

Before the High Court

Reassessing “Reliance Damages”: The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*

David Winterton*

Abstract


The forthcoming appeal in *Cessnock City Council v 123 259 932 Pty Ltd* affords the High Court an opportunity to reconsider the law governing the recovery of expenditure incurred in reliance upon an unperformed contractual promise. The appeal’s central focus is likely to be the nature and status of the so-called ‘presumption of recoupment’ commonly said to provide the legal foundation for the recovery of such expenditure as damages for breach of contract. Depending on the arguments made, and on the Court’s approach, the appeal may additionally provide the chance to identify more precisely when expenditure incurred in reliance upon an unperformed contractual promise is presumptively recoverable as damages: in particular, the relevance of the rule established in *Hadley v Baxendale* in this context. It is argued that the High Court should reject the expansive interpretation of the *Amann* decision some have adopted or, alternatively, provide further guidance regarding the appropriate limits on presumptively recoverable reliance expenditure.

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I Introduction

Following contractual breach, the settled principle is that, at least absent contrary agreement, the innocent party is entitled to be placed in ‘the same situation ... as if the contract had been performed’.¹ But in *McRae v Commonwealth Disposals Commission*,² the High Court of Australia held that, where ‘the breach of contract itself ... makes it impossible’ to determine the value of the promised performance, the ‘burden’ shifts to the defendant to show that, if there had been no breach, ‘reasonable’ expenditure incurred in reliance upon the unperformed promise ‘would equally have been wasted’.³ In *Commonwealth v Amann Aviation*,⁴ the High Court arguably extended the range of circumstances where it is presumed that the plaintiff would have recouped any expenditure reasonably incurred in reliance upon an unperformed contractual promise⁵ to situations where there is sufficient evidential uncertainty as to what position the plaintiff would have occupied had the breach not occurred. Notably, a majority of the Court also apparently accepted that, in determining this ‘non-breach position’, regard may be had to any consequential benefits falling within the scope of the rule in *Hadley v Baxendale*⁶ that may potentially have accrued to the plaintiff following performance.⁷

Precisely what *Amann* establishes, and the cogency of its reasoning, have been the subject of ongoing debate.⁸ The decision also leaves important matters unresolved: in particular, the principles by which ‘contractual reliance expenditure awards’⁹ are properly restricted. The appeal in *Cessnock City Council v 123 259 932 Pty Ltd* (*‘Cessnock’*)¹⁰ provides the High Court with a welcome opportunity to reconsider *Amann* and to provide some guidance regarding this question of restriction. The present column identifies the central issues upon which the appeal will turn and proposes two possible avenues for its disposition.

The discussion commences, in Parts II–IV, by summarising the relevant background to the appeal and the key issues raised. These issues are then examined further in Parts V–IX, where the following claims are defended. First, the broader interpretation of *Amann* is both incorrect and indefensible in principle. Secondly,

¹ Hereafter, ‘the *Robinson v Harman* principle’: see *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B).

² *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (*‘McRae’*).

³ *Ibid* 412–14 (Dixon and Fullagar JJ).

⁴ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (*‘Amann’*).

⁵ Hereafter, ‘the presumption of recoupment’.

⁶ See *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 145, 152.

⁷ In combination, these two propositions are hereafter denoted by ‘the broader interpretation of *Amann*’.

⁸ See, eg, GH Treitel, ‘Damages for Breach of Contract in the High Court of Australia’ (1992) 108 *Law Quarterly Review* 226; HK Lücke, ‘The So-called Reliance Interest in the High Court’ (1994) 6(2) *Corporate and Business Law Journal* 117; Nick Seddon, ‘Contract Damages where Both Parties Are at Fault’ (2000) 15(3) *Journal of Contract Law* 207.

⁹ As Gaudron J pointed out in *Amann* (n 4) 154, although awards of this kind are often described as ‘reliance damages’, that expression ‘is apt to give the erroneous impression that damages [for breach of contract are] ... awarded on some basis other than compensation for the loss of contractual rights’.

¹⁰ *Cessnock City Council v 123 259 932 Pty Ltd* (High Court of Australia, Case No S115/2023) (*‘Cessnock’*).

recovering expenditure reasonably incurred in reliance upon a contractual promise in an action seeking damages for breach of that promise must be distinguished from recovery on a restitutionary basis of expenditure ostensibly incurred in performance of an agreement between the parties. Thirdly, subject to the plaintiff affirmatively establishing the likely recoupment of the claimed expenditure, recovery on the former basis should be limited to circumstances where the defendant cannot discharge any applicable *evidentiary* onus regarding the plaintiff's possible non-recoupment of the expenditure. Fourthly, if, alternatively, the broader interpretation of *Amann* is endorsed, some principled limits upon the availability of contractual reliance expenditure awards must be developed. Fifthly, the requirement that presumptively recoverable reliance expenditure must be reasonably incurred cannot plausibly be equivalent to asking whether it satisfies *Hadley's* second limb. Sixthly, if the broader interpretation of *Amann* is adopted, it should be possible for the parties' agreement to expressly, impliedly, or perhaps even *implicitly*, restrict the scope of presumptively recoverable expenditure. Finally, and most tentatively, on the preferable interpretation of the parties' contract, this is what occurred in *Cessnock*.

II Background

The parties' dispute arose from Cessnock City Council's later abandoned proposal to develop Cessnock Airport. After an extended period of negotiations, the Council entered into a contract with the plaintiff ('Cutty Sark') in July 2007 under which it promised to grant Cutty Sark a 30-year lease over part of the airport following registration of the plan of subdivision. Cutty Sark proposed to construct an aircraft hangar to house previously acquired aircraft from which it would run a business conducting adventure flights and advanced flight aerobatic training, and to use the hangar as a venue for hire and an aviation museum. Significantly, the Council was also the relevant consent authority for approval of the subdivision plan and contractually promised to take all reasonable steps to apply for and register it by 30 September 2011 ('the sunset date').

The Council later notified Cutty Sark that it would not be proceeding with the proposed development because it could not afford to pay the costs of necessary sewerage work. In consequence, the plan was never registered, and the proposed lease was not granted. In the meantime, Cutty Sark had been granted a licence to occupy the subject lot and proceeded to construct the hangar at a cost of approximately \$3.7 million. Notably, none of the businesses Cutty Sark had meanwhile commenced were successful and all ceased to operate prior to the sunset date. By mid-2012, Cutty Sark vacated the proposed lot, and was deregistered. The Council validly terminated the contract and, in accordance with one of its provisions, acquired the hangar for \$1. Cutty Sark was later reinstated and commenced proceedings against the Council claiming, inter alia, damages for breach of contract.

At trial, the Council was found to have breached its obligation to take all reasonable steps to ensure registration of the plan by the sunset date,¹¹ but Cutty Sark's claim to recover expenses incurred in constructing the hangar was denied. According to Adamson J, the presumption established in *McRae* and *Amann* did not arise because the Council's breach did not make it 'impossible' to determine the position Cutty Sark would have occupied had the contract been performed.¹² Her Honour further held that, although Cutty Sark's claim for expenses incurred in constructing the hangar had not been expressly excluded, both the contract's terms and the 'surrounding circumstances' demonstrated that 'the commercial risk [of the venture not succeeding] was the plaintiff's'.¹³ Additionally, Adamson J held that, even if a presumption of recoupment did arise, it had been rebutted by the Council because: (1) the Council made no promise to develop the airport and the development's progression depended on external factors outside the parties' control; and (2) Cutty Sark abandoned each of the three businesses it operated while a licensee prior to the sunset date, and turned down the Council's substitute offer of five consecutive five-year leases.¹⁴ Finally, her Honour held that the relevant expenditure was not recoverable 'under either of the two limbs in *Hadley*',¹⁵ because it was within the parties' reasonable contemplation that the agreement would be terminated on or after the sunset date without breach.¹⁶

III The Decision on Appeal

Cutty Sark successfully appealed to the New South Wales Court of Appeal and was awarded \$3,697,234.41, plus interest.¹⁷ Brereton JA, with whom Macfarlan and Mitchelmore JJA agreed, commenced by explaining why 'the presumption referred to in *McRae* and *Amann*' did arise on the facts.¹⁸ Relevantly, his Honour held that, as regards any expenditure incurred in reliance upon the defendant's promise and 'subject to the rule in *Hadley*'

a plaintiff who is unable *or does not undertake* to demonstrate whether or to what extent the performance of a contract would have resulted in a profit may ... [recover such] expenditure ... except to the extent that the defendant shows that the plaintiff would not have recouped its expenditure had the contract been performed.¹⁹

¹¹ *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329 ('*Cessnock Trial*') [179]. Additionally, it was conceded that this failure was 'an effective cause' of the plan's non-registration: at [180].

¹² *Ibid* [207], [215]–[218].

¹³ *Ibid* [220].

¹⁴ *Ibid* [211], [214], [219], [221].

¹⁵ *Ibid* [225].

¹⁶ *Ibid* [223].

¹⁷ *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 ('*Cessnock Appeal*').

¹⁸ *Ibid* 478 [49].

¹⁹ *Ibid* 487–8 [73] (emphasis added). Compare *Amann* (n 4) 162 (McHugh J): 'it is a mistake to speak of the plaintiff having a right to elect between expectation damages and reliance damages'.

Brereton JA identified ‘[t]wo relevant themes’²⁰ in Adamson J’s reasoning to the conclusion that the presumption of recoupment did not arise, taking issue with each of them. The first theme was that the presumption’s arising was subject to an ‘impossibility prerequisite’. Brereton JA rejected this view on the basis that, when read contextually, none of Mason CJ and Dawson J, Deane J, Toohey J and Gaudron J adopted this precondition in *Amann*.²¹ Adamson J ruled out this interpretation of *Amann* because it suggested ‘the surprising and unorthodox proposition that there is no obligation on an injured party to prove loss since the wrongful party will, in any event, be liable for reliance expenditure’.²² Brereton JA disagreed on the basis that the plaintiff will always have to prove that it ‘incurred the expenditure, *in reliance* on the defendant performing its relevant contractual obligation’,²³ which is ‘of itself prima facie proof of loss’.²⁴ Moreover, according to his Honour

it would be quite illogical that a presumption casting the onus on the defendant to prove that the plaintiff would not have recouped its expenditure would arise only where the plaintiff first established that it could not possibly prove the opposite.²⁵

The second theme Brereton JA identified in Adamson J’s reasoning was that the preferable construction of the parties’ contract was that ‘the risk of the future development occurring ... was to be borne by Cutty Sark and not by the Council’,²⁶ meaning that ‘it was not reasonable for Cutty Sark to incur the expenditure it did’.²⁷ While Brereton JA accepted that the contract allocated certain risks to Cutty Sark, his Honour held that the various contractual exclusions of liability had ‘no direct application’ to the claim advanced. Brereton JA also considered that the absence of any promise to develop the airport was ‘beside the point’²⁸ because ‘[t]he one risk that matters is that which eventuated — that the Council repudiated its obligations to take all reasonable action to procure registration of the Plan — and that risk was one which Cutty Sark did not accept’.²⁹

As regards the limits on presumptively recoverable expenditure, Brereton JA held that the presumption of recoupment extends to ‘any detrimental change of position by the promisee in reliance upon the defendant’s promise’ that falls within

²⁰ Ibid 491 [83].

²¹ Additional support was derived from the interpretation of *Amann* (n 4) adopted in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234 (*‘Meetfresh’*) [30]–[31] (Macfarlan JA, Bell P and Meagher JA agreeing). But, as Brereton JA recognised, the Court there relied upon Brennan J’s reasons rather than those of Toohey J and Gaudron J: see *Cessnock Appeal* (n 17) 493 [91]–[92].

²² *Cessnock Trial* (n 11) [207].

²³ *Cessnock Appeal* (n 17) 494 [94] (emphasis added).

²⁴ Ibid.

²⁵ Ibid 494 [93]. This is a perceptive observation that, as will be explained, suggests either that the defendant’s onus should be merely evidentiary or that the presumption’s arising must be limited on other grounds (for example, the kind of expenditure incurred or the nature of the unperformed promise).

²⁶ Ibid 491 [84] (citations omitted).

²⁷ Ibid 496 [100].

²⁸ Ibid 497 [103].

²⁹ Ibid.

the scope of *Hadley*'s second limb³⁰ and, further, that it was within the parties' reasonable contemplation that Cutty Sark's expenditure here would be incurred and wasted if the Council's promise was breached. Finally, again invoking *Hadley*, his Honour held that the Council had not rebutted the presumption here because a court may have regard to contingent, unpromised 'potential benefits that might have accrued to the plaintiff', provided these benefits were reasonably within the parties' contemplation at formation.³¹

IV Overview of the Issues

The most fundamental question regarding the recovery of expenditure incurred in reliance upon an unperformed contractual promise is when such recovery is justified. In *L Albert & Son v Armstrong Rubber Co*,³² Learned Hand CJ famously observed that because, following contractual breach

[it is] often very hard to learn what the value of the performance would have been ... it is a common expedient, and a just one ... to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other.³³

But it is important not to misinterpret the intended meaning of this proposal. First, earlier in the same passage the Chief Justice also made clear that 'the promisor's default ... [should not] make him an insurer of the promisee's venture'.³⁴ Secondly, his Honour's comments might plausibly be interpreted as requiring that the breach *itself* must be what makes determining the 'value of the performance' sufficiently difficult to justify reversal of the onus.³⁵ Thirdly, and most importantly, as Ng persuasively argues, the logic of Learned Hand CJ's reasoning is not directly transferable to the conception of contractual reliance expenditure awards adopted in *Amann* because, in the United States

there is a discernible link between the shifting of the onus of proof to the defendant on the issue of recoupment ... and the fact that reliance damages are there intended to put the plaintiff in the position that he or she would have been in *if the contract had not been made*.³⁶

Under Australian (and now English)³⁷ law, the recovery of reliance expenditure in an action for breach of contract³⁸ must yield to the *Robinson v*

³⁰ Ibid 488 [73]. See text at above n 19.

³¹ Ibid 505 [126].

³² *L Albert & Son v Armstrong Rubber Co*, 178 F 2d 182 (2nd Cir, 1949) ('*Armstrong Rubber*').

³³ Ibid 189 (citations omitted).

³⁴ Ibid.

³⁵ It is also unclear whether his Honour regarded contingent, consequential benefits that might result from performance as part of this value. As explained by McHugh J in *Amann* (n 4) 174, and by Treitel (n 8) 231, this extension of the scope of the presumption of recoupment is difficult to justify.

³⁶ Gerald Ng, 'The Onus of Proof in a Claim for Reliance Damages for Breach of Contract' (2006) 22(2) *Journal of Contract Law* 139, 148 (emphasis added).

³⁷ *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2011] Bus LR 212, 222–30 [34]–[66] (Teare J) ('*The Mamola Challenger*').

³⁸ As explained below, recovery of reliance expenditure on some other basis might still be justified.

Harman principle.³⁹ Given this, alongside the preceding observations and certain problems with the broader interpretation of *Amann* outlined below,⁴⁰ it will be argued that, unless the plaintiff ultimately demonstrates the likelihood of recoupment on the balance of probabilities, recovering reliance expenditure as damages is only justifiable when the defendant cannot discharge an evidentiary onus in relation to the plaintiff's possible non-recoupment of the relevant expenditure. However, an important preliminary question arising on appeal is precisely what *Amann* establishes. In particular, the Court must decide whether there was majority support there for the proposition that proof that reasonable expenditure was incurred in reliance upon a contractual promise is itself sufficient to entitle the plaintiff to its recovery except to the extent that the defendant demonstrates the likelihood of non-recoupment.

A second critical issue raised by *Cessnock* concerns the appropriate limits on the recovery of reliance expenditure as damages for breach of contract, particularly under the broader interpretation of *Amann*. One question here is precisely what it means to say that presumptively recoverable reliance expenditure must be 'reasonably incurred'. Another is whether the parties' contract may impact the scope of any default presumption of recoupment, whatever its content may be. Presumably, the parties may expressly exclude or limit the plaintiff's default entitlement to recover.⁴¹ But the extent to which the parties' contract may impliedly, or *implicitly*, modify the default position is unclear. As will be explained, this uncertainty partly derives from doubt regarding the content of, and justification for, the contractual remoteness rule more generally.

V The Nature of the Presumption in *Amann* and Its Application in *Cessnock*

As noted, the most significant point of controversy arising from *Amann* is whether there was majority support there for the proposition that proof of expenditure being reasonably incurred in reliance upon a contractual promise itself renders such expenditure presumptively recoverable unless the defendant establishes the likelihood of non-recoupment. One view is that majority support for this proposition derives from the judgments of Mason CJ and Dawson J, Brennan J, and Deane J.⁴² However, in the immediate aftermath of *Amann*, Professor Lücke advanced a different view, arguing that Brennan J did not support the 'general version of the presumption' adopted by Mason CJ and Dawson J, and by Deane J, because Brennan J was clear that, without more, the defendant's breach and the plaintiff's

³⁹ *Robinson v Harman* (n 1). See *Amann* (n 4) 82, 85, 92 (Mason CJ and Dawson J). Cf Marc Owen, 'Some Aspects of the Recovery of Reliance Damages in the Law of Contract' (1984) 4(3) *Oxford Journal of Legal Studies* 393, 395–6.

⁴⁰ See Part VI.

⁴¹ But see *Soteria Insurance Ltd (formerly CIS General Insurance Limited) v IBM United Kingdom Ltd* [2022] EWCA Civ 440.

⁴² See, eg, *Meetfresh* (n 21).

difficulty in quantifying its loss did not justify reversing the onus of proof.⁴³ It is also necessary, said his Honour, that the defendant's breach 'itself makes it impossible to undertake an assessment on the ordinary basis'.⁴⁴

The appellant advances a similar proposition in its written submissions,⁴⁵ and it is suggested that this is the preferable position. As Lücke explains, 'the promise [in *McRae*] was of a rather special type and so was the breach'.⁴⁶ In particular, the Commonwealth did not promise to perform an act, but instead warranted the existence of a particular state of affairs; and, for a warranty, it has been argued that there is 'no promise except a promise to pay damages' if the warranted state of affairs does not exist.⁴⁷

The distinction between promises and warranties provides one plausible basis for quarantining *McRae*. Alternatively, contrary to what *McRae* actually decided, it might reasonably be contended that an agreement to sell a non-existent tanker is void ab initio for 'common mistake', and it is certainly plausible that the case would be resolved differently today since the same relief could be granted either as damages for negligent misrepresentation,⁴⁸ or to satisfy the 'equity'⁴⁹ generated by the plaintiff's reasonable reliance upon the Commission's representation.⁵⁰ Regardless of this, Lücke convincingly explains that it is clear that Brennan J did not support the 'general version of the presumption' adopted by Mason CJ and Dawson J, and by Deane J, 'but one which had been forced in the straight-jacket of *McRae*',⁵¹ with the consequence that 'any attempt to apply either the result or the reasoning of that decision to cases like *Amann* is bound to generate confusion'.⁵²

In *123 259 932 Pty Ltd v Cessnock City Council* ('*Cessnock Appeal*'), the Court agreed with this interpretation of Brennan J's judgment.⁵³ Their Honours nevertheless endorsed the interpretation of *Amann* adopted in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*,⁵⁴ relying upon the judgments of Toohey J and Gaudron J in *Amann*. This view is unsupportable because those Justices only upheld the existence of 'a practical or evidentiary onus'⁵⁵ on the defendant 'of the kind which arises because, in the absence of evidence to the contrary, some particular thing is

⁴³ See Lücke (n 8) 145.

⁴⁴ See *Amann* (n 4) 139 (Brennan J); *ibid* 146, where Lücke notes that this was also the interpretation of *McRae* (n 2) adopted by Hutchinson J in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, 38 ('*CCC Films*').

⁴⁵ See Cessnock City Council, 'Appellant's Submissions', Submission in *Cessnock City Council v 123 259 932 Pty Ltd*, Case No S115/2023, 3 November 2023 [29], [35]–[40] ('Appellant's Submissions').

⁴⁶ See Lücke (n 8) 146.

⁴⁷ See John W Salmond and James Williams, *Principles of the Law of Contracts* (Sweet & Maxwell, 2nd ed, 1945) 44–7.

⁴⁸ Such a claim was denied in *McRae* (n 2) itself due to the presently existing state of the law.

⁴⁹ See, eg, *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 426 (Brennan J).

⁵⁰ For some, admittedly tenuous, support, see *McRae* (n 2) 414 (Dixon and Fullagar JJ).

⁵¹ Lücke (n 8) 147.

⁵² *Ibid* 146.

⁵³ *Cessnock Appeal* (n 17) 470 [91].

⁵⁴ See above n 21.

⁵⁵ See *Amann* (n 4) 156 (Gaudron J), where her Honour noted that in *McRae* this was described as 'a starting point': see *McRae* (n 2) 414 (Dixon and Fullagar JJ).

assumed to be the case’,⁵⁶ rather than upholding a full shifting of the legal onus. The distinction between the two kinds of onus has salience in the present appeal because, even if the Council did not establish non-recoupment on the balance of probabilities, it is difficult to conclude that it did not adduce sufficient evidence to raise this as a serious possibility. Accordingly, if the arising of any presumption of recoupment rests upon the reasoning of Toohey J and Gaudron J in *Amann*, the onus cast upon the defendant must be ‘evidentiary’, meaning that Cutty Sark ultimately bore the burden of persuasion as to the likelihood of recoupment.

VI Difficulties with the Broader Interpretation of *Amann*

The narrow interpretation of Brennan J’s judgment in *Amann* is not universally accepted. Professor McLauchlan has claimed that this interpretation is ‘too literal’ because ‘it is difficult to accept that [his Honour] was saying anything all that different from ... Mason CJ and Dawson J and Deane J’.⁵⁷ For reasons already outlined, this view is rejected here. However, even if one prefers McLauchlan’s interpretation of *Amann*, it does not follow that any alleged presumption of recoupment upheld by Brennan J in the context of a claim to recover the necessary preparatory expenditure there incurred applies to a claim seeking recovery of the non-essential expenditure incurred by Cutty Sark.⁵⁸

This distinction between ‘essential’ and ‘incidental’ reliance was famously made by Fuller and Perdue in ‘The Reliance Interest in Contract Damages’,⁵⁹ where those authors specifically included necessary preparatory expenditure within the former category.⁶⁰ Significantly, however, Fuller and Perdue’s purpose in drawing that distinction was to determine when a plaintiff’s claim for expenditure should be capped by its expected profits rather than whether adopting a presumption of recoupment is appropriate; and significantly, those authors appear to have been highly sceptical that it ever is.⁶¹

By contrast, after first explaining that Fuller and Perdue’s dichotomy actually masks two distinctions — one between ‘obligatory and non-obligatory’ reliance, and one between ‘direct ... and consequential reliance’⁶² — McLauchlan has recently

⁵⁶ *Amann* (n 4) 156. Notably, Gaudron J’s analysis appears to be broadly consistent with what was said recently in *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, 169–70 [29] (Bell, Keane and Nettle JJ), 188 [65]–[66] (Gageler and Edelman JJ) (*‘Berry’*).

⁵⁷ See David McLauchlan, ‘The Limitations on Reliance Damages for Breach of Contract’ in Roger Halson and David Campbell (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar, 2019) 86, 93.

⁵⁸ See further Appellant’s Submissions (n 45) [39].

⁵⁹ LL Fuller and William R Perdue Jr, ‘The Reliance Interest in Contract Damages: 1’ (1936) 46 *Yale Law Journal* 52.

⁶⁰ *Ibid* 78.

⁶¹ *Ibid* 75–80.

⁶² McLauchlan (n 57) 96, invoking the insightful analysis in Robert E Hudec, ‘Restating the “Reliance Interest”’ (1982) 67(4) *Cornell Law Review* 704, 724–8. The former distinction differentiates between reliance ‘required to comply with a contractual obligation owed to the defendant, and

suggested that it is critically important to distinguish between different kinds of reliance expenditure when applying the presumption of recoupment. Specifically, McLauchlan's claim is that while

there is a strong case for placing a formal or strict onus on the defendant in the case of expenditure that is both obligatory and direct reliance ... in the case of expenditure that is consequential reliance (whether obligatory or non-obligatory), the defendant should at most, with one possible exception, be subject to an evidential onus only.⁶³

McLauchlan's apparent reason for imposing this restriction on a full shifting of the legal onus is the same concern previously identified by others that the defendant should not become 'the insurer of the plaintiff's enterprise'.⁶⁴ Although McLauchlan is correct in viewing an unfettered ability to recover (reasonable) expenditure incurred in reliance upon an unperformed contractual promise as problematic, and in identifying the distinction between obligatory and non-obligatory reliance as critically important, his proposal for when such expenditure should be presumptively recoverable is unsupportable. The preferable analysis was that adopted by McHugh J in *Amann*, who recognised the distinctness of the claim in *Amann* from that made in *McRae*.⁶⁵

As McHugh J explained,⁶⁶ the essential problem with the broader interpretation of *Amann* is that it enables the presumptive recovery of reliance expenditure whenever a plaintiff's non-breach position depends upon a (non-remote) contingency that the plaintiff does not attempt to quantify. McLauchlan attempts to confine this untenable approach by proposing that a strict reversal of the onus of proof should be limited to cases where the expenditure is both obligatory and direct. But as Brereton JA recognised in *Cessnock Appeal*, the difficulty this view confronts is that it would 'not capture ... [the expenditure incurred] in *McRae*, where the plaintiff's only obligation was to pay the purchase price, and the expenditure was incurred to enable the plaintiff to exploit the property it acquired under the contract'.⁶⁷

As noted, *McRae* can be otherwise explained. Additionally, in *Yam Seng v International Trade Corporation*,⁶⁸ another case allowing recovery where the expenditure was neither obligatory nor direct, it was unnecessary for Leggatt J to decide whether the defendant's onus was legal or evidential since the defendant

reliance ... not so required'. The latter distinction differentiates between the two sources of *value* from which recoupment can occur: (1) that 'arising directly from receipt of the promised performance' by the defendant; and (2) that 'to be received from collateral or consequential transactions ... [following] the defendant's promised performance': at 96–7.

⁶³ McLauchlan (n 57) 97.

⁶⁴ See *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3rd) 325 (Berger J) (Supreme Court of British Columbia) ('*Bowlay Logging*'); *Armstrong Rubber* (n 32) 189 (Learned Hand CJ); McLauchlan (n 57) 98, demonstrating the implications of such an approach by examining the decision in *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 (Gault, Thomas and Keith JJ) (Court of Appeal).

⁶⁵ See *Amann* (n 4) 172.

⁶⁶ *Ibid* 165.

⁶⁷ *Cessnock Appeal* (n 17) 486 [68].

⁶⁸ *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

adduced no relevant evidence anyway.⁶⁹ It is less clear whether *CCC Films v Impact Quadrant Films*⁷⁰ is similarly equivocal. However, in *Amann* Brennan J did observe that Hutchinson J there recognised that *McRae* stands only for the proposition that there is a reversal of the plaintiff's usual onus 'where the breach itself makes it impossible to assess whether there would have been any returns sufficient to recoup the [relevant] expenditure'.⁷¹

Recognising the need to explain *McRae* and cases like *Yam Seng* and *CCC Films*, but also appreciating that a general reversal of the legal onus is untenable, McLauchlan proposes an exception to the general position that the defendant should be subject only to an 'evidential onus'.⁷² The proposed exception is

where the major part of the expenditure, though strictly speaking consequential reliance, was incurred in order to acquire and/or exploit the property or right granted by the defendant and from which, if all went well, the expenditure would have been recouped and profits made.⁷³

As McLauchlan observes, recognising this exception would capture *McRae* and the English decisions just mentioned. Notably, it would also cover the claim in *Cessnock* itself. The critical problem, however, is that no normatively compelling justification for *why* this (potentially very broad) exception should be recognised is provided.

VII Distinguishing between Obligatory and Non-Obligatory Expenditure

Consistently with McHugh J's analysis in *Amann*, Professor Stevens has recently argued that, properly understood, certain claims to recover expenditure incurred by the plaintiff in performance of an agreement with the defendant are better understood as restitutionary in the sense of reversing a 'performance' rendered by plaintiff to defendant that, viewed retrospectively, has no legal justification.⁷⁴ A notable example of such an award is that made in *Planché v Colburn*,⁷⁵ a case that, while far simpler, bears some similarity with (as well as certain important differences from) *Amann*. Another example is the award made in *Whittington v Seale-Hayne*,⁷⁶ where the plaintiff entered into a lease on the basis of an innocent misrepresentation by the defendant's agent that the premises were in good sanitary condition and, after rescinding the contract, recovered an indemnity for the (ostensibly) obligatory expenditure incurred.

⁶⁹ Ibid [191].

⁷⁰ *CCC Films* (n 44).

⁷¹ See *Amann* (n 4) 107. Notably, however, in *CCC Films* itself, Hutchinson J viewed 'practical impossibility' as sufficient to satisfy this precondition (emphasis added).

⁷² McLauchlan (n 57) 97.

⁷³ Ibid.

⁷⁴ See Robert H Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 36–50, 132–3.

⁷⁵ *Planché v Colburn* (1831) 5 Car & P 58; 172 ER 876.

⁷⁶ *Whittington v Seale-Hayne* (1900) 82 LT NS 49, discussed in Stevens (n 74) 70.

Significantly, there was no breach of contract (or other wrong) in *Whittington*, meaning that the plaintiff's claim for damages was correctly denied. By contrast, a claim for damages was available in *Amann*. Thus, unless Australian law is willing to allow an alternative claim for necessary preparatory, but non-obligatory, expenditure reasonably incurred in reliance upon a contractual promise even where it is not impossible, 'as a matter of theory',⁷⁷ to determine the plaintiff's non-breach position, McHugh J's analysis in *Amann* remains correct.

VIII The Preferable Position Summarised

To summarise and recapitulate, the High Court should distinguish between two situations where expenditure incurred in association with the performance of a contract may be recoverable. One is where, as in *Planché*, incurring certain expenditure was obligatory under an agreement between the parties. This kind of claim is restitutionary and arises independently of any enforceable contract.⁷⁸ Accordingly, subject to the possible existence of a 'contractual ceiling' on recovery when the expenditure is also 'direct',⁷⁹ proof of the plaintiff's likely non-recoupment of the expenditure incurred would be irrelevant here.⁸⁰ The other situation is where, in response to an action seeking damages for breach of contract, the defendant fails to satisfy an *evidentiary* onus to put the plaintiff's possible non-recoupment of its (reasonably incurred) expenditure in issue.⁸¹ As noted, although *McRae* is arguably capable of alternative explanation, this category potentially captures the award made there as well as the awards made in *Yam Seng* and *CCC Films*.⁸²

Whether the defendant should *always* bear an evidentiary onus to raise the possibility of non-recoupment of expenditure reasonably incurred in reliance upon an unperformed contractual promise when such expenditure is claimed as damages for breach of that promise is not finally pursued here. However, generally speaking, if the defendant's breach deprives the plaintiff of a valuable commercial opportunity to make some consequential gain, the plaintiff should be required to establish this loss with sufficient certainty in accordance with orthodox principles.⁸³ Alternatively, the plaintiff may claim the value of the promised performance,⁸⁴ which sometimes

⁷⁷ See *Amann* (n 4) 89 (Mason CJ and Dawson J).

⁷⁸ See *Stevens* (n 74) 132, relying upon *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428. Since the claim is non-contractual, it is also unnecessary here that the relevant expenditure is incurred *in reliance* upon a contractual promise, although it often will be.

⁷⁹ See *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 600–7 [85]–[108] (Gageler J), 643–51 [201]–[216] (Nettle, Gordon and Edelman JJ).

⁸⁰ If the availability of such claims is extended to non-obligatory, but implicitly necessary, expenditure, recovery might still be capped by the amount of the expenditure that would have been recouped by developing a better account of when expenditure is 'reasonably incurred'.

⁸¹ As explained, recovery of (reasonable) reliance expenditure is also justifiable where, after the defendant discharges this onus, the plaintiff persuasively establishes the likelihood of recoupment.

⁸² To the extent that *CCC Films* (n 44) upheld a full shifting of the legal onus, it should not be followed.

⁸³ See *Berry* (n 56) 175 [37] (Bell, Keane and Nettle JJ); *Cessnock City Council, 'Appellant's Reply'*, Submission in *Cessnock City Council v 123 259 932 Pty Ltd*, Case No S115/2023, 22 December 2023, [2]–[9].

⁸⁴ See *Clark v Macourt* (2013) 253 CLR 1.

may be most appropriately measured by positing a hypothetical ‘release’ bargain between the parties at the date of breach.⁸⁵ The Australian law governing the availability of these ‘negotiating damages’ awards is underdeveloped, which might partially explain why the availability of reliance expenditure claims has been overextended.

Obviously, *Cessnock* does not fall within the first category of case identified above. Whether it falls within the second category depends (at least) upon whether this category extends beyond cases where valuing the promised performance was theoretically impossible and where the relevant expenditure was not ‘essential’. But even if it does so extend, the evidence adduced by the Council at trial appears to have been sufficient to raise the possibility of non-recoupment, so the Council’s appeal should succeed. If, contrary to the analysis just advanced, the broader interpretation of *Amann* is preferred and the presumption of recoupment is held to apply to non-essential expenditure, Cutty Sark’s claim might still be denied through restriction of its prima facie claim. This, however, would require the Court to develop a fuller account of the proper limits on presumptively recoverable reliance expenditure, a topic to which the discussion now turns.

IX Reasonableness, Risk Allocation, and the Relevance of *Hadley v Baxendale*

The need for some limit upon when expenditure incurred in reliance upon a contractual promise is presumptively recoverable was recognised in both *McRae* and *Amann* by general acceptance that presumptively recoverable expenditure must be ‘reasonably incurred’.⁸⁶ In *Cessnock Appeal*, it was held that this requirement just expresses the rule in *Hadley v Baxendale*,⁸⁷ and therefore ‘turns on whether it was the type of expenditure as might naturally be incurred in preparing for, performing or exploiting the benefit of the contract, or is or ought to have been contemplated by the defendant’.⁸⁸ Support for this view was derived from the adoption of this interpretation in *McRae*. On inspection, however, it does not withstand scrutiny.

The most obvious reason for scepticism regarding this view of what renders reliance expenditure ‘reasonable’ is that the Court in *Hadley* was simply unconcerned with this question. The principle there articulated was devised to identify which adverse consequences resulting from, and therefore *following*, the relevant breach are compensable in damages rather than being concerned with what pre-breach expenditure in reliance upon a contractual promise is recoverable under any supposed — and, as yet, unrecognised — presumption of recoupment. On reflection, at least on the broader interpretation of *Amann*, it is quite remarkable that

⁸⁵ Compare *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 689–90 [95] (Lord Reed) with *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655; [2018] SGCA 44, [177].

⁸⁶ See, eg, *McRae* (n 2) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing); *Amann* (n 4) 81 (Mason CJ and Dawson J).

⁸⁷ *Cessnock Appeal* (n 17) 486–7 [69].

⁸⁸ *Ibid* 487 [70].

Hadley's second limb could be regarded as the sole determinant of presumptively recoverable reliance expenditure since the critical question in this context is whether the claimant was *justified* in incurring the expenditure.⁸⁹ On this view, the requirement that expenditure must be 'reasonably incurred' is more analogous to the avoidable loss rule of mitigation, albeit that the concern here is with the reasonableness of the claimant's *pre-breach*, rather than post-breach, conduct.⁹⁰

This observation alone provides sufficient reason to reject the *McRae* view of when reliance expenditure is 'reasonably incurred'. But given the reputation of the Justices who propounded that view, albeit when considering a very different scenario from that in *Cessnock* or *Amann*, certain other deficiencies with the *Hadley* rule should be noted. One obvious problem is the rule's indeterminacy,⁹¹ as is clearly demonstrated by the disagreement between Adamson J and the Court of Appeal in the present case as well as the disagreement between Webb J and the High Court majority in *McRae* itself.⁹² A related problem,⁹³ recognised by Fuller and Perdue,⁹⁴ is that the *Hadley* rule does not accurately describe the justified restriction (or set of restrictions) that it purports to identify. A final problem is justifying the use of *Hadley* as the *sole* determinant of what adverse consequences of breach are compensable, particularly if contractual liability arises independently of fault.⁹⁵

One response to this final concern is that the *Hadley* rule, at least in its application, just enforces an externally imposed norm of 'fairness' between the parties.⁹⁶ An alternative view, arguably adopted by a majority of the House of Lords in *The Achilles*,⁹⁷ is that the *Hadley* formulation is best viewed 'as a rough-and-ready proxy for ... the true [remoteness] rule', which, at least principally, involves determining whether 'the loss [was] within the purpose of the primary duty assumed'.⁹⁸ This view has much to recommend it, including its ability to explain

⁸⁹ See Lücke (n 8) 147; *Bowlay Logging* (n 64) 117 (Berger J); *C&P Haulage v Middleton* [1983] 1 WLR 1461, 1467 (Ackner LJ).

⁹⁰ For further insights, see Hudec (n 62) 728, noting, in the context of analysing *Armstrong Rubber* (n 32), that 'claims for consequential reliance expenditures ... raise many of the same concerns about remoteness and disproportion that lead courts to look for ways of limiting consequential damages generally'.

⁹¹ See, eg, Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 265–6.

⁹² The majority held that the expenditure incurred in preparing to salvage the non-existent tanker fell within *Hadley*'s second limb: see *McRae* (n 2) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing), while Webb J held that incurring this expenditure was not within the Commission's proper contemplation.

⁹³ See Lord Hoffmann, 'The *Achilleas*: Custom and Practice or Foreseeability?' (2010) 14(1) *Edinburgh Law Review* 47, 53: '[This] degree of indeterminacy ... is usually a symptom of other unexpressed factors operating beneath the surface'.

⁹⁴ See Fuller and Perdue (n 59) 85, where it is said that 'it is clear that the test of foreseeability is less a definite test itself than a cover for a developing set of tests'.

⁹⁵ See further Andrew Tettenborn, 'Hadley v Baxendale Foreseeability: A Principle beyond Its Sell-by Date?' (2007) 23(1–2) *Journal of Contract Law* 120, 129.

⁹⁶ See eg, Andrew Robertson, 'The Basis of the Remoteness Rule in Contract' (2008) 28(2) *Legal Studies* 172.

⁹⁷ See *Transfield Shipping Inc v Mercator Shipping Inc* [2009] AC 61 ('*The Achilles*').

⁹⁸ See Robert Stevens, 'Rights Restricting Remedies' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart, 2016) 159, 163–70.

certain difficult authorities.⁹⁹ Of greater present relevance, however, is that deciding whether the loss claimed was within the purpose of the primary duty assumed necessarily involves an exercise in construction to determine the objective purpose of the duty breached within the context of the parties' overall bargain.

Recall that at the trial, Adamson J held that the preferable construction of the parties' contract was that 'the risk of the future development occurring ... was to be borne by Cutty Sark',¹⁰⁰ with the result that incurring the relevant expenditure was unreasonable.¹⁰¹ Brereton JA's response was that because Cutty Sark did not accept the risk that the Council would breach its obligations to take all reasonable action to procure registration of the plan of subdivision, then, in the event of breach, the Council accepted responsibility for all 'reasonably contemplated' reliance expenditure Cutty Sark incurred, subject to proof that such expenditure would not in fact have been recouped. This view apparently assumes that if the particular risk that eventuated was not allocated to Cutty Sark, it must have been allocated to the Council. But it may be that, on its proper construction, the contract did not allocate the relevant risk to *either* party.¹⁰² If so, one is forced back to deciding what the appropriate default rule should be.

More specifically, Brereton JA's conclusion is only valid if there is both a default rule that a presumption of recoupment arises in relation to all 'reasonably contemplated' reliance expenditure *and* the parties' contract did not alter this default position. It has already been explained why it is doubtful that the requirement that presumptively recoverable expenditure be 'reasonably incurred' is equivalent to asking whether such expenditure was 'reasonably contemplated'. But even if ('reasonably contemplated') non-obligatory and consequential expenditure of the kind incurred by Cutty Sark is presumptively recoverable, it remains possible that the parties' contract altered this default rule. Although the contract did not expressly have this effect and no such term could be implied, a plausible interpretation of the parties' bargain (and Adamson J's reasoning at first instance) is that the contract's other provisions and the background against which it was made affected the extent to which the Council assumed responsibility for the adverse consequences of non-performance of its promise.¹⁰³ This is essentially just to apply the approach (arguably) upheld by the House of Lords in *The Achilles* to a reliance expenditure claim,¹⁰⁴ which it is within the High Court's authority to do.

⁹⁹ See, eg, *Stuart Pty Ltd v Condor Commercial Insulation Pty Ltd* [2006] NSWCA 334.

¹⁰⁰ *Cessnock Trial* (n 11) [84].

¹⁰¹ *Ibid* [100].

¹⁰² This reveals the importance of identifying the agreement's 'domain': see further, Frederick Wilmot-Smith, 'Express and Implied Terms' (2023) 43(1) *Oxford Journal of Legal Studies* 54, 59.

¹⁰³ A complication here is that, as the present column demonstrates, there is uncertainty as regards the relevant default rule against which the parties were contracting. But this does not prevent the Court from concluding that the preferable construction of the parties' contract is that it (implicitly) exempted the Council from liability to compensate Cutty Sark for the particular risk that eventuated.

¹⁰⁴ If seeking to challenge the interpretation proffered, Cutty Sark might emphasise the Council's contractual right to acquire the hangar for \$1 upon expiry or termination of the contract. However, it is not clear that this provision supports its preferred construction. Compare Gaudron J's reliance in *Amann* (n 4) upon the resale of the planes that would have been in Amann's possession upon

X Conclusion

The Australian law governing the recovery of expenditure incurred in reliance upon an unperformed contractual promise is presently unsatisfactory. The *Cessnock* appeal provides the High Court with an opportunity to rectify this. Hopefully, this opportunity is grasped. Most importantly, the Court should reject the proposition that a plaintiff has an unfettered choice, following breach of a contractual promise, to recover non-obligatory expenditure reasonably incurred in reliance upon that promise, subject only to the defendant positively establishing the likely non-recoupment of such expenditure. If, however, a more expansive view is taken regarding when contractual reliance expenditure is presumptively recoverable, the Court should make clear that the requirement that such expenditure must be ‘reasonably incurred’ is not equivalent to asking whether it satisfies the second limb of *Hadley v Baxendale*. Ideally, the Court should also provide some guidance in relation to what this requirement does entail, as well as whether — and when — the parties’ contract may alter the scope of the applicable default rule.

completion of its contract with the Commonwealth in concluding that Amann’s recoupment of its expenditure was likely.