IN THE COURT OF APPEAL OF NEW ZEALAND CA227/00

BETWEEN TI LEAF PRODUCTIONS LIMITED

Appellant

AND LESTER BAIKIE AND ROBYN BAIKIE

Respondents

CA35/01

BETWEEN LESTER BAIKIE AND ROBYN BAIKIE

Appellants

AND TI LEAF PRODUCTIONS LIMITED

Respondent

Hearing:	23 July 2001
Coram:	Gault J Thomas J Keith J
Appearances:	J G Miles QC and P J Dale for Ti Leaf Productions Ltd R B Squire QC and T M Gresson for L and R Baikie
Judgment:	17 September 2001

JUDGMENT OF THE COURT DELIVERED BY GAULT J

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[1] This appeal is from a decision of Panckhurst J delivered in the High Court at Christchurch on 3 October 2000 on a claim for breach of contract and defamation.

The claim was brought by the appellant, Ti Leaf Productions Ltd, against the respondents, Mr and Mrs Baikie. It will be convenient to refer to the parties simply as "Ti Leaf" and "the Baikies". Both causes of action arose out of certain comments made by the Baikies about Ti Leaf and its shareholders and employees relating to matters arising in the course of a tenancy agreement between the parties. Although denied in the pleading, breach of contract and defamation were effectively conceded by the Baikies part way through the trial, so that the only real issue was damages. Panckhurst J assessed the contract damages at the nominal sum of $500. The Judge, having also found that the Baikies could not establish the defence of qualified privilege, awarded Ti Leaf a further $5,000 for defamation.

[2] In this Court Mr Miles QC, for Ti Leaf, challenged the primary factual finding of the Judge of absence of causation of losses claimed. He also challenged the Judge's interpretation and application of the legal principles establishing entitlement to recover pre-contract expenditure in the circumstances.

[3] Mr Miles accepted that the appellant faced a considerable hurdle in attempting to upset on appeal the findings of fact made by a Judge after hearing a great deal of evidence of competing views on Ti Leaf's level of professionalism and commitment to its film-making project and its likely completion.

[4] The Baikies' also appealed against the decision of Panckhurst J to award costs to Ti Leaf of $25,000.

Background

[5] Ti Leaf was incorporated in Hong Kong in late 1993 for the purposes of making a low-budget film called *"The Lost Prince"*. Its five shareholders shared a common religious belief in a branch of Hinduism known as Vaishnavism and the idea was that *"The Lost Prince"* would, in part, convey the spiritual life philosophy associated with their beliefs. Its story was described in these terms: "*An action/adventure/martial arts epic of heroism, revenge and the triumph of wisdom over ignorance … good over evil*", set at a time "*several thousand years before recorded history*", and based in an "*idyllic, peaceful kingdom with an ancient,*

spiritual culture … graced with an extremely varied environment from the snowy peaks of Mt Meru to the vast ocean with everything from deserts, rain forests and waterfalls in between".

[6] In December 1993 Ti Leaf entered into a series of contracts with persons to be involved in the film production. Mr Butler, an American who is a spiritual leader and teacher of Vaishnavism, was to be the script writer, director, and, with his wife, a co-producer of the film. A schedule to his agreement with Ti Leaf provided that the script was to be available by 1 March 1994, filming was to be completed by 1 November 1994, and post-production by 31 December 1994. A similar agreement was entered into with Mr David Moore retaining his services as a sound recording consultant. Mr Moore was an employee of Sunset Studios Limited, an Arizona-based company that had independently agreed to provide audio and video equipment and production support to Ti Leaf. The lead actors were to be the three children of Mrs Butler. Their father (a Mr Bellord) was an investor in the project.

[7] At the end of 1993, when Ti Leaf was formed and the service contracts were concluded, the intention was to film *"The Lost Prince"* in Australia. To that end Ti Leaf was registered as a foreign company in Australia and about US$30,000 was deposited in an Australian account in order to demonstrate Ti Leaf's solvency and to satisfy the requirements of the Media, Entertainment and Arts Alliance (MEAA), a body which regulates the working conditions for actors and others involved in film production in Australia. However, by about mid-1994 problems with MEAA and the Australian Immigration Department resulted in a decision to relocate and film *"The Lost Prince"* in New Zealand. Successful applications were made to the New Zealand Immigration Service for multiple-entry working visas for the cast and crew. The letter from one of the shareholders supporting the application contained comments to the effect that the film would not be shot "in the traditional way", that is "under strict time constraints", and it was anticipated a considerable time would be taken because "the script is being written around the terrain".

[8] At about the same time an approach was made to the Baikies who owned a 12,000 hectare farm near Twizel known as Pukaki Downs station that was thought to be a suitable location for filming. There appeared to be some discrepancy in the

evidence as to who approached the Baikies and in what context but nothing turns on this. Through its agent, Mr Ormond, protracted negotiations ensued between Ti Leaf and the Baikies concerning the terms of a tenancy agreement. Mr Ormond explained that the intended occupants of the farm homestead suffered from severe allergy problems which would necessitate substantial alterations to the house and special terms in the lease governing fire-lighting and the use of pesticides and herbicides on the farm property. On 8 November 1994 a tenancy agreement was concluded between Mr and Mrs Butler and Ti Leaf as tenant and the Baikies as landlord. It was for a fixed term to 17 July 1995, with a right of extension to 21 August 1995 subject to a doubling of the rent. The ordinary rental figure was $1200 per week. There were many special conditions to the agreement that defined the rights of the tenant to alter the homestead both on account of the Butlers' allergy and respiratory problems and for the establishment of a studio facility on the land.

[9] In mid-January 1995 persons associated with the company arrived in New Zealand. Mr and Mrs Butler took up residence of the Pukaki Downs homestead which had already been altered in accordance with their requirements. Members of the film crew and their families obtained rental accommodation at Twizel, 14 kilometres away. The Baikies moved to another house situated on their property a short distance from the homestead.

[10] Almost immediately difficulties surfaced between landlord and tenant. The initial problem arose out of the Butlers' high water use as the domestic water supply was used to dampen areas surrounding the homestead to minimise dust. As the water supply was common to that of the Baikies, this resulted in insufficient water being available for the Baikies' own use. Mr Baikie responded by cutting off the water supply to the homestead. While this initial dispute was eventually resolved with the assistance of solicitors, problems between the parties persisted. Specific concerns, raised under the general allegation that Mr and Mrs Butler did not have quiet enjoyment of the homestead and its surrounds, included rabbit shooting, the threat to clean air arising from the use of fertiliser and herbicides and from burning-off, and the threat of physical violence because of the ongoing differences of opinion.

[11] For their part the Baikies were concerned as to whether Ti Leaf was seriously engaged in the production of a film. From their perspective the unusual and, to a degree, intrusive methods employed by Ti Leaf personnel were inconsistent with what they expected of a film crew. The nature and extent of the modifications to the homestead they considered strange. The practice of a tanker transporting water from Twizel to the homestead once or more daily was regarded with suspicion. The desire for privacy, characterised by the positioning of a guard caravan on the access road to the homestead was regarded as abnormal in a high country farm setting. In particular, Mr Baikie was unable to come to terms with the insistence made on behalf of Mr and Mrs Butler that their enjoyment of the homestead required restrictions upon normal farming activity. Local rumours as to the activities of Ti Leaf personnel appeared to be rife. In these circumstances the Baikies were reluctant to grant an extension of the lease, which was an issue of increasing concern to Ti Leaf as time passed.

[12] Negotiation of the terms of a new tenancy arrangement began around the time of the expiry of the first agreement, with Ti Leaf becoming a monthly tenant in the meantime. In early September 1995 the Baikies communicated with their Member of Parliament, Mr Neill. They raised two matters of concern. The first related to the cast and crew's compliance with the terms of their New Zealand work permits. Despite being advised by an Immigration Service officer that the permit situation was in order, they remained concerned that because the permits had been granted to facilitate the filming of "*The Lost Prince*", their holders would be in breach if a film was not being shot. The second concern related to the rumours concerning drug manufacturing and cult-based activities on the part of Ti Leaf personnel.

[13] In pursuing the Baikies' concerns Mr Neill made a number of allegedly defamatory statements about Ti Leaf under the protection of parliamentary privilege and then repeated them to a lesser extent outside Parliament. This led to defamation proceedings being brought against Mr Neill in consolidated proceedings. Though no issue arises before this Court in relation to Mr Neill's position (the claim against him was settled in the course of the hearing), it is to be kept in mind that the conduct of

the proceedings in the High Court would have been affected by the consolidated claim.

[14] On 8 February 1996 written agreement was reached concerning an extension of the tenancy agreement. The agreement, which took the effect of a variation, included the following terms:

> 1. That the Tenants (Mr & Mrs Butler/Ti Leaf Productions Ltd.) will remain on the leased property at Pukaki Downs until May 10th 1996. During this time the original lease will be in force.
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> 2. That the Tenants will be allowed the quiet enjoyment of the property until 10th of May 1996 and that the Landlords, their family members, and the tenants during this time and for two years after, will not make any negative comment about the other or their dealings with each other, to the media, representatives of government agencies, and any member of the public.
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> 3. The Tenants agree to pay the Landlord $8,000 as goodwill money. The Tenants will also leave behind for the Landlord the upgraded electrical facility, and a fuel metre for the petrol tank.

[15] The cause of action based on breach of contract related to the second clause. The covenant not to make negative comments was said to have been breached by the Baikies as the result of an interview given to the Timaru Herald reported on 6 June 1996 and during various subsequent conversations with other people. The cause of action in defamation was founded on some of the same and various other comments to specified persons including Mr Neill. Significantly, the comments attributed to the Baikies in the Timaru Herald article formed no part of the defamation allegations.

[16] It was alleged that the breach of the contract and the defamation led to the withdrawal of support of Ti Leaf's three major investors which forced them to abandon production of "*The Lost Prince*". The loss claimed in contract was amended during the trial to $1,337,064. The breakdown comprised costs incurred by Ti Leaf in preparation work in both Australia and New Zealand. The major components were salaries and fees, property rentals, travel, and general living

expenses. There was an equivalent claim for actual pecuniary loss in terms of s6 of the Defamation Act 1992. There was also a claim for aggravated and punitive damages although the latter was abandoned during the course of the trial.

The High Court Judgment

[17] Panckhurst J dealt with the breach of contract claim first, noting it had assumed greater significance. He found that pleaded comments had been made to a reporter from the Timaru Herald and that a number of them were negative in nature. He then considered the evidence of the withdrawal of Ti Leaf's investors and, with express reservations, determined that he was not in a position to make an adverse finding concerning the credibility of the investors and conclude that it was not the article in the Timaru Herald which caused them to withdraw financial support for the film.

[18] The Judge next found that the kinds of losses claimed (flowing from abandonment of the production) were foreseeable by the Baikies when they entered into the covenant and so were not too remote to flow from their breach.

[19] The next section of the judgment is headed "Was there a loss?" It deals with the issue of causation. The essential question was whether the wasted expenditure claimed would have been recovered had the negative comments of the Baikies not caused withdrawal of the funding support for the film. The enquiry through the trial was a broad one. There was the question whether or not Ti Leaf was a committed and professional film-maker or, as one defence witness put it, "naïve dabblers".

[20] Extensive evidence was given in that area, it was said, because of the defences relied on by the Baikies but eventually abandoned. For the Judge, however, the real focus came to be on whether *"The Lost Prince"* would have been completed and have recovered the expenditure incurred. To that end Panckhurst J summarised the extensive evidence relating to Ti Leaf's professionalism and commitment to completing *"The Lost Prince"*, in terms not criticised in the argument in this Court.

[21] The Judge found that Ti Leaf was a film-making company and that this was the primary purpose for its presence in New Zealand. However, he went on to make the finding that was challenged in this Court. His conclusion is expressed in the following two paragraphs in his judgment:

> But on all the evidence I am in no doubt that to successfully make and market a feature film is a difficult exercise. A hard-nosed professional approach is required, and even then commercial success in a fickle market place is not assured. Even absent Mr Gibson's evidence, I was left in real doubt whether in fact *"The Lost Prince"* would have been shot regardless of publication of the Timaru Herald article in June 1996. Three aspects of the evidence suggested this. [He then reviewed those aspects and concluded:]
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> …
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> When one views objectively the modest pace of progress, the amount expended on pre-production alone, the absence of adequate forward planning for a resumption of production in New Zealand, and the circumstances of the abandonment, I am satisfied that Ti Leaf had lost its way, had lost direction, by about May 1996 when the crew and cast disbanded. From that point the probability was that "*The Lost Prince"* would never be completed. The various indicators, viewed in combination, all point in that one direction.

[22] The judgment on the contract claim did not end there. The Judge, having made the essential finding of fact, went on to deal with the arguments addressed to him on the onus of proof where reliance damages are claimed. He noted that Ti Leaf's case was advanced as one of reliance losses in that it claimed damages for the wasted expenditure it had incurred in reliance on the agreement with the Baikies (albeit that much was incurred before the covenant was agreed). In support of its claim, counsel for Ti Leaf had relied on a line of authority originating from a decision of the English Court of Appeal in *Anglia Television v Reed* [1972] 1 QB 60. That case concerned a television play in which the defendant was to play the leading role. He repudiated the contract and Anglia successfully sued for wasted expenses rather than loss of profits.

[23] The Judge referred to *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 as authority for the proposition that in claims for reliance losses the onus of proof is reversed. In the context of the present case that meant that

the onus rested on the Baikies to establish that Ti Leaf would not have recouped its expenditure in whole or in part. He stated that the rationale for the imposition of a reverse onus is that where, through the default of the defendant, the plaintiff is denied the opportunity to demonstrate whether and to what extent the contract would have been profitable, it is appropriate that the defendant should carry the burden of demonstrating that reliance costs would not have been recouped.

[24] The Judge distinguished *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325 and *C & P Haulage (a firm) v Middleton* [1983] 3 All ER 94 as unhelpful because, unlike the present case, they were cases of interrupted business activity where cost implications could be assessed from available financial information.

[25] The Judge then revisited the issue of foreseeability with reference to expenditure claimed but incurred before the covenant was entered into. Relying on the *Anglia Television* case he held pre-contract expenditure could be recovered provided it was reasonably in the contemplation of the parties as likely to be wasted if the covenant was broken. On this test he excluded expenditure incurred by Ti Leaf in Australia before relocation to New Zealand. The wasted expenditure claimable was quantified at $1,199,825. However, referring back to the finding previously made that the breach was not causative of the loss, he rejected the claim and awarded the nominal amount of $500 for the proved breach of the covenant. He concluded:

> To summarise I am satisfied that Mr and Mrs Baikie breached the negative comments clause of the February 1996 agreement. However, I am also satisfied that the New Zealand expenditure, which foreseeably was at risk in the event of a breach, was not in fact lost for that reason. Rather it is established that Ti Leaf lost its way and the probability was the film would never have been completed, even absent the breach. Nonetheless proof of the breach justifies an award of nominal damages in the sum of $500.00.

[26] Turning to the defamation cause of action, Panckhurst J referred to the evidence of defamatory statements made by the Baikies about Ti Leaf from about September 1995. He noted that counsel did not contest that the allegations of involvement with drugs, using film production as a front, and involvement in illegal surveillance by bugging were defamatory. The surviving defence of qualified

privilege in respect of statements to Mr Neill, the police and immigration officials was rejected.

[27] Addressing damages for the defamation cause of action the Judge noted that s6 of the Defamation Act requires that a company must prove that the defamatory publication "caused pecuniary loss" or was "likely" to do so. The causation finding made under the contract head in respect of wasted expenditure was fatal to this claim also. The Judge then went on to consider the subsidiary question of whether the defamation caused, or was likely to have caused, Ti Leaf pecuniary loss in the sense that it expended resources to meet the defamatory publications. Despite a lack of evidence as to what this might have amounted to, the Judge did not doubt that Ti Leaf incurred such expenses. Adopting what he described as a conservative estimate of those expenses he awarded $5,000 for defamation.

The Appeal

[28] For Ti Leaf two arguments were advanced in support of the appeal. They are linked. They underwent some considerable refinement between the preparation of the written submissions and the oral argument. It was submitted that the Judge erred in law in identifying the correct principles and in failing to consider the decision cited to him in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16. He erred also in applying a standard of proof on the balance of probabilities for the discharge by the Baikies of the onus of proving that the expenditure lost would not have been recovered in any event. Secondly, it was submitted that in any event, and especially on the correct standard, the factual finding that the film would not have been completed cannot stand.

[29] Having carefully reviewed the written submissions filed in support of the appeal, we are satisfied they reflect a misunderstanding of what the Judge decided. For that reason it is important to state clearly what we take the Judge to have said. He determined that the onus of proof shifted to, and was discharged by, the defendants, the Baikies. That is clear from the statement at para 126 at the end of his review of the authorities on the issue of onus. He posed the question: "In such circumstances (those in the present case as distinct from cases in which cost

implications can be assessed from available financial information), can the defendants surmount the onus which confronts them?" We suspect it was recognition of this that led to the change in the appellants' argument from the onus, said to have been wrongly placed on Ti Leaf, to the issue of the standard of proof which the Baikies had to meet.

[30] There has been no suggestion in this case that Ti Leaf could not advance its claim as for wasted expenditure. It is convenient to begin with the case which counsel submitted is of central importance and which was not referred to in the judgment under appeal: *CCC Films (London) Ltd v Impact Quadrant Films Ltd.* In his judgment in that case, Hutchison J reviewed the earlier authorities and applied his conclusions to the fact situation with which he was presented. That involved breach by the defendant of a contract of bailment of copies of three films to which the plaintiff had licence rights of exploitation, distribution and exhibition. The breach consisted of failure to deliver the films thereby preventing the plaintiff from exploiting its licence rights. The defendant was the grantor of the licence and so well knew the plaintiff's situation. The claim was not for loss of profits which could not be assessed, but for wasted expenditure being the amount paid as consideration for the licence.

[31] Hutchison J cited the *Anglia Television* case under which the Court of Appeal had held that wasted expenditure, whether incurred before or after the contract was made, could be recovered as damages for breach of the contract. He also referred to that case and another Court of Appeal case, *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292, as establishing that the plaintiff has an "unfettered choice" to claim relief in the form of wasted expenditure or in the form of loss of profits. On that basis he rejected an argument that wasted expenditure can be claimed only when the plaintiff establishes that he cannot prove loss of profit or that such loss of profit as he can prove is small.

[32] Hutchison J also noted that in the *Anglia Television* case there was no suggestion that the expenditure might not have been recouped even if there had been no breach of the contract. He went on to add that it was common ground in the case before him that a claim for wasted expenditure cannot succeed where, even had the

contract not been broken, the returns earned by the plaintiff's exploitation of the films would not have been sufficient to recoup the expenditure. He cited *C & P Haulage (a firm) v Middleton* as authority confirming that.

[33] Hutchison J then turned to the question of the onus of proof which he determined had not been considered in any of the earlier English cases to which he referred. He found more directly relevant authority in North America. He cited *Bowlay Logging Ltd v Domtar Ltd*, a decision of Berger J in the British Columbia Supreme Court, which drew on United States material, and in particular on the judgment of Learned Hand CJ in *L Albert & Son v Armstrong Rubber Co* (1949) 178 F 2d 182. He concluded (p40):

> Even without the assistance of such authorities, I should have held on principle that the onus was on the defendant. It seems to me that at least in those cases where the plaintiff's decision to base his claim on abortive expenditure was dictated by the practical impossibility of proving loss of profit rather than by unfettered choice, any other rule would largely, if not entirely, defeat the object of allowing this alternative method of formulating the claim. This is because, notwithstanding the distinction to which I have drawn attention between proving a loss of net profit and proving in general terms the probability of sufficient returns to cover expenditure, in the majority of contested cases impossibility of proof of the first would probably involve like impossibility in the case of the second. It appears to me to be eminently fair that in such cases where the plaintiff has by the defendant's breach been prevented from exploiting the chattel or the right contracted for and, therefore, putting to the test the question of whether he would have recouped his expenditure, the general rule as to the onus of proof of damage should be modified in this manner.

[34] We have found nothing in the judgment of Hutchison J, nor in the cases to which he referred, to support the argument advanced by Mr Miles that where it is the breach of contract by the defendant that has rendered it impossible for the plaintiff to establish that the expenditure would have been recouped, the plaintiff is entitled to judgment for the wasted expenditure and the defendant is, in effect, estopped from showing that the loss would have occurred even if there had been no breach. In the *Bowlay Logging* case Berger J did refer to a decision of the United States Supreme Court in *United States v Behan* (1884) 110 US 338, seemingly to that effect, but noted that "it has been rejected in the United States in this century".

[35] Mr Miles referred to the apparent illogicality of reasoning that because of the plaintiff's breach it is impossible to prove whether or not expenditure would be recouped by the plaintiff, yet permitting the defendant to show that it would not have been recouped. But there is no logical flaw in accepting on the one hand that it is not possible to determine whether a course of action will have been profitable if the contract was performed, while on the other hand allowing proof that for some reason the course of action would never have eventuated. That is recognised in the judgment of Mason CJ and Dawson J in *The Commonwealth of Australia v Amann* (86).

[36] Counsel also relied on the judgment of Dixon and Fullagar JJ in the High Court of Australia in *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 (a case which Hutchison J in the *CCC Films* case considered was not comparable with the *Anglia Films* case). The contract there involved a tanker on the Jourmaund Reef which the Commonwealth purported to sell to the plaintiffs. They incurred considerable expenditure in preparing for a salvage expedition and proceeding to the locality. There was in fact no tanker and the claim for wasted expenditure was upheld. The judgment, with which McTiernan J agreed, reads (p414):

> The fact that the expense was wasted flowed prima facie from the fact that there was no tanker; and the first fact is damage, and the second fact is breach of contract. The burden is now thrown on the Commission of establishing that, if there had been a tanker, the expense incurred would equally have been wasted. This, of course, the Commission cannot establish. The fact is that the impossibility of assessing damages on the basis of a comparison between what was promised and what was delivered arises not because what was promised was valueless but because it is impossible to value a non-existent thing. It is the breach of contract itself which makes it impossible even to undertake an assessment on that basis. It is not impossible, however, to undertake an assessment on another basis, and, in so far as the Commission's breach of contract itself reduces the possibility of an accurate assessment, it is not for the Commission to complain.

This does not suggest that, as a matter of law, the Commonwealth could not have adduced evidence, had it been available, tending to show that the expenditure would not have been recouped in any event.

[37] There is also no support in the *CCC Films* judgment or the cases cited therein for the proposition that the standard of proof to be met by the defendant is higher than the usual civil standard of the balance of probabilities. On this point the Ti Leaf argument rested on comments in two judgments and on the *American Restatement of the Law*: *Contracts 2nd ed* (1981), para 349, referred to in one of those judgments.

[38] In the *Bowlay Logging* case, Berger J held that the defendant met the onus shifted to it and established that the breach of contract saved the plaintiff from further losses which would have exceeded the expenditures incurred. In so holding the Judge said (p335):

> The onus is on the defendant. But the onus has been met. The only conclusion that I can reach on the evidence is that if the plaintiff had fully performed the contract its losses would have continued at the rate that the figures show they were running at up to the time when the logging operation was closed down.

[39] We were invited to read this passage as imposing a standard of proof of inevitability of outcome which was said to equate with "the only conclusion … on the evidence". We do not accept that. This was no more than a comment on the evidence in the particular case. That is apparent when reference is made to the calculation set out by the Judge on the following page in which he assessed the "Probable Loss on Full Performance of Contract". The use of "probable" is the very usage by Panckhurst J in the case before us that was the subject of criticism.

[40] In the joint judgment of Mason CJ and Dawson J in *Commonwealth v Amann* there is both reference to, and explanation of, the use of the expression "with reasonable certainty" in para 349 of the *American Restatement* which reads:

> As an alternative to the measure of damages stated in §347 [expectation damages], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

The judgment, after quoting this paragraph, goes on to state (p83):

> The United States references in the decided cases and in the texts to the availability of reliance damages where loss of profits cannot be proved with reasonable certainty must be treated with some reserve. As early as 1858 it was decided that damages for breach of contract must "be shown, by clear and satisfactory evidence, to have been actually sustained" and to "be shown with certainty, and not left to speculation or conjecture" (43). The burden thus imposed upon the party not in breach was more onerous than the balance of probabilities test traditionally applied in Australia and England.
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> The settled rule, both here and in England, is that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them as best it can.

[41] It can be noted that, even in England, where it is clear that the correct approach to damages requires a court to do the best it can, and without any departure from the civil standard of proof, the law has developed from the often cited dictum of Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524,532:

> As much certainty and particularity must be insisted on … in proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

[42] Accordingly, there is no support in the judgment of Mason CJ and Dawson J in the *Amann* case for imposing on a defendant to whom the onus has shifted any higher standard of proof than the balance of probabilities. Indeed, in many cases the burden on the defendant will be in respect of matters within the knowledge of the plaintiff so that the normal standard will be burden enough. Further, the defendant will be addressing matters on the basis of there having been no breach of contract so there is no justification for imposing any higher standard because of reliance on his or her own wrong.

[43] It was submitted that Panckhurst J distinguished the decisions in *Bowlay Logging Ltd v Domtar Ltd* and *C & P Haulage v Middleton* on a flawed basis. We do not accept that submission. The Judge referred to those cases as examples of cases in which the defendant met the onus of showing that the plaintiff entered into a bad bargain and was not entitled to cover reliance damages. That is correct in respect of the *Bowlay Logging* case, but, so far as it suggests that the court in the

C & P Haulage case expressly addressed the matter of the onus of proof, it is not. However, on the evidence that was given in that case, the court had no difficulty in finding that as a consequence of the contract breach the plaintiff was better off. Panckhurst J did see the present case as unlike those two cases in that there was no evidence from which it could be determined whether or not Ti Leaf would have recouped its expenses from exploitation of the film. But that had no bearing on the decision he reached that, for a quite different reason (non-completion of the film), the expenses would not have been recouped.

[44] It should perhaps be mentioned that at no stage has the case for Ti Leaf been advanced on the basis of loss of a chance.

[45] Having reviewed the authorities as they bear upon the appellant's arguments, it would be sufficient to move on to the factual issue. Before doing so, however, some brief comment on the state of the authorities may be useful. The development of the law in England and Australia in respect of wasted expenditure and reliance damages for breach of contract, as reflected in the cases referred to, suggests that some care is needed before adopting as applicable in New Zealand the principles so far indicated.

[46] First, there is a clear difference between the English and Australian authorities on when lost expenditure might be claimed as damages for breach of contract. The conclusion of Hutchison J in the *CCC Films* case, based upon the Court of Appeal in the *Anglia Films* case, that a plaintiff has the unfettered choice whether to claim loss of profits or wasted expenditure, has been rejected by the High Court of Australia in the *Amann* case.

[47] The majority of the High Court in the *Amann* case considered that reliance damages or damages for wasted expenditure are recoverable where it is not possible for a plaintiff to establish what profits would have flowed had the contract been performed. The views of the members of the High Court emerge from reasoning that seeks to reconcile reliance damages with the basic principle governing damages for breach of contract that the plaintiff is to be put in the position, so far as possible, as if the contract had been performed: *Robinson v Harman* (1848) 1 Ex 850,855; 154 ER

363,365. To achieve that, in varying forms, they construct a rebuttable presumption or assumption that the expenditure would have been recouped. Whether that represents a majority view is questioned by Professor H K Lücke, in an informative article entitled *The So-Called Reliance Interest in the High Court* (1994) 6 CBLJ 117.

[48] There must be room for respectable argument that with the general trend towards a rationalisation of remedies and the greater analysis of underlying principle, there no longer is need to adhere to a single approach to the award of damages for contract breaches. Certainly there will be reluctance to accept the need to resort to a legal presumption (if that is what it is) to do so. That seems productive of complexity and inflexibility. The views of Professor Treitel are instructive in this respect – see G H Treitel, *Damages for Breach of Contract in the High Court of Australia* (1992) 108 LQR 226.

[49] The shift in the burden of proof has its source in the United States and was justified by Learned Hand CJ as a "common expedient". Its adoption for all cases in which there is an issue of whether loss flowing from a breach of contract would have been suffered even without the breach would run counter to the primary rule that it is for a plaintiff to prove his or her loss. Just when, and in what circumstances the burden should shift – whether as a matter of law or as simply as an evidential burden - are broad questions. It may be one thing to consider recovery of expenditure incurred in partly performing a contract that is subsequently breached. Then it may be reasonable to require the party in breach to show why the innocent party would not have received from performance of the contract value at least equal to the part performance. It may be quite different, however, where in reliance on a contract expenditure is incurred for a separate and highly speculative venture. The members of the High Court in the *Amann* case demonstrate a range of tenable views.

[50] In any event, in the present case, Panckhurst J's approach was favourable to the plaintiff. He required the defendants to show that the plaintiff would not have recouped its expenditure because the film would never have been completed. He held they had succeeded in doing so. It is that finding, and the challenge to it, to which we now turn.

[51] The Judge summarised the evidence he heard and the context in which it was given. There were six relevant witnesses for Ti Leaf. Their evidence was given at the stage when the defence of truth was extant and so was directed to the expertise and professionalism of the Ti Leaf employees and sub-contractors. On their evidence the Judge found that Ti Leaf was a film-making company and that was its purpose in New Zealand. But, as the Judge said, the questions of whether the film would have been completed and whether it would have been a marketable film assumed increasing significance as the case developed. The Judge reviewed the evidence of five of the witnesses called for the plaintiff as it bore on these questions. One of the criticisms on appeal is that he appears to have overlooked the evidence of the sixth and it will be necessary to deal with that.

[52] The Judge recorded the work done by three of the witnesses from Sunset Studios in the United States. Two had spent considerable time in New Zealand working on aspects of development for the film. Sunset Studios undoubtedly had extensive skills and facilities in film-making, particularly for television. There was an arrangement with Ti Leaf that Sunset Studios would provide production facilities and personnel though details were not given and the association seems to have rested primarily on personal relationships and common beliefs. Sunset Studios had a long-standing and on-going relationship with Mrs Butler in the production of TV films featuring yoga instruction.

[53] Mr Holt visited New Zealand from Australia and spent about six weeks advising on set designs in early 1996. These witnesses as well as Mr Khemaney, Vice President and seemingly in charge of the business of Ti Leaf, did not address the likelihood that the film would be completed. That was not in their hands, but rather under the control of Mr Butler who was contracted to Ti Leaf as executive co-producer, writer and director. He did not have any experience as a film-maker and he did not give evidence.

[54] Mr Miles relied heavily on the evidence of Pamela Smith which was addressed in the judgment, and that of Diane Oliver, Executive Director of Film New Zealand, which was not. The evidence of both of these witnesses was criticised and

disagreed with in material respects by David Gibson who was called as an expert in film production on behalf of the Baikies.

[55] The Judge said that on whether the film was a low-budget film, was likely to be completed, and if so whether it would have enjoyed commercial success, he much preferred the evidence of Mr Gibson.

[56] For Ti Leaf it was submitted that the reliance on Mr Gibson and the ignoring of crucial witnesses for Ti Leaf led the Judge to a conclusion which could not be supported by the evidence or was plainly wrong.

[57] In his judgment, Panckhurst J expressed the conclusion that even without Mr Gibson's evidence he was left in real doubt whether the film would have been shot regardless of the publication of the Timaru Herald article. He identified three aspects suggesting this. The first was the progress achieved over the period Ti Leaf personnel were in New Zealand which indicated that the production schedule provided to the Immigration Service would not have been met. The second feature was the vagueness in the evidence concerning the return of Ti Leaf personnel to New Zealand for resumption of the project. The third factor was the abandonment of the project and the circumstances surrounding it.

[58] Mr Miles criticised the Judge's reasoning and contrasted the evidence given by the Ti Leaf witnesses reflecting professionalism, determination and the clear expectations underlying all their evidence.

[59] Having read the evidence, we are unconvinced that the manner in which it was assessed by the Judge was wrong. Certainly it was open to him to resolve conflicts in the evidence by accepting that of Mr Gibson over that of others. He saw and heard the witnesses, all closely cross-examined and confronted with the contrary views. Confined as we are to the transcript, we consider his assessment has been fair and we agree with it.

[60] The Judge noted the focus of the case at the time Ti Leaf's witnesses gave their evidence. They were contesting the defence contention that the whole film-

making project was a sham. He held that not to be the case. The project was real and was pursued with energy and enthusiasm by a number of people with skills and experience. That evidence justified the conclusion that film-making was Ti Leaf's purpose. But when taken overall with the evidence of what had been achieved up to the point in May 1996 when the Butlers and the other personnel left New Zealand, the evidence established, in addition to its genuineness, the operation's general character against which its prospects could be assessed.

[61] With the stated purpose of producing a low-budget feature film, Ti Leaf brought to New Zealand and contracted here a considerable number of people. They rented the Baikies' property and ten or so houses in Twizel. Initial activities were directed to the needs and comfort of Mr and Mrs Butler. Mr Butler was contracted as writer, executive producer and director though without prior film writing or producing experience. Three young persons with martial arts skills but no acting experience were to be the "stars". Though unpaid they remained throughout with coaches training them in martial arts.

[62] Sunset Studios, a small United States film-maker with experience primarily in television films, was "contracted" on the basis that it would be credited as co-producer and would receive by way of remuneration one percent of the net profits from the film. On that basis two of its personnel spent approximately 18 months in New Zealand undertaking some development work. One was Mr Olsen, who over that period scouted the whole of the south-west of the South Island for locations and did some design and other preparatory work. The other, Mr Moore, a sound engineer, over the same period worked on preparing music for the film score. He proposed to build a sound stage at Pukaki Downs but that did not prove feasible because of the absence of a long term lease. Mr Lowther, the manager of Sunset Studios, was to be responsible for lighting. He worked with Messrs Olsen and Moore but remained in the United States.

[63] Mr Holt, who came from Australia to provide set design expertise, did not actually end up building any sets in the two months he was here. In explanation he referred to "a fair amount of uncertainty". He left on May 1996 (before publication of the Timaru Herald article). He said in answer to a question about his then

understanding as to the future of the film, that it was very disheartening and he was "hoping, praying that it would take off where it left off maybe in another country …".

[64] Throughout this time work was proceeding on the screen play, which it had been said, needed to be written in New Zealand as it was to be written around the terrain. Though it was Mr Butler's responsibility, it seems to have been a team effort. By May of 1996 a script was not finalised. As late as mid-April 1996 there were negotiations with Pamela Smith, an experienced script consultant, who had been brought to New Zealand for three weeks late in 1995, to prepare a 30-40 page "treatment". This indicated that a shooting script was some distance away.

[65] In May of 1996 Mr and Mrs Butler left New Zealand. The lease of Pukaki Downs expired on 10 May. That property, according to Mr Moore, was to have been used for some 50% of the film shooting and was to be where the sound stage was to be built. It was no longer to be available.

[66] The Immigration Service had been provided with a production programme in February 1996 in the course of correspondence concerning work permits. By April that already was recognised as unachievable in that it provided for "pre-production" beginning at the end of April. A revised schedule with "Milestones", against which visas were to be reviewed, referred to pre-production beginning on 31 May.

[67] Under these pressures introduced by the requirements of the Immigration Service, and notwithstanding the previous need to have personnel in New Zealand during an extended development period, Ti Leaf had its people leave New Zealand in May. That was before withdrawal of its investors. Without access to Pukaki Downs, and without clear arrangements for accommodation, locations and key filming personnel, claims of intention to return in August or September to complete 40% of film footage by 30 November must be seen as unrealistic.

[68] The lack of coherence over the development stage (reflected in the evidence overall and in the breakdown of the expenses said to have been wasted), the fact that after some 2½ years development the project was well short of pre-production, the

unconvincing progress in the writing and the loss of access to Pukaki Downs, all indicate the accuracy of the Judge's assessment. Indeed, even making all due allowance for an unconventional approach to film-making, a reading of the evidence indicates not so much that the project had lost its way but rather that it was never on a clear path.

[69] There is support also in the circumstances surrounding the abandonment of the project. The withdrawal of support from the three investors, though it must be accepted as having been caused by the article in the Timaru Herald, reflected less than full conviction towards the project. That they were able to withdraw indicates insecurity in the financing arrangements. The acceptance of that withdrawal and the absence of efforts to seek alternative funding reflect recognition that the project was not a viable proposition.

[70] Pamela Smith's expertise as a script consultant is not in question. Her opinion, based on her visit in November 1995 and subsequent communications, that a successful feature film would have been completed is unconvincing.

[71] Ms Oliver was the Executive-Director of Film New Zealand with the role of supporting film-making in New Zealand. She visited Twizel on 24 and 25 January 1996 and formed the view that Ti Leaf was a genuine film-making company going about its business in a proper manner. She later advised the Immigration Service that she considered that Ti Leaf's production schedule was achievable. That view was contested by Mr Gibson who gave extensive reasons. They are convincing. The Judge preferred his evidence and so do we.

[72] The Ti Leaf appeal accordingly fails and is dismissed.

[73] There remains the Baikies' appeal on costs.

[74] In a separate judgment delivered on 9 February 2001, Panckhurst J awarded costs to Ti Leaf in the global sum of $25,500. The Baikies' appeal against that award claiming that it resulted from a wrongly exercised discretion.

[75] While he acknowledged that Ti Leaf's claim from the outset was primarily directed towards recovery of its wasted expenditure, the Judge gave weight to the persistence in the defence of truth until the twelfth day of trial and the success of Ti Leaf in clearing its name from the sting of the defamation. He declined to give significant weight to a "Calderbank" letter offering $30,000 in full settlement received five days before the trial.

[76] We find no error in the Judge's approach. Very serious slurs upon Ti Leaf and its personnel were published and maintained. To meet the allegation that the film-making was a sham concealing other activities, it was plain witnesses would be brought from overseas. The offer five days before trial was late, offered no retraction or apology and rightly was given little significance.

[77] The award represents the Judge's view that Ti Leaf succeeded "albeit by a nose". Its recovery in the proceeding was nominal but, in relation to the actual costs of the litigation, the award can be similarly described.

[78] As is frequently re-iterated, costs are discretionary. Awards will be interfered with only where they have been made inconsistently with principle. That cannot be said in this case.

[79] The Baikies' appeal is also dismissed.

[80] The respondents are entitled to costs on the appeal. Taking into account the unsuccessful cross-appeal, costs are fixed at $4,500 together with disbursements including the travel and accommodation expenses of counsel approved, if necessary, by the Registrar.

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