

Episode 133: Summary

Episode name: Unpacking *Cessnock*: The High Court's Take on Damages for Wasted Expenditure

Guest(s): David Winterton

What area(s) of law does this episode consider?

Remedies for breach of contract; damages for wasted expenditure.

Why is this topic relevant?

Where expenditure is incurred in reliance on a contractual promise being performed, and then is 'wasted' as a result of another party's breach of contract, damages may be awarded as a compensatory remedy with the aim of placing the innocent party in the position they would have been in had the contract been performed. Significantly, the recent High Court ruling, *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17, sought to address the approach for determining when an award of damages to recover these losses is, and is not, appropriate.

The High Court's decision emphasises the complexities and considerations involved with these assessments, and has shed light on the limits of these damages, the evidentiary standards that must be met for damages to be awarded, and where the burdens of proof lie. This ruling has a profound impact on both public and private contracts, where parties often incur significant costs upfront, relying on the assumption of contractual performance.

What cases are considered in this episode?

[*Cessnock City Council v 123 259 932 Pty Ltd* \[2024\] HCA 17 \('Cessnock'\)](#)

- *Cessnock City Council* promised to grant 123 259 932 Pty Limited (formerly Cutty Sark Holdings) a 30-year lease for part of Cessnock Airport, where Cutty Sark spent approximately \$3.7 million building an aircraft hangar. The council breached its obligation to take reasonable action to register the subdivision plan, leading to legal proceedings. At trial, Cutty Sark was initially denied recovery for its wasted expenditure, but the NSW Court of Appeal reversed this, shifting the burden to the Council to prove the hangar costs would not have been recouped. The High Court upheld the appeal, ruling that damages for wasted expenditure could be recovered under the "facilitation principle," placing the burden of evidential uncertainty on the breaching party, but rejected a separate claim for wasted expenditure, treating it as part of expectation damages.

[*Commonwealth v Amann Aviation Pty Ltd* \[1991\] HCA 54](#)

- *Amann Aviation* entered a three-year contract with the Commonwealth for aerial coastal surveillance. Amann invested heavily in aircraft but was unable to have all planes ready on time. The Commonwealth terminated the contract, citing breach. However, the termination was found invalid, constituting wrongful repudiation by the Commonwealth. The issue in relation to damages for wasted expenditure was whether Amann could recover their initial losses based on the presumption that they would have recouped the expenditure if the contract had been renewed, despite the initial contract being a loss-making

venture. Amann sought damages for lost future profits and wasted expenditure. The High Court upheld the decision of the Federal Court, ruling that Amann could recover wasted expenditure, applying a presumption of recoupment and placing the burden on the Commonwealth to prove that the expenditure would not have been recovered.

[Clark v Macourt \[2013\] HCA 56](#)

- Dr. Clark purchased a fertility clinic from Dr. Macourt, including a stock of donor sperm. Upon discovering that much of the sperm was unusable due to regulatory non-compliance, Dr. Clark sued for breach of warranties regarding its quality. At trial, Dr. Clark was awarded \$1,246,025.01 in damages based on the number of usable sperm samples. The Court of Appeal overturned this decision, finding no loss since Dr. Clark had recouped replacement costs from patients. However, the High Court reinstated the trial judge's damages, with the majority affirming Dr. Clark's entitlement to compensation, while Justice Gageler dissented, raising concerns about the damages assessment.

[McRae v Commonwealth Disposals Commission \[1951\] HCA 79](#)

- The Commonwealth Disposals Commission sold an oil tanker to the McRaes through a tender process, with the intention of salvaging it and its cargo. The McRaes incurred substantial expenses preparing for the salvage mission, but their vessel sank before reaching Papua, and it was later revealed that the tanker never existed. The key issues were whether the contract was void due to a common mistake and whether the McRaes could claim damages for the non-existent tanker and related expenses. The trial court awarded the McRaes the sale price of the tanker plus £500 for costs incurred in verifying the tanker's existence. However, the High Court overturned this judgment, granting the McRaes £3,285 in damages for breach of contract. The High Court acknowledged the difficulty in assessing damages but concluded that the McRaes were entitled to recover the price paid and nominal damages for the breach.

[Armory v Delamirie \[1722\] EWHC KB J94](#)

- A chimney sweep found a valuable jewel and took it to a jeweler, who refused to return it, leading to a legal dispute over the jewel's value. The issue in this case was the application of the "facilitation principle," which shifts the burden of proving the value of the item to the party that creates the evidentiary uncertainty, in this case, the jeweler. The court found that because the jeweler created the uncertainty, they had to disprove the chimney sweep's claim about the jewel's value, establishing the facilitation principle as a way to address evidentiary difficulties caused by one party.

[Robinson v Harman \(1848\) 1 Ex Rep 850](#)

- Mr. Harman agreed to grant Mr. Robinson a lease but later refused to complete the lease after it was revealed he did not have full ownership of the property. The issue was whether Mr. Robinson could recover damages for the loss of his bargain, given that Mr. Harman lacked the legal title to grant the lease. The court found that since Mr. Harman had knowingly breached the contract, Mr.

Robinson was entitled to damages for the loss of his bargain, putting him in the position he would have been in had the contract been performed.

[Hadley v Baxendale \[1854\] EWHC J70](#)

- Mr. Hadley contracted with Baxendale to deliver a broken crankshaft for repair, but the delivery was delayed, causing Hadley to lose business profits. The issue was whether Baxendale could be held liable for Hadley's lost profits, given that Baxendale was not informed that the delay would cause such losses. The court found that damages are limited to those that arise naturally from the breach or were reasonably foreseeable by both parties at the time of contract, and since Baxendale was unaware of the special circumstances, he was not liable for the lost profits.

Blatch v Archer (1774) 98 ER 969

- This dispute centered on the validity of a will, with the plaintiff, Blatch, asserting that the will was legitimate and that he was entitled to the estate, whilst the defendant, Archer, challenged the will's validity, alleging it was a forgery. The court ruled in favour of Blatch. Lord Mansfield articulated that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

[Ti Leaf Productions Ltd v Baikie \[2001\] NZCA 303](#)

- Ti Leaf, a company that leased a farm from the Baikies to film a martial arts movie, spent over \$1 million on the project. The issue arose when the Baikies breached the contract by making a negative public comment, which led to investors pulling out, causing Ti Leaf to seek damages for the wasted expenditure. The court found that Ti Leaf failed to prove causation, concluding the film would never have been completed, and rejected the argument that the onus was on the defendants to prove the expenditure wouldn't have been recouped.

[Anglia Television v Reed \[1972\] 1 QB 60](#)

- Anglia Television hired Reed for a film, and when Reed breached the contract, they sought damages for both pre- and post-contract expenses related to the project. The issue was whether reliance damages could include expenditure incurred before the contract was made. The court found that such pre-contractual expenses could be recovered if they were within the contemplation of the parties, and Reed was held liable for the full £2750, including costs incurred both before and after the contract.

[Soteria Insurance Ltd \(formerly CIS General Insurance Ltd\) v IBM United Kingdom Ltd \[2022\] EWCA Civ 440](#)

- Soteria, a sophisticated commercial party, claimed damages against IBM for breaching their contract by failing to provide the promised performance regarding the installation of software or computers, despite an express exclusion clause that barred recovery for certain types of consequential loss. The issue was whether the exclusion clause also implicitly excluded claims for wasted expenditure, which Soteria sought to recover. The Court of Appeal found that wasted expenditure claims are fundamentally different from

consequential loss claims, and thus the exclusion clause did not bar Soteria's claim for wasted expenditure.

What are the main points?

- Damages for wasted expenditure refers to awards for breach of contract, where the aim is to put the innocent party in the position they would have been in if the contract had been performed.
- These damages are often referred to as “reliance damages”, however this term may cause confusion for those less familiar with the complexities of contract damages.
- The case of *Cessnock* provided the courts with the opportunity to clarify the principles governing damages for wasted expenditure, in light of various interpretations in previous authorities such as *Amann* and *McRae*.
- When a defendant's breach increases uncertainty about the plaintiff's position, there is a presumption of recoupment that the plaintiff would have recouped any reasonable expenditure made in anticipation of the contract's performance.
- In a claim for damages, the burden of proof generally lies with the party seeking damages to demonstrate that their loss was caused by the defendant's breach; however, this burden can be facilitated by the presumption of recoupment. The High Court in *Cessnock* reiterated that the party creating uncertainty should bear the burden of proof.
- The concept of reasonably incurred expenditure is related to the *Hadley v Baxendale* remoteness rule, which determines the limits of recovery of damages for consequential loss in breach of contract cases, emphasising reasonableness and foreseeability by both parties at the time of the contract.

Show notes

[Winterton, D. \(2024\). 'Reassessing "Reliance Damages": The High Court Appeal in Cessnock CityCouncil v 123 259 932 Pty Ltd', *Sydney Law Review*, vol. 46, no. 1 pp. 87-102.](#)

[McLauchlan, D. \(2019\). 'The Limitations on 'Reliance' Damages for Breach of Contract', Campbell, D and Halson, R \(eds\), *Research Handbook on Remedies in Private Law*, Edward Elgar Publishing.](#)

[Judgement of Chief Justice Gageler in *Cessnock*.](#)

[Stone, J. \(1907\), *Legal System and Lawyers' Reasoning*, Stanford University Press, Stanford.](#)