cessnock promised to take all reasonable efforts to obtain permission to subdivide by 30 September 2011. It was also the authority responsible for approving the plan of subdivision.

In the meantime, Cutty Sark was given a licence to occupy the land and the council gave it permission to build an aircraft hangar. The hangar was constructed at a cost of over A$3.6m, and Cutty Sark began to operate a business conducting joy flights and acrobatic training for pilots. However, Cessnock made no effort to register the plan of subdivision, despite its reasonable efforts obligation. Cutty Sark was deregistered when it became insolvent. Cessnock purchased the hangar for A$1, as it was entitled to do under the contract. Cutty Sark was revived to claim "reliance damages" for breach of contract (but as a "zombie company" it could only be referred to by its Australian Company Number). Cessnock argued, among other things, that Cutty Sark's expenses would not have been recouped if the contract had not been breached.

The trial judge awarded Cutty Sark only nominal damages ([2021] NSWSC 1329) but the New South Wales Court of Appeal overturned the trial judge's decision and awarded "reliance damages" ([2023] NSWCA 21). The court noted that this form of damages is perhaps better conceived of as "wasted expenditure", in line with academic opinion (see e.g. McLauchlan (2011) 127 L.Q.R. 23). The High Court of Australia unanimously upheld the decision of the New South Wales Court of Appeal, in four separate

judgments (Edelman, Steward, Gleeson and Beech-Jones JJ. ("the plurality") and separately Gageler C.J., Gordon J. and Jagot J.).

In *Commonwealth v Amann Aviation Pty Ltd.* (1991) 174 C.L.R. 64 the High Court of Australia had suggested that there was a "presumption" (Mason C.J. and Dawson J., at [87]–[89], Deane J., at [126]–[128]), "assumption" (Gaudron J., at [155]–[158]) or "inference" (Brennan J., at [105]) that in a commercial contract, the non-breaching party expects *at least* to recoup their outlay. Thus, if expectation damages are unable to be easily calculated, an award of wasted expenditure incurred in reliance on the contract puts the non-breaching party in the position as if the contract had been performed.

In *Cessnock*, the plurality (at [61]), Gordon J. (at [51]) and Jagot J. (at [190], [191]) agreed that there is a principle that, in circumstances where expectation damages are otherwise unavailable or difficult to calculate as a result of the other party's breach, wasted expenditure can act as a proxy for expectation loss for breach of contract.

However, the plurality eschewed the use of the word "presumption" (at [128]) and rejected the idea that wasted expenditure was based on a presumption that, in the ordinary course of commercial dealings, a party will expect at least to recoup their expenses. Instead, damages for wasted expenditure were situated within a broader "facilitation principle" where the claimant's loss would be more likely to be inferred if the defendant's wrongdoing resulted in uncertainty regarding the quantum of loss (at [129]). The facilitation principle was said to be reflected in other decisions governing the calculation of damages for both contract and tort (at [127]–[168]; see also A. Kramer, "Proving Contract Damages" in G. Virgo and S. Worthington (eds.), *Commercial Remedies: Resolving Controversies* (Cambridge 2017), 288, at 232).

Conversely, Gordon J. stated that the availability of damages for wasted expenditure reflected a "presumption of recoupment" which arose in circumstances where it was difficult to calculate the expected profit from the transaction (at [50], [51]). Her Honour continued at [52]:

> The value of damages for wasted expenditure is the quantum of the relevant expenditure, less any retained benefit accruing to the plaintiff from the expenditure. The plaintiff must establish that, but for the promise, they would not have spent the money. The plaintiff is not worse off just because they spent money. The "wasted" expenditure must be linked to the breach of the contractual promise. … Expenditure which would have been made anyway is not recoverable.

Jagot J.'s judgment reflects a broadly similar approach, although her Honour did not see difficulty of calculation of the value of contractual performance as a prerequisite to the award of damages for wasted expenditure (at [226], [229]).

While Gageler C.J. also upheld the appeal, his Honour rejected the existence of a presumption (at [4]). Instead, his Honour held that "[w]asted expenditure is itself a category of damage" (at [9]; see also L. Fuller and W. Purdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52). Drawing on case law from across the Commonwealth, including *Soteria Insurance* (at [17]). At [14], Gageler C.J. suggested "wasted expenditure is without more a recognised category of compensable damage". However, Professor Burrows has described the existence of a separate reliance interest as a "myth" (A. Burrows, *A Restatement of the English Law of Contract* (Oxford 2016), 123).

Expectation losses can be described in two ways. First, they might be explained as representing the "difference in value" between the position contracted for and the position the claimant should reasonably have taken in mitigation. Alternatively, reflecting the way in which damages were analysed by Gageler C.J. in *Cessnock* (at [28]–[32]) and by Mason C.J. and Dawson J. in *Amann Aviation* ((1991) 174 C.L.R. 64, 82) expectation damages could be seen as wasted expenditure *plus* the net profit the claimant would have made had the defendant performed coming to the same sum as the difference in value. It is easy to see here why the claimant's wasted expenditure seems to be independently compensated if the difference in value is analysed in the second way. However, it becomes clear that wasted expenditure is not independently compensated by expectation damages calculated on a difference in value measure when the claimant would not have recouped their entire wasted expenditure even if the defendant had performed. Suppose that the difference in value between the position contracted for and the position the claimant should reasonably have taken in mitigation is only £3,000, but the claimant has spent £5,000 in reliance on the contract. The claimant does not recover the entire £5,000, but only £3,000. Courts are (generally) not in the business of compensating claimants for entering into "losing contracts".

Gageler C.J. deals with this by stating that expectation loss provides a "ceiling" on recovery (at [16]). However, this suggests that wasted expenditure is not independently compensable: in fact, it simply acts as a proxy for the expectation loss. Simply being "worse off" is not a reason to award wasted expenditure. It is to be hoped that courts in the UK resist the siren call of this analysis, notwithstanding Coulson L.J.'s dicta in *Soteria Insurance*.

For courts seeking guidance as to the principles governing wasted expenditure, Gordon J.'s judgment is admirably clear and concise, and most consistent with the judgments in *Amann Aviation*, as is Jagot J.'s.

Whether UK courts will adopt the broader "facilitation principle" advanced by the plurality remains to be seen. At [61], the plurality said:

> The strength of this assumption or inference, and thus the weight of the burden placed on the party in breach to adduce evidence to rebut the inference in whole or in part, will depend on the extent of the uncertainty that results from the breach. Expressed in this way, this facilitation principle is tied to its rationale, namely the uncertainty in proof of loss occasioned to the plaintiff by the defendant's breach.

It therefore seems that the plurality envisages a sliding scale of proof, dependent upon the level of uncertainty present and the extent to which the defendant's deliberate breach created it. However, it was worth noting that this approach was rejected by Gordon J. and Jagot J., on the basis that it may bring unnecessary complexity into the law.

KATY BARNETT

Address for Correspondence: Melbourne Law School, Level 7, The University of Melbourne, 185 Pelham Street, Carlton, Victoria 3010, Australia. Email: k.barnett@unimelb.edu.au