Damages for Wasted Expenditure in Contracts for the Sale of Land.

by

David P. Grinlinton.*

I. INTRODUCTION

In *O'Connell v Hay*[1], an action for recovery of wasted expenditure by the rescinding purchaser in an abortive purchase of a farm, Cook J made the following comment:

> "... there seems no reason why expenditure incurred prior to the signing of the contract which is of a type which would normally be incurred as part of the process leading to the formalisation of the bargain and, as such, could be contemplated by the other party, should not be recoverable."[2]

This statement was made on the authority of *Anglia Television Ltd v Reed*[3] where Lord Denning said:

> "[the Plaintiff] can claim also the expenditure incurred *before* the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken."[4]

If correct, the statement made by Cook J would appear to extend considerably the scope for recovery of expenditure made by a party at a time when no contract exists. If no contract is subsequently formalised, this expenditure would certainly not be recoverable. Such an extension of the law must be seriously questioned.

This paper will be concerned primarily with the issue of recovery of expenditure including pre-contractual expenditure incurred in reliance on contracts for the sale of land. *O'Connell v Hay*[5] will be discussed

* BA, LLB(Hons).

[1] High Court, Dunedin. 4 February 1983 (A.48/82). Cook J.
[2] *Ibid*, 6.
[3] [1972] 1 QB, 60.
[4] *Ibid*, 63.
[5] *Supra*, note 1.

in the light of its own peculiar circumstances. The principles of contractual damages will then be briefly outlined. Finally, the correctness of the decision in *Anglia Television Ltd v Reed*[6] will be assessed in relation to the principles of damages for breach of contract.

II. *O'CONNELL v HAY*[7]

A. The Contract

On 30 October 1981 Mr D.J.Hay entered into a contract subject to finance for the sale of his farm to the plaintiff's cousin, Mr R.O'Connell. A second unconditional contract was entered into on 19 February 1982 between J.T.O'Connell and his brother, B.G. O'Connell, as purchasers, and D.J. Hay as vendor. The first contract was cancelled on this date. However, prior to this contract and shortly after the original contract of 30 October 1981, the son of the vendor issued proceedings seeking an injunction prohibiting his father from completing the contract and restraining any further dealings with the property on the grounds that a constructive trust had arisen in the son's favour because of certain promises made to him by his father. A caveat making reference to this trust and writ was also registered against the title to the property prior to the signing of the second contract.

Settlement date under the second contract was 31 March 1982. The vendor did not sign the transfer by that date, and on 2 April the Court ordered an interim injunction in the proceedings brought by the son in the terms sought. In June 1982 the plaintiffs issued a writ claiming specific performance but in August 1982 elected to rescind the contract and claim damages for wasted expenditure.

The first step must be to ascertain the nature of the contract in issue.

The first contract of 30 October 1981 was cancelled on 19 February 1982. There was a new and independently binding contract entered into on this date. This contract was unconditional and contained the essential elements of parties, property and price. The agreement was in writing, was signed by all the parties and is the operative contract on which the action for damages was based.

These facts establish that the second contract was signed after the defendant's son issued proceedings and filed a caveat. It appears from the judgment[8] that the O'Connells may have known of the injunction proceedings before they entered into the operative contract. Additionally, of course, the lodging of a caveat is notice that there is a claim against the land.[9]

[6] *Supra*, note 3.
[7] *Supra*, note 1.
[8] *Supra*, note 1, at 4.
[9] See, *Butler v Fairclough* (1917) 23 CLR 78, 91. (Approved in *Abigail v Lapin* [1934] AC 491, 502).

The presence of a caveat, while indicating the existence of a possible defect in title is not, however, a defect in title itself. Barwick CJ said in *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd*:[10]

> "A caveat against dealings, such as the caveat in the present case, is not a defect in a vendor's title. It is in its nature a notice to the Registrar-General, which he is bound to observe, not to register any dealings without notice to the caveator."

A caveat such as that registered in the *O'Connell* case is "notice to all the world"[11] of the interest alleged in the caveat. However, the purchaser's implied knowledge of this caveat prior to entering into a contract for sale and purchase does not disentitle him from requiring the vendor to make good title to him. In *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd (supra)*, which concerned the existence of such a caveat, Barwick CJ said:

> "It is important to bear in mind that the obligation of a vendor of an estate or interest in land held under [the Torrens System] is, on settlement, to place his purchaser in a position to be registered in respect of that estate or interest."[12]

Thus, the obligation was on Mr Hay to remove the caveat from his title by the settlement date of 31 March. Having not been able to do this, Hay was in breach and the O'Connells were found to have a valid claim in damages after abandoning an initial claim for specific performance.

B. Damages Sought By The O'Connells

(i) *Legal Expenses and Disbursements:* The sum of $5,418 claimed included the conveyancing costs in connection with: the purchase; vendor mortgage finance; other finance applications; the advance from the O'Connell father to his sons (plaintiffs); the sales among the O'Connell's sons which would have redistributed the O'Connell property; and the entry of a later caveat on behalf of the O'Connell's. Some of these expenses related to conveyancing costs incurred before the contract was entered into.[13]

(ii) *Further Legal Expenses in Connection with Arranging Finance:* The sum of $700.81 was incurred prior to the contract for negotiating a loan of $250,000. This was not taken up and the claim was disallowed by Cook J as the claim in (i) (above) included costs of arranging the mortgage finance which was, in fact, utilised. His Honour felt that there could not be a claim for both.

(iii) *Toll Fees:* $153.00 was claimed as estimated expenditure for calls made regarding the deal from 1st January 1982 to August 1982.[14]

[10] (1972) 128 CLR 529, 537.
[11] *Butler v Fairclough* (1917) 23 CLR 78, 91, *per* Griffith CJ.
[12] *Supra*, note 10, at 536.
[13] This detail appears from the transcript of the evidence at the hearing.
[14] *Ibid.*

Cook J allowed $100[15] stating that the deduction was made as the expenditure incurred for such calls *after* breach date could not correctly be termed 'wasted' expenditure. Rather, this was expenditure incurred in deciding on a course of action following the breach.

However, part of the $100 awarded represented recovery of expenditure incurred prior to 19 February 1982. This shows a marked extension of the law to allow recovery of non-conveyancing pre-contractual expenditure.

(iv) *Travelling Expenses:* Again Cook J reduced the amount claimed ($1080) for travel expenses from October 1981 onwards. He awarded $216. Again, part of this sum represented pre-contractual non-conveyancing expenditure.

It will be useful at this point to review the principles of damages for breach of contract generally before discussing the reasons for, and accuracy of, the decision in *O'Connell v Hay.*[16]

III. DAMAGES FOR BREACH OF CONTRACT

A. General

Fuller and Perdue[17] identified three principal interests in awarding damages for breach of contract. These are the 'restitution' interest; the 'reliance' interest; and the 'expectation' interest. The restitution interest concerns any benefit the plaintiff has conferred on the defendant in reliance on the promise of the defendant. The reliance interest concerns the protection of the plaintiff from any loss incurred by changing *his* position in reliance on the promise of the defendant. The expectation interest is the value of the expectancy created by the promise of the defendant. In a sale of land, this would be the loss of profit being the difference between the agreed price and the market value (if more). The thrust of their article is that legal rules can be understood only by reference to their purposes. In the field of damages these must be directly related to the purpose they are intended to serve. Fuller and Perdue state:

> "We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry; *toward what end is this activity directed*?" (My emphasis)[18]

Ogus[19] refines Fuller and Perdue's categories of interest, and includes a fourth interest which he terms the 'indemnity' interest. This describes the pecuniary value of the loss which B has suffered as a consequence of A's breach of contract. An example of this interest is the

[15] *Supra*, note 1, at 7.
[16] *Supra*, note 1.
[17] "The Reliance Interest in Contract Damages" 46 Yale LJ 52; 373 (1936).
[18] *Ibid*, 52.
[19] A I Ogus, *The Law of Damages* (1973) chs 8,9.

payment of compensation by B to a third party to whom B has resold the goods but to whom B has been unable to deliver because of the original seller, A's, refusal to deliver.

The restitution, reliance and indemnity interests represent *actual* positive losses whereas the expectation interest represents a *contingent* loss.

In *Cullinane v British "Rema" Manufacturing Co Ltd*[20] an action was brought by purchasers of clay pulverising machinery which performed at less than a third of its claimed capacity. Damages were claimed under five heads. They were: (i) the cost of the plant less its residual value; (ii) the cost of ancillary plant less its residual value; (iii) the cost of buildings to house the plant less their break-up value; (iv) interest on all the capital sums expended on these items; and finally, (v) loss of profits from the date of the purchase to the date of the action.

The general proposition was laid down by Evershed MR that the plaintiff could not recover both the capital cost (difference between cost of plant and market value) as well as the anticipated profit that should have been made had the machine performed to its specification. If the capital cost is seen as a positive loss, and the loss of anticipated profit as the expectation interest, then this case would suggest that the plaintiff must claim damages for either the expectation interest or the reliance interest, but not both.

This case was a majority decision and as Ogus states,[21] ambiguous in certain respects. The reliance interest may be claimed in addition to the expectation interest provided only the net profit is claimed under the second head.

Should a plaintiff be able to mitigate the effects of a bad bargain by electing to pursue damages for wasted expenditure instead of the expectation interest? In *C&P Haulage v Middleton*[22] the English Court of Appeal reaffirmed the general proposition that the award of damages for breach of contract should attempt to put the plaintiff in the position he would have been in had the contract been performed. Ackner LJ stated:

> "It is not the function of the Courts where there is a breach of contract knowingly, as this would be the case, to put the plaintiff in a better financial position than if the contract had been properly performed."[23]

In contracts for the sale of land, however, it is often difficult to determine whether a bad bargain has been made.

[20] [1954] 1 QB 292.
[21] *Supra*, note 19, 352.
[22] [1983] 3 All ER 94.
[23] *Ibid*, 99.

O'Connell v Hay involved a claim for wasted expenditure only. This expenditure, where recoverable, falls within the reliance interest. For this reason, detailed discussion of the restitution and indemnity interests is outside the scope of this paper. Suffice it to say that in an action for damages (and/or restitution), the indemnity interest may often form a part of the reliance interest, both interests concerning positive losses to the plaintiff. The restitution interest is primarily concerned with benefits conferred on the defendant himself.

An election to seek only reliance interest damages may be made where loss of profits can not be quantified or are too uncertain.[24] Expenses incurred from the date of the contract until breach and pre-contract if in anticipation of and required by the contract[25] may be claimed. Expenses incurred after breach, unless coming within the 'indemnity' interest as obligations to other parties, are not recoverable under the reliance interest as the plaintiff has notice of the breach and could not reasonably increase the liability of the defendant from this time. In *Lloyd v Stanbury*[26] Brightman J stated:

> "... if the buyer treats the contract as repudiated he is not, in my judgment, entitled to recover an expense which he only incurred because he was at that time keeping his option open to sue for specific performance. If he decides to claim damages such expenditure is the very reverse of mitigation of damages; it increases them."[27]

When damages are awarded for the reliance interest as an alternative to damages for the loss of the expectation interest, the object of the award is *'restitutio in integrum'* — to put the plaintiff in the position he would have been in had he not entered into the contract. Unfortunately, in an atmosphere of inflation and economic unrest such an object will be difficult to achieve as the courts have been unwilling to compensate innocent parties for capital tied up in contracts which are repudiated through breach of the other party. In *Wroth v Tyler*[28] Megarry J disallowed a claim for inflationary losses in a contract for the sale and purchase of land. He did, however, award damages of £5,500 in lieu of specific performance.[29] These were assessed at the date of judgment and not the date of breach. Reliance interest damages assessed at the date of breach would only have been £1,500. Thus the plaintiffs were able to re-enter the market for another house of comparable standard despite the rapid inflation between the breach date and the judgment.

A plaintiff therefore, if seeking reliance interest damages, is advised

[24] See: *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377. Cf, *Anglia Television Ltd v Reed* [1972] 1 QB 60, 64.
[25] *Lloyd v Stanbury* [1971] 1 WLR 535, 546.
[26] *Idem.*
[27] *Ibid*, 546.
[28] [1974] Ch 30.
[29] *Ibid*, 60.

to pursue his case promptly as the court will award damages *restitutio in integrum* at the date of breach.[30] If he is seeking damages as an alternative to specific performance, however, the date of measuring damages is brought forward to the date of election to pursue these damages (or the date of judgment if they are awarded in lieu of specific performance).[31]

However, the party seeking specific performance must be acting reasonably, as an unreasonable pursuit of specific performance as a device to extend the measure of damages to the date of election to sue for damages instead, or to the date the court orders damages in lieu of specific performance, may be unjust. In times of inflation, the injustice may arise if this extension is unreasonably long or caused through want of prosecution by the plaintiff. In *Asamera Oil Corp Ltd v Sea Oil & General Corp*[32] Estey J, delivering the judgment of the Supreme Court of Canada, stated:

> "Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found."[33]

In summary then, damages may be awarded in lieu of specific performance. These damages are intended to satisfy the expectation interest. Alternatively, damages may be awarded on the basis of *'restitutio in integrum'*. These damages are intended to satisfy the reliance interest, and the indemnity and restitutionary interests not already included in the reliance interest.

These basic principles are applicable to contracts for sale and purchase of land. Indeed many of the principles emanate from vendor and purchaser decisions. There are, however, some specific rules which apply to remedies for breach of sale and purchase of land contracts.

B. *Damages for Breach of Contracts for the Sale of Land*

Halsbury outlines the measure of damages in contracts for the sale of land where the vendor refuses to complete:

> "Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest together with expenses which he has incurred in investigating title and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain."[34]

[30] *Lloyd v Stanbury* [1971] 1 WLR 535.
[31] *Domb v Isoz* [1980] 1 Ch 548, 559-560 *per* Buckley LJ.
[32] [1979] 89 DLR (3d) 1.
[33] *Ibid*, 26.
[34] *Halsbury's Laws of England* (4th ed) 468.

A preliminary point to note following *Johnson v Agnew*[35] is the lack of distinction between equitable and common law damages in vendor and purchaser actions. Lord Wilberforce[36] made the point that equity and the common law would award damages on the same basis where they are awarded as a substitute for specific performance. This discussion will be directed primarily at common law damages however.

Further, *Buckland v Farmer*[37] clearly shows that where one party rescinds a contract as a result of a breach by the other party, the rescinding party is entitled to damages for breach of contract which would include the expectation interest. This decision was approved by Lord Wilberforce in *Johnson v Agnew*[38].

However in certain circumstances where there is a defect of title, a purchaser may be restricted to damages based on *restitutio in integrum*.[39]

A case of direct relevance to the *O'Connell* case[40] is *Jacobs v Bills*.[41] The vendor was a trustee who had contracted to sell the property she held in trust without the knowledge or concurrence of the beneficiaries. Prior to settlement the vendor decided to repudiate the contract after the intervention of the beneficiaries and their solicitors. The purchaser brought an action claiming specific performance of the contract, or in the alternative, damages for breach including loss of bargain. McGregor J applied the rule in *Bain v Fothergill*[42] by restricting the award of damages to the purchaser to the amount of his deposit and wasted expenditure in legal fees. Quoting *Halsbury's* expression of the rule,[43] he said:

> "... where a vendor who has not expressly undertaken to deduce a good title is unable, acting in good faith and without committing a breach of trust, to make a title, the purchaser, in action for breach of contract, can recover only the expenses he has incurred, but not damages for the loss of his bargain.
>
> ... [In the present case] such sale at a gross undervalue would constitute a breach of trust."[44]

Later McGregor J quoted with approval the judgment of Sir W.M. James LJ in *Dance v Goldingham*:

> "I am of the opinion that the purchaser, under a mere contract for purchase, is not entitled to insist upon a transaction being completed, which, as between the 'cestuis

[35] [1980] AC 367 (HL).
[36] *Ibid*, 400.
[37] [1979] 1 WLR 221, 231-232 *per* Buckley LJ; 237-238 *per* Goff LJ.
[38] [1980] AC 367, 395D.
[39] See: *Bain v Fothergill* (1874) LR 7 HL 158, 201.
[40] *Supra*, note 1.
[41] [1967] NZLR 249
[42] *Supra*, note 39.
[43] *Halsbury's Laws of England* (4th ed) Vol 42, para. 267.
[44] *Supra*, note 39, 254.

> que trust' and the trustees, is a breach of trust. He has, therefore, no right to call upon the trustees, or to ask the court to allow the trustees, to execute a conveyance, having its origin in a breach of trust, when before the thing was completed he had notice of the irregularity which had been committed."[45]

The purchaser was allowed the return of his deposit and compensation for the expenses and delay incurred by the vendor's repudiation. Damages for loss of bargain were not allowed.

A.J. Oakley in his article "Pecuniary Compensation for Failure to Complete a Contract for the Sale of Land"[46] discusses the situation where a spouse had registered a charge on the title under the Matrimonial Homes Act 1967 (UK) prior to the signing of a contract by the other spouse (the registered owner) for sale of the property.[47] He states:

> "Such a registered charge must be a defect of title; it has appeared "without the fault" of the vendor (unless he can be held at fault for having married such a recalcitrant spouse in the first place!); and he clearly has no power to remove it."[48]

This reasoning, supported by the cases discussed, is persuasive. Thus the constructive trust alleged by the vendor's son in *O'Connell's* case[49] and supported by the caveat lodged prior to the contract to sell the property would in this sense represent a defect in title. This would be reinforced by the issue of an interim injunction, two days after the date of intended settlement, restraining the sale of the property. The only way the property could have been transferred was by the removal of the caveat prior to the interim injunction, or the cancellation of the interim injunction and the removal of the caveat after this date. The title was defective in the sense that the vendor was restrained from transferring it at the settlement date and subsequently.

Had the O'Connells claimed damages for loss of bargain in *O'Connell v Hay*,[50] it is submitted that the rule in *Bain v Fothergill* would have had effect.

IV. PRE-CONTRACTUAL EXPENDITURE AND THE DECISION IN *O'CONNELL V HAY*[51]

The case of *Wallington v Townsend*[52] was cited as authority for the recovery of conveyancing expenses in *O'Connell v Hay*.[53] This exception to the rule prohibiting the recovery of precontractual wasted ex-

[45] (1873) LR 8 Ch App 902, 911.
[46] [1980] CLJ 58, 69.
[47] This was a variation on the facts in *Wroth v Tyler* [1974] Ch 30, where a wife had registered such a charge *after* the contract date.
[48] *Supra*, note 46, at 69 n 63.
[49] *Supra*, note 1.
[50] *Idem*.
[51] *Idem*.
[52] [1939] 1 Ch 588.
[53] *Supra*, note 1.

penditure[54] is consistent with the landmark case of *Hanslip v Padwick*[55] allowing costs of investigating title. This exception was also allowed in *Lloyd v Stanbury*,[56] which case extended the exception to cover other wasted non-conveyancing pre-contract expenditure for an act required to be done by the contract and performed in anticipation of it.[57] In this sense the expenditure was 'ratified' as it became a term of the subsequent contract. Brightman J made a further observation that the purchaser would also be entitled:

> "... on general principles to damages for any other loss which ought to be regarded as having been within the contemplation of the parties."[58]

It should be noted, that this statement was strictly obiter as the damages he ultimately awarded in that case, other than conveyancing and legal costs, related only to expenditure which was *required* by the terms of the contract, or which was incurred between the contract date and the breach date. In *Lloyd v Stanbury*[59] the pre-contractual expenditure claimed was for the transportation and installation of a caravan on the site of the intended purchase prior to the date the contract was signed, and in anticipation of this. A term of the intended contract was to provide a caravan on land retained by the vendor to accommodate him until he had completed building a bungalow on that land. Thus *Lloyd v Stanbury*[60] is only authority for the proposition that such pre-contractual wasted expenditure can be claimed where it is of a conveyancing or legal nature, or where it is an act required to be performed by the contract, but actually performed in anticipation of it.

The obiter comment regarding recovery of any other loss "within the contemplation of the parties" would appear to be a reference to the principles laid down in *Hadley v Baxendale*.[61] That case dealt with remoteness of damage and did not refer to pre-contractual expenditure, but rather the losses which may be foreseen as flowing from breach of a contract.[62] Pre-contractual expenditure, unless for matters required in the contract, does not arise out of the contract. Such expenditure is usually made in anticipation of a contract being made. If the contract is not made, these expenses can not be recouped. Therefore they are not made in reliance on the *contract* and can not be said to be a loss caused by a breach of the contract, as the sums were

[54] *Hodges v Earl of Litchfield* (1835) 1 Bing (NC) 492, 498 *per* Tindal CJ; 131 ER 1207, 1209.
[55] (1850) 5 Exch Rep 615, 624 *per* Alderson B; 155 ER 269, 274.
[56] [1971] 1 WLR 535.
[57] *Ibid*, 546.
[58] *Idem*.
[59] *Supra*, note 56.
[60] *Idem*.
[61] (1854) 9 Exch Rep 341, 354; 156 ER 145, 151.
[62] Thesiger J dealt with this issue in *Perestrello & Comphania Limitada v United Paint Co Ltd*, *The Times* April 16, 1969.

expended whether or not a contract ultimately came into existence. It is not logical that such expenses should change their nature and become recoverable damages (in the event of breach) at the time the contract is signed.

Authority can be found in *Hodges v Earl of Litchfield*[63] where Tindal CJ stated:

> "The expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit at a time when it is uncertain whether there will be any contract or not."[64]

More recently in *Perestrello & Companhia Limitada v United Paint Co Ltd,*[65] a case not cited in *Lloyd v Stanbury* (*supra*), Thesiger J quoted the words of Tindal CJ (*supra*) and said:

> "[In my judgment] precontract expenditure, though thrown away, is not recoverable."[66]

As has been shown, the pre-contract expenditure awarded as damages in *Lloyd v Stanbury* (*supra*) did not include the recovery of other expenses a party *chooses* to incur prior to a contract being made. Unfortunately, it appears that Cook J in *O'Connell v Hay*[67] relied upon the headnote in *Lloyd v Stanbury* (*supra*) for this proposition (that such damages could be recovered) which, as has been demonstrated, was not part of the ratio of that case.

The $5,418 awarded in *O'Connell's* case (*supra*) for legal and conveyancing costs would appear to be within the authorities cited for such expenditure. However, the award of $100 for toll calls, and $216 for travelling expenses included amounts for expenditure incurred prior to the contract signed on 19 February 1982. This represents a further extension of the law supported only by Brightman J's obiter statement incorporated in the headnote of *Lloyd v Stanbury* (*supra*) and Lord Denning's judgment in *Anglia Television Ltd v Reed,*[68] which was also based on the obiter proposition of Brightman J.

The actual wording of this proposition in the judgment should be noted. Brightman J favoured the recovery of —

> "... damages for any *other* loss which ought to be regarded as having been within the contemplation of the parties."[69]

Unfortunately, the headnote omitted the word 'other', thus considerably widening Brightman J's statement which, it is submitted, was merely a reference to basic principles regarding contractual

[63] *Supra*, note 54.
[64] *Ibid*, 498; 131 ER 1207, 1209.
[65] *Supra*, note 62; on appeal on a different issue in [1969] 1 WLR 570.
[66] *Idem*.
[67] *Supra*, note 1.
[68] [1972] 1 QB 60.
[69] *Lloyd v Stanbury* [1971] 1 WLR 535, 546.

damages, and not to pre-contractual expenditure.

Cook J specifically relied on *Anglia Television Ltd v Reed*[70] for the recovery of pre-contractual expenditure generally. Lord Denning stated:

> "He can claim also the expenditure incurred *before* the contract, provided that it was such as would reasonably be in the contemplation of the parties."[71]

This statement is, with respect, faulty on theoretical grounds; is contrary to established authority; and draws support from the incorrect interpretation of the judgment of Brightman J in *Lloyd v Stanbury* discussed above.

V. *ANGLIA TELEVISION LTD v REED*[72]

In *Anglia Television Ltd v Reed*[73] the plaintiffs, a television company, entered into a contract with Mr Reed who was to play the lead in a film production. Prior to the formal contract they incurred £1895 on expenditure including fees for a director, designer, stage manager, and other artists. Following the contract a further £855 was expended. The defendant then repudiated the contract. The plaintiffs claimed the full £2750 for wasted expenditure, as a claim for loss of profits was uncertain and would have been based on speculation.

The defendant argued that only £855 could be awarded as expenditure incurred prior to the contract was not recoverable.

Lord Denning awarded the full sum £2750 as damages for wasted expenditure.

It would appear that 'reliance' interest damages were being claimed. As discussed earlier,[74] these damages are based on the doctrine of *restitutio in integrum*, or putting the parties back in time to the position they would have been in had they not entered into the contract. In *Anglia Television Ltd v Reed* (*supra*) there is no causal connection between either the making of the contract (or breach) and the loss of wasted expenditure prior to the contract unless an earlier oral contract is inferred, which it was not.[75]

This expenditure would have been lost even if no contract had been signed and could not be claimed in the absence of a contract. It is conceptually untenable that the signing of the contract changes the nature of this expenditure from that made by the plaintiff through his own choice and at his own risk (and which he would 'write off' if no con-

[70] *Supra*, note 68.
[71] *Supra*, note 68, at 64.
[72] [1972] 1 QB 60, CA.
[73] *Idem*.
[74] See Section III.A, pp
[75] If this had been the case the wasted expenditure would not then have been incurred pre-contract.

tract ensues), to a recoverable loss suffered as a result of the defendant's repudiation.

It may be, as Ogus suggests,[76] that wasted pre-contract expenditure could be recovered where the reliance interest is part of a claim for damages based on the plaintiff's expectation interest. Here the plaintiff would be claiming damages for breach of contract comprising loss of net profit (expectation) and wasted expenditure (reliance). The plaintiff seeks to be put forward in time to the position he would have been in had the contract been fulfilled, therefore the doctrine of *restitutio in integrum* would not apply. As the expenditure incurred in negotiating and implementing the contract could reasonably have been taken into account in calculation of profits from the abortive contract, these should logically be recovered, but not in addition to gross profit. In *Anglia Television Ltd v Reed (supra)* this was not the case and therefore the decision is wrong in principle.

Established authority[77] suggests that wasted pre-contract expenditure is not recoverable. In the restricted area of sale of land contracts there is a limited exception. Costs of investigating title have been allowed as recoverable damages.[78] Historically this arose from the fact that investigation of title in the nineteenth century took place after the contract was made.[79] The exception, then, had its origins in damages for post-contract expenditure. Later cases have extended this exception to include all the legal costs of approving and executing the contract,[80] and also the costs of performing any act required to be done by the contract.[81] Such a claim could only succeed where the contract was in fact entered into. The restriction of recovery of wasted expenditure to those sums expended post-contract was also made in *McRae v Commonwealth Disposals Commission*[82] and more recently in *Perestrello & Companhia Limitada v United Paint Co Ltd.*[83]

In the recent case of *C&P Haulage v Middleton*[84] the question arose as to the recovery of expenditure made during the currency of a contractual licence to occupy which was subsequently breached by the licensor by the ejection of the licensee 10 weeks before the end of the term. The court held that the purpose of contractual damages was to put the plaintiff in the position he would have been in had the contract been performed. The court concluded that the plaintiff had made a bad bargain as the expense would not have been recoverable had the

[76] Ogus, "Damages for Pre-Contract Expenditure", 35 MLR 423, 426.
[77] *Hodges v Earl of Litchfield* (1835) 1 Bing (NC) 492; 131 ER 1207.
[78] *Hanslip v Padwick* (1850) 5 Exch Rep 615, 624; 155 ER 269, 274.
[79] Ogus, *supra*, note 76, 425 n 14.
[80] *Wallington v Townsend* [1939] 1 Ch 588; cf *Jacobs v Bills* [1967] NZLR 249.
[81] *Lloyd v Stanbury* [1971] 1 WLR 535, 546.
[82] (1951) 84 CLR 377, at 412 and 415.
[83] *The Times*, April 16, 1969.
[84] [1983] 3 All ER 94.

contract been performed. No loss of expectation interest could be shown, therefore no damages could be claimed. *Anglia Television Ltd v Reed*[85] was considered as the plaintiff raised the issue of recovery of wasted expenditure. It was distinguished, however, as the expectation interest in that case could not be calculated, therefore the plaintiffs were thrown back on a claim for wasted expenditure.

Thus it would appear that a claim for wasted expenditure is only available where it is not possible to calculate the expectation interest whether positive or negative (if a bad bargain has been made).

As already stated the decision of Lord Denning in *Anglia Television Ltd v Reed (supra)* was also based on a misinterpretation of the judgment of Brightman J in *Lloyd v Stanbury*.[86] In discussing *Lloyd v Stanbury* Lord Denning states:

> "... Brightman J held, at p.547, that he could recover the cost of moving the caravan and furniture, because it was "within the contemplation of the parties when the contract was signed."[87]

This is incorrect. In allowing the recovery of those sums of which only the moving of the caravan to the site was clearly pre-contract, Brightman J allowed these damages as:

> "... the costs of performing an act *required* to be done by the contract notwithstanding that the act is performed in anticipation of the execution of the contract ...."[88]

— not because they were in "... the contemplation of the parties when the contract was signed." Not only was the judgment misinterpreted, but the misinterpretation was based on an obiter statement in *Lloyd v Stanbury*[89] which was construed to become part of the ratio of that case.[90]

Since he cites nothing beyond *Lloyd v Stanbury* in support of his extension of the law of damages to include recovery of pre-contract expenditure generally, the oral judgment of Lord Denning in *Anglia Television Ltd v Reed*[91] is questionable.

Bearing in mind the unsatisfactory nature of this decision, Cook J's reliance on *Anglia Television Ltd v Reed*[92] becomes inappropriate.

VI. CONCLUSION

Damages for wasted expenditure are an alternative to specific performance and/or damages in lieu of specific performance. These are available where the expectation interest is not calculable or the party

[85] *Supra*, note 3.
[86] *Supra*, note 81.
[87] *Anglia Television Ltd v Reed* [1972] 1 QB 60, 64.
[88] *Lloyd v Stanbury* [1971] 1 WLR 535, 546.
[89] *Idem*.
[90] See discussion on this point *ante*, pp. 46-48.
[91] *Supra*, note 72.
[92] *Supra*, note 72.

chooses not to seek specific performance. These damages are based on the principle of *restitutio in integrum* and have as their object putting the parties back in time to the position they would have been in had they not entered into the contract.

Wasted expenditure made in reliance on the contract is recoverable. Contractual damages of this nature may not include expenditure incurred before the formation of the contract[93] as this expenditure is not made in reliance on the contract, and the loss has, therefore, no causal connection to the breach of such a contract.

In contracts for the sale of land certain exceptions have been allowed for the recovery of conveyancing expenses incurred pre-contract.[94] This developed out of the unique nature of contracts for the sale of land and was extended to include expenditure which was required by the contract and made in anticipation of it.[95] This extension can be justified as the expenditure is required by the contract, thus the parties have expressly made it a term of the contract. That a party chooses to incur the expenditure prior to the formal ratification of the contract merely puts that party at risk of losing the expenditure should the contract not be signed.

In *Anglia Television Ltd v Reed*[96] Lord Denning attempted to extend this exception to include all pre-contractual expenditure which could be seen as being in the "reasonable contemplation of the parties." Such an extension is unjustified. It attempts to use an established narrow exception in the area of contracts for the sale of land as a foundation for expansion of the basic principles of the general law of damages to which the exception relates. Such an exception to general principles is no foundation for subsequently altering those principles. This is the fallacy of *petitio principii*. In *O'Connell v Hay*[97] Cook J cited *Anglia Television Ltd v Reed (supra)* as authority that some telephone and travelling expenses incurred by the purchaser prior to a contract for the sale and purchase of land could be recovered as damages.

It is suggested, with respect, that *Anglia Television Ltd v Reed* was wrongly decided on this point and represents a confusion between reliance interest and expectation interest damages. In addition to theoretical flaws, there is no authority for the recovery of pre-contractual expenditure generally. No further reference has been found in the English or New Zealand case law (apart from *O'Connell*

[93] *Hodges v Earl of Litchfield* (1835) 1 Bing (NC) 492, 498; 131 ER 1207, 1209; cf *Perestrello & Comphania Limitada v United Paint Co Ltd, The Times* 16 April 1969.
[94] *Hanslip v Padwick* (1850) 5 Exch Rep 615, 624; *Wallington v Townsend* [1939] 1 Ch 588.
[95] *Lloyd v Stanbury* [1971] 1 WLR 535.
[96] [1972] 1 QB 60.
[97] *Supra*, note 1.

v Hay (supra)) which follows *Anglia Television Ltd v Reed* on this point.

The dangers of such extensions to the law are succinctly summarised by Lord Wilberforce in *Johnson v Agnew*:[98]

> "... starting from a judgment in which no reasons are given, and which may rest upon any one of several foundations, of which one is unsound, ... a wavering chain of precedent has been built up, relying upon that foundation, which is itself unsound. Systems based upon precedent unfortunately often develop in this way and it is sometimes the case that the resultant doctrine becomes too firmly cemented to be dislodged."[99]

It is concluded that there is no justification in principle or practice to extend the law of damages in contracts for the sale of land to pre-contractual expenditure beyond the limits established in *Lloyd v Stanbury*.[1]

[98] [1980] AC 367.
[99] *Ibid*, 396.
[1] See discussion *infra*, pp. 46-48, 50.