Case Note

Cessnock City Council v 123 259 932 Pty Ltd: Clarifying Wasted Expenditure, A Facilitation of Proof

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Abstract

In *Cessnock City Council v 123 259 932 Pty Ltd* ('*Cessnock*'), the High Court of Australia provided long-awaited clarity regarding the method of proving damages for wasted expenditure in an action for breach of contract. The plurality did so by presenting a new framework for assessing such damages where a wrongdoer's breach causes or increases uncertainty regarding the position the plaintiff would have been in 'but for' the breach — a principle of facilitation of proof. This case note examines the High Court's treatment of wasted expenditure, analysing the method of proving wasted expenditure and considering the application of *Hadley v Baxendale*. Further, *Cessnock* prompts consideration of how damages should be assessed, and why they are awarded. I argue that while the decision appears to provide an elegant solution to difficulties faced by plaintiffs in proving damages where a defendant causes or increases uncertainty as regards the plaintiff's loss, the solution is impractical and inconsistent with earlier authority.

I Introduction

The ruling principle on the recovery of compensatory damages for consequential loss following a breach of contract is that 'where a party sustains a loss by reason of a breach of contract, he is, 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'.[1] But how can loss be compensated, and damages assessed, where it is uncertain what position the plaintiff would have been in had the contract been performed? In *Cessnock City*

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1 *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B) ('*Robinson v Harman*'). The High Court of Australia affirmed this proposition in *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 98 ALJR 719, 724 [6] (Gageler CJ), 732 [48] (Gordon J), 735 [60] (Edelman, Steward, Gleeson and Beech-Jones JJ), 759 [190] (Jagot J) ('*Cessnock*').

Council v 123 259 932 Pty Ltd ('*Cessnock*'),[2] the High Court of Australia considered that question in the context of a claim for 'wasted' expenditure.

The High Court considered how damages for breach of contract are assessed where a plaintiff has incurred expenditure in reliance on the expectation that the defendant will perform its contractual obligations, but the defendant fails to perform its obligations rendering the expenditure 'wasted'. In four separate judgments (the joint judgment of Edelman, Steward, Gleeson and Beech-Jones JJ and the separate judgments of Gageler CJ, Gordon and Jagot JJ) the High Court unanimously dismissed the Council's appeal, allowing the plaintiff to recover expenditure incurred and 'wasted' due to the Council's breach of contract. Yet, a divide in reasoning appears, with the disagreement reflecting a difference in the underlying rationale for awarding damages for wasted expenditure and the method of calculating loss.

This case note examines the High Court's decision in *Cessnock* as regards the Court's introduction of a principle of facilitation of proof for proving loss in instances of wasted expenditure, but also more broadly where a wrongdoer's breach causes (or increases pre-existing) uncertainty as to loss. In Part II I trace the High Court's jurisprudence on wasted expenditure prior to *Cessnock*. In Part III I set out the case's background, outlining the decision at trial and before the New South Wales ('NSW') Court of Appeal. In Part IV I summarise the High Court's approach to the recovery of wasted expenditure, beginning with its characterisation, then the method of proof, before turning to a consideration of remoteness. I argue that the plurality presented a new method for facilitating the proving of wasted expenditure, which has a low threshold for enlivenment and appears to impose a fluctuating burden of proof that is impractical and inconsistent with precedent. In Part V I then discuss the fundamental divide that has arisen over how loss ought to be calculated. Underlying this divide is the question of why damages are awarded. I argue that despite the division, the ruling principle in *Robinson v Harman* — to place plaintiffs in the position they would have been in but for the breach — remains the lodestar.

II The State of the Law Prior to *Cessnock*

Until *Cessnock*, the leading High Court case on the assessment of damages in the context of wasted expenditure was *Commonwealth v Amann Aviation Pty Ltd* ('*Amann*').[3] However, the six separate judgments in *Amann* left the law on damages claimed for wasted expenditure in a state of disarray.[4] To understand how *Cessnock* attempts to clarify the confusion, it is important to understand the position of the Court to date. Cases like *McRae v Commonwealth Disposals Commission* ('*McRae*')[5] and *Amann* are frequently discussed in this context, however, cases like

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2 *Cessnock* (n 1).

3 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 ('*Amann*').

4 Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 2019) 80; GH Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 (April) *Law Quarterly Review* 226, 234.

5 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ('*McRae*'). See also Gerald Ng, 'The Onus of Proof in a Claim for Reliance Damages for Breach of Contract' (2006) 22(2) *Journal of Contract Law* 139, 150–4.

Carr v JA Berriman Pty Ltd ('*JA Berriman*')[6] and *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* ('*TC Industrial*')[7] are not so well understood. This section traces those decisions, referred to by the Court in *Cessnock*, to begin to understand the rationale behind the Court's recent reasoning and illustrate circumstances where damages for wasted expenditure have been recognised.

Damages for wasted expenditure have been recognised by the High Court of Australia since at least 1951, when Dixon and Fullagar JJ in *McRae* accepted that where a breach of contract makes it 'impossible'[8] to assess the value of what was promised and what was received, 'damages are to be measured by reference to expenditure incurred and wasted in reliance' on the promise,[9] with the burden 'thrown' to the defendant to prove that, if there was no breach, the plaintiff would not have recouped their expenditure.[10]

Two years later, the Court once again recognised the availability of damages for wasted expenditure, this time alluding to its availability as a unique head of damage. In *JA Berriman*, a builder entered a contract to build on land owned by T Carr & Co. However, Carr failed to excavate and deliver the site, preventing the builder from commencing work. In the meantime, the builder had incurred expenditure to employ labourers in anticipation of commencing building works. Fullagar J, with whom Dixon CJ, Williams, Webb and Kitto JJ agreed, found that the builder validly rescinded the contract and was therefore entitled to damages.[11] His Honour affirmed the assessment of damages awarded by Owen J at first instance, which included three heads of damage, with 'expenditure incurred and wasted' treated as a unique head.[12] Although Fullagar J appears to treat wasted expenditure as a unique head of damage, it is important to recognise that his Honour did not consider the issue because 'the amount awarded under this head was not challenged'.[13]

A decade on, Kitto, Windeyer and Owen JJ in *TC Industrial* expressed a preference for a 'single calculation' of damages, rejecting the notion of the necessity of making an election between wasted expenditure and loss of profits.[14] In *TC Industrial*, a buyer purchased a defective stone crushing machine and sought to recover damages for wasted expenditure and loss of profit from the seller. The buyer purchased the machine to fulfil a government contract to supply a large quantity of crushed stone to the Commonwealth. The machine did not meet the required

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6 *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 ('*JA Berriman*').
7 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 ('*TC Industrial*').
8 *McRae* (n 5) 414 (Dixon and Fullagar JJ, McTiernan J agreeing).
9 Ibid 415 (Dixon and Fullagar JJ, McTiernan J agreeing). In *McRae*, the plaintiffs incurred expenditure on a salvage operation after purchasing an oil tanker from the Commonwealth Disposals Commission. The Commission provided the plaintiffs with the supposed coordinates of the tanker and the plaintiff incurred expenditure on a salvage operation 'on the faith of the promise that there was a tanker in that place': at 414. However, the tanker did not exist.
10 Ibid 414 (Dixon and Fullagar JJ, McTiernan J agreeing); *CCC Films (London) Ltd v Impact Quadrant Films* [1985] 1 QB 16, 38, 40 (Hutchison J) ('*CCC Films*'); Ng (n 5) 148; *Amann* (n 3) 106 (Brennan J).
11 *JA Berriman* (n 6) 352.
12 Ibid.
13 Ibid.
14 *TC Industrial* (n 7) 142–3.

standards and as a result the buyer was unable to fulfil its contract. This resulted in the Commonwealth terminating the agreement. The seller relied on the English decision of *Cullinane v British "Rema" Manufacturing Co Ltd* ('*Cullinane*')[15] to argue that the buyer 'could not recover under both heads of damages' and needed to elect between damages for the 'expenditure uselessly incurred' due to the breach and 'the loss of the profits' it would have earned under the Commonwealth contract.[16] In *TC Industrial*, the High Court rejected this submission and in turn the English position that required election between damages for loss of profits and capital expenditure.[17] The Court reasoned that the majority's requirement in *Cullinane* that the plaintiff elect between the heads of damage, flowed from: first, the plaintiff's failure to show that his expenditure would have been recouped;[18] and second, the confusing use of the word 'profits' when what was intended appears to be 'gross profits', as in revenue or 'gross receipts'.[19] To allow the plaintiff to recover damages for gross receipts, in addition to the capital expenditure, would have been to allow double recovery.[20] The High Court suggested that had the majority in *Cullinane* considered a claim for the capital expenditure plus the 'profits that would have remained after recouping' the expenditure (that is, net profits), the claim likely would have been accepted,[21] putting the plaintiff in the position they would have been in had the contract been performed and preventing double recovery.[22]

The unanimous judgment in *TC Industrial* makes two important contributions. First, it rejects the premise that a plaintiff needs to elect between damages for wasted expenditure and loss of profits.[23] Second, their Honours make clear that the question of damages is best resolved through 'a single calculation', by subtracting the total expenditure the buyer would have incurred performing the Commonwealth's contract from the 'total receipts the plaintiff would have obtained under the contract', thereby treating profits as net profits and eliminating concerns of double recovery.[24] The High Court in *TC Industrial* thus, indicated that there ought to be just one measure of consequential loss.

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15 *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292 ('*Cullinane*').

16 *TC Industrial* (n 7) 138.

17 Ibid 142–3. Cf *Cullinane* (n 15), affirmed in *Anglia Television v Reed* [1972] 1 QB 60, 64 (Lord Denning MR).

18 *TC Industrial* (n 7) 141–2.

19 David Campbell and Roger Halson, 'Expectation and Reliance: One Principle or Two?' (2015) 32(3) *Journal of Contract Law* 231, 242; Donald Harris, *Remedies in Contract and Tort* (Weidenfeld and Nicolson, 1988) 103–5; AI Ogus, *The Law of Damages* (Butterworths, 1973) 352–4.

20 Harris (n 19) 105; Ogus (n 19) 354.

21 *TC Industrial* (n 7) 140; GH Treitel, *The Law of Contract* (Stevens & Sons, 3rd ed, 1970) 797; Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th ed, 2015) 1129 [20-035].

22 Harris (n 19) 105. See also *Cessnock* (n 1) 732–3 [49] (Gordon J).

23 *TC Industrial* (n 7) 142; affirmed in *Amann* (n 3) 85 (Mason CJ and Dawson J).

24 *TC Industrial* (n 7) 143. See the discussion of gross receipts versus net profits in Campbell and Halson (n 19) 242.

In sum, prior to *Amann* the position appeared to be:

(1) damages for wasted expenditure were available where the position that the plaintiff otherwise would have been in was impossible to assess;[25] and

(2) that a plaintiff did not need to elect between damages for wasted expenditure and loss of profits, nor plead them in the alternative.

In *Amann*, the Commonwealth entered a contract with Amann Aviation Pty Ltd, whereby Amann Aviation would provide aerial surveillance over the northern Australian coastline for three years. However, the Commonwealth purported to terminate the contract six months after the contract was awarded (and on the day surveillance operations commenced). Unfortunately, Amann Aviation had already incurred expenditure in preparing for performance, namely acquiring and fitting out 14 specially equipped aircrafts. Amann Aviation sought damages for breach of contract, including on a reliance basis.

The result in *Amann* was a 'cacophony of the six different judgments'[26] making it difficult to discern a ratio decidendi. The position appeared to be that a 'presumption of recoupment' gave rise to a rebuttable presumption that a plaintiff would recoup its expenses incurred in reliance on the contract, with the defendant required to rebut the presumption by proving that the plaintiff would not have been able to recoup that expenditure even if the contract had been performed.[27] However, the treatment of damages claimed for wasted expenditure nonetheless remained uncertain.

In this article I do not aim to deal with the complexities of *Amann*, since this has been attempted elsewhere[28] and the importance of these complexities has undoubtedly been diminished by the decision in *Cessnock*. However, I do identify and consider two unresolved questions flowing from *Amann*. The first is whether this 'presumption of recoupment' exists. The second is what the content and application of the 'presumption' could be. *Cessnock* answers both questions.

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25 This question was not considered in *JA Berriman* or *TC Industrial*. However, the Court appeared to accept that damages for wasted expenditure were available, even though damages would not have been impossible to calculate: *TC Industrial* (n 7) 143; *JA Berriman* (n 6) 352.

26 Ng (n 5) 140. See also *Cessnock* (n 1) 729 [28] (Gageler CJ).

27 *Amann* (n 3) 86–90 (Mason CJ and Dawson J), 105–7 (Brennan J), 126–7 (Deane J); *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234, [30]–[31] (Macfarlan JA, Bell P and Meagher JA agreeing) ('*Meetfresh*'). Cf HK Lücke, 'The So-Called Reliance Interest in the High Court' (1994) 6(2) *Corporate and Business Law Journal* 117, 145.

28 See generally, David Winterton, 'Reassessing "Reliance Damages": The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*' (2024) 46(1) *Sydney Law Review* 87, 93–7; JW Carter, Wayne Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31(3) *Journal of Contract Law* 171, 177–9; David McLauchlan, 'Reliance Damages for Breach of Contract' [2007] (3) *New Zealand Law Review* 417, 430–40; Treitel, 'Damages for Breach of Contract in the High Court of Australia' (n 4).

III Background

A *Facts*

In the early 2000s, Cessnock City Council sought to redevelop Cessnock Airport. To achieve this, the Council, as a developer and the registered proprietor, lodged a development application ('DA') to consolidate the airport land, then subdivide it.[29] The DA was approved on the condition that the subdivided lots be connected to the reticulated sewerage system. However, the subdivision was never registered by the Council.[30] After the subdivision DA approval, a further development application was lodged to develop an aircraft hangar on one of the proposed subdivided lots (Lot 104).[31] The hangar DA was granted. The appellant and respondent negotiated an agreement whereby the appellant promised to grant the respondent a 30-year lease for the proposed Lot 104 the day after the subdivision plan was registered. Under the agreement, the respondent was to pay an annual licence fee and undertake extensive works to develop the land.[32] The lease was subject to the registration of the subdivision plan and required the Council to take all reasonable actions to apply for and obtain the registration by the sunset date. If the plan was not registered by that date, either party could terminate the agreement.[33] The contract also allowed the Council to acquire the hangar for $1 on termination or expiry of the contract.[34]

The respondent undertook significant works to develop the hangar, estimated to be about $3.7 million.[35] Once construction was complete, the respondent operated three businesses from the hangar, none were profitable. The respondent then ceased operation and was deregistered by ASIC for non-payment of fees. The appellant decided that connecting the proposed subdivided lots to sewerage was too costly; as a result, the land was not subdivided by the sunset date. The appellant then terminated the contract acquiring the hangar for $1 from ASIC.[36] Cutty Sark was reinstated by order and commenced proceedings against the Council for breach of contract claiming that the Council failed to take all reasonable actions to apply for and obtain registration of the subdivision plan by the sunset date.[37]

B *Trial*

At first instance, Adamson J concluded that the Council breached its obligations under the contract because it had failed to take all reasonable action to register the subdivision plan.[38] The plaintiff, Cutty Sark, sought 'reliance damages' at trial,[39] seeking the wasted expenditure incurred in reliance on the Council's obligation to

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29 *Cessnock* (n 1) 738 [76] (Edelman, Steward, Gleeson, Beech-Jones JJ).
30 Ibid 738 [80] (Edelman, Steward, Gleeson, Beech-Jones JJ).
31 Ibid 738 [82] (Edelman, Steward, Gleeson, Beech-Jones JJ).
32 Ibid 738 [84] (Edelman, Steward, Gleeson, Beech-Jones JJ).
33 Ibid 738 [85] (Edelman, Steward, Gleeson, Beech-Jones JJ).
34 Ibid 738 [84] (Edelman, Steward, Gleeson, Beech-Jones JJ).
35 Ibid 736 [63] (Edelman, Steward, Gleeson, Beech-Jones JJ).
36 Ibid 736 [63] (Edelman, Steward, Gleeson, Beech-Jones JJ).
37 Ibid 741 [103] (Edelman, Steward, Gleeson, Beech-Jones JJ).
38 *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329, [178]–[179].
39 Ibid [210].

take all reasonable steps to apply for and obtain registration of the subdivision plan. However, Adamson J refused to award substantive damages on two bases. First, the presumption in *Amann* did not arise because the Council's breach did not render it impossible to calculate the expenditure that would have been recouped if the agreement had not been breached.[40] Second, the damages sought did not fall within either limb of *Hadley v Baxendale* ('*Hadley*').[41] Thus, Cutty Sark was awarded only nominal damages of $1 and the quantum of Cutty Sark's expenditure was not assessed.[42]

C *Court of Appeal*

On appeal, Cutty Sark sought to challenge Adamson J's finding that it was only entitled to nominal damages. Cutty Sark argued that it ought to have been awarded substantial reliance damages for expenditure incurred constructing the hangar. The Court of Appeal (Brereton JA, Macfarlan and Mitchelmore JJA agreeing)[43] unanimously set aside the judgment below, finding:

(1) the presumption in *McRae* and *Amann* had been engaged;[44]

(2) the Council had failed to rebut the presumption;[45] and

(3) the damages fell within the second limb of *Hadley*.[46]

The appeal was allowed, and judgment entered in favour of Cutty Sark for $3,697,234.41.[47]

The Court of Appeal concluded that the presumption in *McRae* and *Amann* arose because Cutty Sark was entitled to recover reasonable expenditure incurred in relying on the Council's contractual promise to take all reasonable action to procure and obtain registration of the subdivision plan.[48] The Court found that the expenditure incurred did not need to be confined to expenditure incurred pursuant to or required by the contract.[49] Adopting the view taken by Macfarlan JA (Bell P and Meagher JA agreeing) in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*,[50] the Court of Appeal rejected the trial judge's conclusion that wasted expenditure was only recoverable where expectation damages were unquantifiable. Further, the Court concluded the presumption was not rebutted as the Council could not prove that over the 30-year lease Cutty Sark would not have recouped its expenditure had the Council registered the subdivision plan.[51] Moreover, the nature of the wasted expenditure could reasonably be supposed to have been contemplated by both parties

40 Ibid [215], [221].
41 Ibid [225], citing *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 14 ('*Hadley*').
42 *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329, [227].
43 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 ('*Cessnock (NSWCA)*').
44 Ibid 503–4 [121]–[124] (Brereton JA, Macfarlan JA agreeing at 466 [1], Mitchelmore JA agreeing at 519 [171]).
45 Ibid 509 [135], 511 [140] (Brereton JA).
46 Ibid 514–15 [149] (Brereton JA).
47 Ibid 518–19 [170] (Brereton JA).
48 Ibid 485 [64] (Brereton JA).
49 Ibid 485–6 [65] (Brereton JA).
50 Ibid 493 [92] (Brereton JA), quoting *Meetfresh* (n 27) [30]–[31].
51 Ibid 509 [135] (Brereton JA).

at the time of contracting, meaning the nature of the wasted expenditure fell within the scope of the second limb in *Hadley*.[52] The Court then assessed the quantum Cutty Sark expended on the construction of the hangar including overheads and miscellaneous expenses as $3,697,234.41.[53] This was the quantum of reliance damages Cutty Sark was entitled to.

IV The High Court's Decision

On appeal, the High Court was faced with two questions:

- whether 'a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract between the [Council] and the respondent had been performed';[54] and
- whether 'the presumption was not rebutted in the circumstances of this case'.[55]

All four judgments recognise the recoverability of expenditure wasted in reliance on the promise the defendant would perform its obligations. However, disagreement arose over the characterisation of wasted expenditure, including:

(a) whether it is an independent head of damage or a 'proxy' for expectation loss;

(b) how a plaintiff should prove a wasted expenditure claim; and

(c) how such a claim is to be limited to 'reasonable expenditure'.

A *One Measure of Consequential Loss*

The plurality, Edelman, Steward, Gleeson and Beech-Jones JJ wrote a joint judgment stating that 'it is now well established that there is only one measure of consequential losses for a breach of contract'.[56] Their Honours reasoned that expenditure wasted in anticipation of, or reliance on contractual performance is best characterised as a 'proxy' for or 'species of' expectation loss.[57] While Gordon J, writing separately, stated that damages for wasted expenditure are 'not a separate measure or category of expectation damages but a method of calculating damages consistent'[58] with the principle in *Robinson v Harman*. All five judges shared a common goal — to place the plaintiff in the position they would have been in had the contract been performed.[59] Jagot J also shared the same goal, though she did not

52 Ibid 514–15 [149] (Brereton JA).
53 Ibid 517 [159] (Brereton JA).
54 *Cessnock* (n 1) 743 [115] (Edelman, Steward, Gleeson and Beech-Jones JJ).
55 Ibid.
56 Ibid 743 [117] (Edelman, Steward, Gleeson and Beech-Jones JJ).
57 Ibid 744 [119] (Edelman, Steward, Gleeson and Beech-Jones JJ) (citations omitted).
58 Ibid 733 [51] (Gordon J).
59 Ibid 743 [114], 758 [182] (Edelman, Steward, Gleeson and Beech-Jones JJ) quoting *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526, 553 [188] (Leggatt J), 733 [52] (Gordon J).

explicitly restrict the recovery of consequential loss to a single measure, nor did she explicitly permit the recovery of anticipatory expenditure.[60]

Gageler CJ's view is at odds with the plurality's characterisation of wasted expenditure. His Honour asserted that '[w]asted expenditure is itself a category of damage'.[61] This position aligns with the recent decision of *Soteria Insurance Ltd v IBM United Kingdom Ltd*, where the Court of Appeal of England and Wales treated a claim for wasted expenditure as distinct from a claim for loss of profits in determining that a clause excluding claims for loss of profit did not exclude a claim for wasted expenditure.[62] However, his Honour thought it unnecessary to go as far as Fuller and Perdue to recognise a distinction between reliance and expectation interests, nor the object of 'reliance interests' in putting a plaintiff in the same position as before the promise was made.[63] Instead, Gageler CJ argued that the plaintiff was entitled to compensation because the defendant's non-performance caused the plaintiff to incur expenditure that was 'thrown away'.[64] His Honour framed this as a 'legally cognisable respect in which the plaintiff is worse off as a result of non-performance in comparison to performance'.[65]

Nonetheless, by recognising and awarding damages for wasted expenditure as a unique head of damage, Gageler CJ initially placed the plaintiff in the position they would have been in before the contract was made: that is, their historical position.[66] This is a plaintiff's 'prima facie entitlement',[67] but may place a plaintiff in a 'better position than if the defendant had performed' the contract, for example, where a plaintiff sought to recover wasted expenditure under a loss-making contract.[68] Against this, and consistent with the approach taken by the New South Wales Court of Appeal, a defendant may challenge a plaintiff's prima facie entitlement, with the entitlement reduced to the extent the defendant proves the counterfactual: that the expenditure would not have been recouped, even if the contract was performed.[69] Where a plaintiff's entitlement nevertheless exceeds the position they would have been in had the contract been performed, Gageler CJ imposes a 'ceiling on the overall damages recoverable',[70] which caps a plaintiff 'at

60 *Cessnock* (n 1) 759 [191]–[192] (Jagot J); David Winterton, 'Clarifying the Basis for Recovering Reliance Expenditure as Damages for Breach of Contract in Australia' (2025) 141 (January) *Law Quarterly Review* 19, 21–2 ('Reliance Expenditure as Damages').

61 *Cessnock* (n 1) 725 [9] (Gageler CJ).

62 *Soteria Insurance Ltd v IBM United Kingdom Ltd* [2022] 2 All ER (Comm) 1082 ('*Soteria*').

63 *Cessnock* (n 1) 725 [12] (Gageler CJ). See also Winterton, 'Reliance Expenditure as Damages' (n 60) 23–4; LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46(1) *Yale Law Journal* 52; American Law Institute, *Restatement (Second) of Contracts* (1981) § 349.

64 *Cessnock* (n 1) 725 [12] (Gageler CJ).

65 Ibid.

66 McLauchlan (n 28) 419.

67 *Cessnock* (n 1) 723 [3] (Gageler CJ).

68 AI Ogus, 'Notes of Cases: Damages for Pre-Contract Expenditure' (1972) 35(4) *The Modern Law Review* 423, 424.

69 *Cessnock* (n 1) 723–4 [2]–[3] (Gageler CJ); *Cessnock (NSWCA)* (n 43) 487–8 [73], 513 [146] (Brereton JA).

70 *Cessnock* (n 1) 726 [16] (Gageler CJ).

the expectation position'.[71] This ensures consistency with the principle in *Robinson v Harman*.[72]

A fundamental divide thus arises in the High Court between the treatment of wasted expenditure, reflecting the underlying disagreement over the purpose and calculation of damages for wasted expenditure.

B *A Principle of Facilitation of Proof*

Edelman, Steward, Gleeson and Beech-Jones JJ reframed how to prove damages for wasted expenditure, through 'a principle of facilitation of proof'.[73] Importantly, the principle has potential for broad application, serving as a general framework regarding the 'allocation of the evidentiary and legal burdens of proof'[74] where a defendant has caused (or increased) uncertainty as to loss.[75]

The starting point is uncontroversial. The initial legal onus lies with the plaintiff to prove a breach of contract resulted in loss, measured against the position the plaintiff would have been in had the contract been performed.[76] A facilitation of proof then occurs where 'a breach of contract has resulted in (namely, caused or increased) uncertainty about the position that the plaintiff would have been in if the contract had been performed'.[77] This marks a significant expansion from *Amann*, which suggested that a presumption would only arise where proof was difficult.[78] The principle facilitates the discharge of the plaintiff's legal burden of proof by 'assuming (or inferring) in their favour that, had the contract been performed', expenditure reasonably incurred in anticipation of, or reliance on performance of the contract would have been recovered.[79]

Their Honours justify this facilitation principle by explaining that its rationale is to overcome the 'uncertainty in proof of loss occasioned to the plaintiff by the

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71 Adam Kramer, 'The New Leading Case on Reliance or Wasted Expenditure Damages in Contract: *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17' (2024) 39(2) *Journal of Contract Law* 62, 65.

72 *Cessnock* (n 1) 724 [6] (Gageler CJ), citing *Haines v Bendall* (1991) 172 CLR 60, 63.

73 *Cessnock* (n 1) 746–7 [127] (Edelman, Steward, Gleeson and Beech-Jones JJ). See also *Allen v Tobias* (1958) 98 CLR 367, 375.

74 *Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8)* [2024] FedCFamC2G 779, [48] (Manousaridis J).

75 *Cessnock* (n 1) 747 [129]. See ibid [53]–[56] (Manousaridis J) where the principle was applied, in the context of an employment contract, to determine whether the contract was terminated lawfully. See also *Commonwealth v Sanofi* (2024) 99 ALJR 213, 221 [14] (Gordon A-CJ, Edelman and Steward JJ). Cf *Kisun v New Zealand* [2024] FCAFC 118, [44], [46] (Bromwich, Abraham and Halley JJ).

76 *Cessnock* (n 1) 735–6 [61], 746 [127] (Edelman, Steward, Gleeson and Beech-Jones JJ).

77 Ibid 735 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

78 *Amann* (n 3) 89 (Mason CJ and Dawson J), 126 (Deane J); *L Albert & Son v Armstrong Rubber Co*, 178 F 2d 182, 189 (2nd Cir, 1949). See also *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2011] 1 Lloyd's Rep 47, 51 [22] (Teare J).

79 *Cessnock* (n 1) 735–6 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

defendant's breach'.[80] This principle is framed as an 'evidentiary onus'[81] or 'prima facie inference'[82] rather than a 'presumption' that parties in commerce recoup their expenses, which is 'unrealistic' as 'bad bargain[s]' are 'not uncommon in the ordinary course of commercial dealings'.[83]

Curiously, the strength of the assumption or inference in favour of the plaintiff depends on the extent of the uncertainty resulting from the defendant's breach.[84] The implication is that the defendant's burden of proof — when rebutting the inference that the plaintiff would have recovered their expenditure — depends on the extent to which the breach causes uncertainty as to the plaintiff's position under the relevant, non-breach counterfactual. This means that the defendant's burden will be heaviest where the uncertainty as to the plaintiff's counterfactual position derives entirely from the breach, but will be lighter where the breach only results in some uncertainty when assessing the plaintiff's position 'but for' the breach. Thus, in *Cessnock*, the Council was required to 'lead substantial evidence' to prove that the plaintiff would not have recouped its wasted expenditure.[85] It failed to, and the plaintiff was successful in establishing that it would have recovered its wasted expenditure.[86]

The principle of facilitation of proof represents a principled and conceptually coherent approach that draws on cases from the law of torts, the law of contract, as well as cases concerning statutory claims. Arguably, the flexibility of the approach has some appeal given its potential to serve as a general framework for addressing cases where a defendant creates uncertainty about a plaintiff's position, but for the breach. However, Edelman, Steward, Gleeson and Beech-Jones JJ's analysis has two shortcomings. First, their Honours fail to satisfactorily justify why the principle of facilitation of proof will be enlivened merely because a defendant's 'breach of contract has resulted in (namely, caused or increased) uncertainty'.[87] Second, the majority's fluctuating burden is unsupported by precedent and there are legitimate concerns that it is impractical. It seems likely that further clarification in subsequent cases will be necessary to understand how the principle ought to work in practice.

1 *The Threshold for Enlivening the Principle*

It is difficult to justify the low threshold for enlivening the principle of facilitation of proof, particularly given contract claims tend to involve 'a degree of conjecture'

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80 Ibid. See also *Amann* (n 3) 142 (Toohey J).

81 *Cessnock* (n 1) 747 [128] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Amann* (n 3) 142 (Toohey J), 156 (Gaudron J), 165 (McHugh J); *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, 169 [29] (Bell, Keane and Nettle JJ) ('*Berry*'). See also *Masson v Parsons* (2019) 266 CLR 544, 575–6 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

82 *Cessnock* (n 1) 747 [128]; *Amann* (n 3) 165–6 (McHugh J); *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527, 571.

83 *Cessnock* (n 1) 751 [150] (Edelman, Steward, Gleeson and Beech-Jones JJ). See also Winterton, 'Reliance Expenditure as Damages' (n 60) 20. Cf *Amann* (n 3) 81, 87 (Mason CJ and Dawson J), 156 (Gaudron J).

84 *Cessnock* (n 1) 735–6 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

85 Ibid 758 [184] (Edelman, Steward, Gleeson and Beech-Jones JJ).

86 Ibid 759 [186] (Edelman, Steward, Gleeson and Beech-Jones JJ).

87 Ibid 735 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

where 'it can be said that it is the defendant's breach of contract that has made conjecture necessary'.[88]

The facilitation principle appears to derive from *Armory v Delamirie* ('*Armory*').[89] *Armory* concerned a claim for trover (that is, conversion), where a goldsmith (the defendant) wrongfully deprived the rightful owner (the plaintiff) of his possessory title to a jewel. The defendant refused to produce the jewel. In turn, Pratt CJ directed the jury to 'presume the strongest against [the defendant]' when determining its value and assessing damages.[90] This was because the defendant's wrongdoing, in withholding the jewel, was the sole cause of the uncertainty as to the jewel's market value.[91]

Although *Armory*, and cases like it, affirm that the facilitation of proof against a wrongdoer is not inherently novel,[92] similarities between *Cessnock* and *Armory* are far from obvious. In *Armory*, the defendant actively withheld evidence that would have answered the question of loss. By contrast, in *Cessnock* the defendant Council was arguably in no better position than the plaintiff to produce evidence that would assist in assessing the plaintiff's position had the contract been performed.[93]

Moreover, the lower threshold for the principle's application is difficult to justify because the cases relied upon by their Honours confine the application of the principle to instances where a defendant's wrongdoing has 'made quantification difficult'[94] or impossible,[95] for example where a defendant destroys evidence,[96] or where the defendant's wrongdoing 'preclude[s] the ascertainment of the amount of damages with certainty'[97] and instances where it is 'very hard to learn what the value of the performance would have been'.[98] Modern English authorities, by contrast, are concerned with instances where a defendant's breach causes 'considerable

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88 *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) [244] (Hamblen J) ('*Porton*').

89 *Armory v Delamirie* (1722) 1 Strange 505; 93 ER 664 ('*Armory*'); *Cessnock* (n 1) 747 [130] (Edelman, Steward, Gleeson and Beech-Jones JJ). Cf *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337, [210] (Young JA) ('*McCartney*').

90 *Armory* (n 89) 664.

91 Ibid.

92 See also *Porton* (n 88) [237]–[245]; *Browning v Brachers* [2005] EWCA Civ 753, [205] (Parker LJ); *Double G Communications Ltd v News Group International Limited* [2011] EWHC 961 (QB), [99] (Eady J).

93 In this case, the Council may have been better placed to produce evidence, though generally defendants are not: see, eg, *Blatch v Archer* (1774) 1 Cowper 63; 98 ER 969, 970 [65]; *Porton* (n 88) [244].

94 *Cessnock* (n 1) 748 [132] (Edelman, Steward, Gleeson and Beech-Jones JJ), quoting *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 416 [74].

95 *Amann* (n 3) 86 (Mason CJ and Dawson J), 105 (Brennan J), 126 (Deane J), 154 (Gaudron J); *McRae* (n 5) 414 (Dixon and Fullagar JJ, McTiernan J agreeing). See also *CCC Films* (n 10) 38 (Hutchinson J).

96 *Berry* (n 81) 169 [29] (Bell, Keane and Nettle JJ). See also *White v Lady Lincoln* (1803) 8 Ves Jun 363; 32 ER 395 (Lord Eldon LC); *Gray v Haig* (1855) 20 Beav 219; 52 ER 587 (Romilly MR); *Lupton v White* (1808) 15 Ves Jun 432; 33 ER 817 (Lord Eldon LC); *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345, 369 (Staughton J); *McCartney* (n 89) [208], [214] (Young JA).

97 *Story Parchment Co v Paterson Parchment Paper Co*, 282 US 555, 563 (1931), quoted in *Cessnock* (n 1) 747 [131] (Edelman, Steward, Gleeson and Beech-Jones JJ).

98 *L Albert & Son v Armstrong Rubber Co* (n 78) 189, quoted in *Cessnock* (n 1) 748 [136] (Edelman, Steward, Gleeson and Beech-Jones JJ).

uncertainty'[99] or the 'practical impossibility of proving loss'.[100] A facilitation principle that arises merely because the defendant's wrongdoing occasions *some* uncertainty as to the plaintiff's position is a significant jump from existing case law considered by their Honours.[101]

2 *A Fluctuating Burden that is Impractical and Inconsistent with Precedent*

Edelman, Steward, Gleeson and Beech-Jones JJ asserted that '[n]aturally … the greater the difficulty in proof that results from the defendant's wrongdoing, the stronger the inference the court will be prepared to draw against the wrongdoer'.[102] To overcome the potential overreaction of shifting the entire burden to the defendant, where only minimal uncertainty as to loss is caused, their Honour's appear to impose a fluctuating burden that depends on the degree of uncertainty as to loss caused by the defendant's wrongdoing. The rationale is that the wrongdoer, rather than the injured party, ought to bear the 'the risk of uncertainty that results' from the wrongdoing.[103] Yet, this framework is difficult to justify with case law, and in practice. In support of the premise, their Honours rely on *Porton Capital Technology Funds v 3M UK Holdings Ltd* ('*Porton*').[104] However, the reliance on *Porton* is overstated as in that case Hamblen J rejected the application of the principle in *Armory*, stating that as a matter of principle *Armory* 'should not be extended further than is necessary'.[105] Nor did Hamblen J consider the critical question of whether the strength of the burden placed on the defendant varied according to the uncertainty of loss resulting from their wrongdoing.

It is not only inconsistent with precedent, but also impractical to impose a burden on the defendant that varies according to the extent their wrongdoing affects the uncertainty of the plaintiff's counterfactual position. Jagot and Gordon JJ, writing separately, were critical of that approach. Gordon J stressed that it is not the role of a trial judge to 'undertake a forensic assessment of the gravity of the wrongdoer's conduct' and 'assess the *extent* of the uncertainty that results from the breach' to adjust the burden placed on the wrongdoer to prove the plaintiff would still have made a loss.[106] Instead, a trial judge's task is to assess the evidence before them to identify the counterfactual position.[107] As Jagot J acknowledges, this assessment may be influenced by the 'nature of the particular contract or the

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99 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 536, 553 [188] (Leggatt J), quoted in *Cessnock* (n 1) 752 [152] (Edelman, Steward, Gleeson and Beech-Jones JJ).

100 *Omak Maritime Ltd v Mamola Challenger Shipping Co* (n 78) 52–3 [33] (Teare J), quoting *CCC Films* (n 10) 40 (Hutchinson J). See *Cessnock* (n 1) 752 [152] (Edelman, Steward, Gleeson and Beech-Jones JJ).

101 See generally *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd* (2019) 271 FCR 392, 418 [116] (Allsop CJ, Yates and O'Bryan JJ); *McCartney* (n 89) [148]–[161] (Giles JA, Macfarlan JA agreeing); [198]–[218] (Young JA).

102 *Cessnock* (n 1) 748 [132] (Edelman, Steward, Gleeson and Beech-Jones JJ).

103 Ibid 748 [131] (Edelman, Steward, Gleeson and Beech-Jones JJ).

104 Ibid 749 [138] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Porton* (n 88) [349].

105 *Porton* (n 88) [244].

106 *Cessnock* (n 1) 735 [58] (Gordon J) (emphasis in original).

107 Ibid.

allocation of risks under it', but the strength of the 'presumption' remains fixed.[108] On the other hand, Gageler CJ, perhaps also appreciating these difficulties, simplifies a plaintiff's task of proving and quantifying loss, by treating wasted expenditure as a unique head of damage,[109] thereby avoiding the imposition of a threshold of uncertainty, difficulty or impossibility, and the need to shift burdens.

The expansion of a facilitation of proof to circumstances where a defendant causes uncertainty as to the plaintiff's loss is therefore both impractical and inconsistent with precedent. Nevertheless, when the facilitation of proof principle is extended to cases where the defendant's wrongdoing causes uncertainty as to loss, Gordon J's approach ought to be favoured as it successfully clarifies the confusion in *Amann* by largely adopting the principle of facilitation of proof presented by Edelman, Steward, Gleeson and Beech-Jones JJ. However, Gordon J's approach avoids the challenges that flow from an everchanging burden placed on wrongdoers that varies according to the uncertainty resulting from their breach and is particularly unwieldly in cases like *Cessnock* and *Amann* where the defendant's breach is not the sole cause of the uncertainty as to loss, but adds to pre-existing uncertainty.[110]

C *Reasonable Expenditure*

Damages for wasted expenditure have traditionally been limited to expenditure that has been 'reasonably incurred'.[111] However, it is unclear precisely what this limitation denotes and, in particular, the extent to which it derives from the principle articulated in *Hadley*. Although the appellants in *Cessnock* did not allege that the expenditure was not reasonably incurred, their Honours nonetheless expressed some views on the question of remoteness in obiter dicta.

Both Gageler CJ and Jagot J, writing separately, adopted *Hadley* in relation to the contemplation of wasted expenditure. Jagot J found that the expenditure wasted by Cutty Sark fell within the second limb of *Hadley*, meaning that at the time of contracting, the loss could reasonably have been contemplated by the parties as a probable result of the breach.[112] Similarly, Gageler CJ, was of the view that 'the Court of Appeal was correct'[113] in applying the 'standard limiting principles, such as remoteness and mitigation' to damages for wasted expenditure.[114]

Edelman, Steward, Gleeson and Beech-Jones JJ proposed an alternative method of applying *Hadley*, suggesting that perhaps the remoteness limit should be applied to the plaintiff's lost potential *revenue* rather than its wasted expenditure.[115] This is consistent with their position that wasted expenditure is a proxy for expectation loss and only used to enliven the principle of facilitation of proof.[116] In

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108 Ibid 768 [236] (Jagot J).
109 Ibid 728 [25] (Gageler CJ).
110 Cf *Armory* (n 89); *McRae* (n 5).
111 *Amann* (n 3) 81 (Mason CJ and Dawson J). See also *McRae* (n 5) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing).
112 *Cessnock* (n 1) 769 [238] (Jagot J).
113 Ibid 723 [3] (Gageler CJ).
114 Ibid 724 [3] (Gageler CJ). See also at 727 [23] (Gageler CJ), citing *McRae* (n 5) 413.
115 *Cessnock* (n 1) 743 [114] (Edelman, Steward, Gleeson and Beech-Jones JJ).
116 Ibid.

practice, it means that the remoteness limit applies to the overall expectation interest, the lost potential revenue, rather than wasted expenditure. This also seems to address the concerns that the foreseeability of wasted expenditure may not be in the contemplation of the parties at the time of contracting, while 'the prospect of a loss of future potential revenue would plainly be within the[ir] knowledge'.[117] Moreover, the plurality acknowledge the application of the rules of mitigation of loss, which, in addition to the rules of remoteness of loss, limit 'loss which is due to unreasonable or improvident actions of the plaintiff', with the onus of proof falling on the defendant.[118]

Gordon J, consistently with earlier authorities,[119] recognised the existence of a reasonableness criterion to prevent damages for wasted expenditure becoming a 'form of insurance'.[120] However, her Honour avoided referencing *Hadley*, despite assessing reasonable expenditure by considering whether the 'nature and extent of the expenditure … was in the contemplation of the parties'.[121] Her Honour then considered the distinction between essential and incidental expenditure. She concluded that the reasonableness criterion is sufficient to limit any remote damages and extended that reasoning to expenditure incurred 'in performing or preparing to perform the contract', which she found ought to be recoverable as wasted expenditure, so long as it was still subject to the reasonableness criterion.[122] For example, in *McRae*, the expenditure was incurred 'so that they could derive benefit from the contract', even though the 'expenditure was not required by … any contractual obligation', the expenditure was nonetheless wasted and recoverable.[123] Where a wrongdoer shows that the wasted expenditure is not reasonable, either because of the type of expenditure, or the amount expended, and the 'plaintiff's expenditure was, on the balance of probabilities, wasted anyway', that expenditure would not be recoverable.[124] *Hadley* remains relevant in limiting the damages recoverable to expenditure that is reasonably incurred.

V The Fundamental Divide

A fundamental divide arose between the plurality and Gageler CJ over how loss and damage ought to be determined. Edelman, Steward, Gleeson and Beech-Jones JJ adopt an approach that is forward looking, aiming to compensate the deterioration of a plaintiff's projected financial position, to place the plaintiff in the factual position they would have been in had there been no breach. On the other hand, Gageler CJ's approach is backward looking, aiming to compensate the harm caused

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117 Ibid 743 [114] (Edelman, Steward, Gleeson and Beech-Jones JJ).
118 Ibid 744–5 [120]–[121] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Arsalan v Rixon* (2021) 274 CLR 606, 624–5 [32]; *TC Industrial* (n 7) 138.
119 *McRae* (n 5) 412–3 (Dixon and Fullagar JJ, McTiernan J agreeing); *Amann* (n 3) 81 (Mason CJ and Dawson J).
120 *Cessnock* (n 1) 734 [55] (Gordon J).
121 Ibid. Cf Marc Owen, 'Aspects of the Recovery of Reliance Damages in the Law of Contract' (1984) 4(3) *Oxford Journal of Legal Studies* 393, 411.
122 Ibid 734 [53] (Gordon J).
123 Ibid 734 [54] (Gordon J)
124 Ibid 734 [56] (Gordon J).

by reliance on a contract that was breached, (at least initially) placing the plaintiff in the position had the contract not been entered.[125]

The distinction can be explained by reference to Campbell and Halson's universal formula for contractual damages:

> **E = d = e + r**
>
> **E** is the overall expectation interest.
>
> **d** is contractual damages
>
> **e** is the net profit concept of expectation interest
>
> **r** is the reliance interest, which is taken to be 'investment the parties may make (part-) performing their obligations' which is wasted due to the breach.[126]

Gageler CJ treated wasted expenditure and the net profit concept of expectation interest, as separate heads of damage, which are combined to determine the overall contractual damages. His Honour identified wasted expenditure as the amount expended by the plaintiff in reliance on the expectation of performance, which was wasted upon the defendant's breach.[127] This requires looking backwards and puts the plaintiff in the position had the contract not been entered, while the expectation interest looks forward, placing the plaintiff in the position had the contract been performed. By treating wasted expenditure as a unique head of loss, Gageler CJ determined the plaintiff's prima facie entitlement by reference to a historical approach to the calculation of loss, arguing that '[c]ompensable damage lies in the simple fact that the plaintiff has incurred expenditure which, because of non-performance, is incapable of yielding any benefit or gain to the plaintiff'.[128] To avoid over-compensation, the overall contractual damages are then 'capped at the expectation position',[129] that is E, the overall expectation interest. This ensures adherence to the fundamental principle in *Robinson v Harman*. But it remains unclear how Gageler CJ calculates the ceiling on recovery, that is the overall expectation interest.[130]

In contrast, Edelman, Steward, Gleeson and Beech-Jones JJ calculated E, the overall expectation interest, directly, with wasted expenditure only used as a proxy to assist in the calculation of the expectation interest. This method is supported by economic theory, which suggests that 'perfect expectation damages' is the best remedy as it encourages the performance of contracts and disincentivises breach or repudiation.[131] However, because this method is entirely forward-looking, it is often difficult to estimate the position the plaintiff would have been in had the contract been performed. For that reason, Gageler CJ's approach is appealing as it simplifies

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125 See generally the discussion on the components of compensatory damages in *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 348–9 [63]–[64] (Edelman J). See also Nicholas Tiverios and David Winterton, 'The Nature and Availability of "Negotiating Damages" for Breach of Contract' (2025) 48(3) *Melbourne University Law Review* (forthcoming).

126 Campbell and Halson (n 19) 233. See also at 235.

127 *Cessnock* (n 1) 724 [3] (Gageler CJ).

128 Ibid 725–6 [12] (Gageler CJ).

129 Kramer (n 71) 65, citing; ibid 726 [16] (Gageler CJ).

130 Winterton, 'Reliance Expenditure as Damages' (n 60) 23–4.

131 Robert Cooter and Thomas Ulen, *Law and Economics* (Berkeley Law Books, 6th ed, 2016) 291.

a plaintiff's method of proving wasted expenditure and does not require the defendant's wrongdoing to occasion uncertainty when proving loss.[132]

However, the treatment of wasted expenditure as a unique head of damage, is difficult to reconcile with Australian precedent. Gageler CJ argued that his position accords with the reasoning of the High Court in *McRae*, *JA Berriman* and *TC Industrial*.[133] But at best, on a close reading of these cases, the reasoning merely alludes to treating wasted expenditure as a distinct category of loss.[134] Whilst, at worst, *TC Industrial* could be taken to suggest the opposite, with the Court favouring a single calculation of loss aimed at placing a plaintiff in the position they would have been in had the contract been performed.[135]

Nevertheless, there is some principled basis for Gageler CJ's approach. In England and Wales, for example, the object of an award of wasted expenditure has been recognised 'to compensate the aggrieved party for expenses incurred and losses suffered in reliance on the contract'.[136] Notably, Owen also suggests that even where a plaintiff enters a 'deliberate bad bargain',[137] they should still be entitled to damages for wasted expenditure, albeit subject to a cap of expectation loss.[138] For example, where a plaintiff enters a contract that is initially loss-making with the expectation of future contracts, a plaintiff should be entitled to wasted expenditure if 'the breach has made the prospect of future profits significantly lower than it would have been had the contract been fully performed'.[139] This is because 'an innocent party's reasonable reliance'[140] ought to be protected. On a practical level, the emphasis placed on wasted expenditure, rather than an expectation interest, may be because 'losing what one previously possessed is commonly regarded as more serious than failing to get something one was promised'.[141] Moreover, damages for wasted expenditure as a unique head of damage, is easier to prove, given it is the actual amount expended in reasonable reliance on the contract.

In practice, there may be little difference between the ultimate outcome under the plurality's approach or Gageler CJ's approach[142] given Gageler CJ imposes a ceiling on the overall damages recoverable, which is the plaintiff's overall expectation position. This ceiling is the overall expectation interest the plurality seeks to calculate directly. In the end, both approaches ground themselves in the orthodoxy of *Robinson v Harman*: the plurality places the plaintiff in the position they would have been in but for the breach, while Gageler CJ ensures the plaintiff is in no better position than they would have been in but for the breach.

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132 *Cessnock* (n 1) 726 [14] (Gageler CJ).
133 Ibid 727 [21] (Gageler CJ).
134 *JA Berriman* (n 6) 352.
135 *TC Industrial* (n 7) 143.
136 *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, 1369 (Steyn LJ) quoted in *Soteria* (n 62) [43].
137 Owen (n 121) 405.
138 Ibid 409.
139 Ibid.
140 Ibid 395.
141 Winterton, 'Reliance Expenditure as Damages' (n 60) 24.
142 But compare *Soteria* (n 62), which may be inconsistent with the plurality in *Cessnock*.

VI Conclusion

The High Court's decision in *Cessnock* is significant for several reasons. Not only does the decision clarify how plaintiffs should prove damages for wasted expenditure, but it also offers a general principle for dealing with the allocation of evidential and legal burdens in circumstances where a defendant's wrongdoing has caused (or increased) uncertainty regarding the plaintiff's non-breach position. *Cessnock* nonetheless raises fundamental questions about the rationale for awarding damages for breach of contract and, despite clarifying how damages for wasted expenditure ought to be proven, many questions remain unanswered. For example, how a Court will respond to a claim for both loss of profits and wasted expenditure, and how it will treat non-pecuniary benefits.[143] The principle of facilitation of proof aims to offer a general method of proof 'to address and minimise the forensic disadvantage of a party'.[144] However, the principle does not emerge with clarity from precedent. Instead, greater complexity is sown into and permitted to invade the field.[145]

[143] Kramer (n 71) 65.
[144] *Willmot v Queensland* (2024) 98 ALJR 1407, 1434 [102] (Edelman J).
[145] Adopting the language and warning of Jagot J in *Cessnock* (n 1) 760 [193].